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ARE CURRENT REGULATIONS TOWARD MONOPOLIZATION EFFECTIVE IN PREVENTING ANTICOMPETITIVE PRACTICES TOWARDS STARTUPS?

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I. INTRODUCTION: WHO BUYS THE INNOVATORS?

Amazon, Apple, Facebook, Google, Microsoft—these are five of the biggest companies in the global technology sector.[1] These companies define and shape the modern economy, determining everything from how we interact with the world to how we buy virtually everything.[2] They maintain the platforms most companies

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1. Fortune Global 500, *Top 50 Global Technology Companies*, FORTUNE, www.fortune.com/global500/search/ (last visited Oct. 11, 2019).

2. *See* Dave Gershgorn & Mike Murphy, *Tech Companies are Finding Big Money in Smaller Payments,* QUARTZ, (Feb. 3, 2018), www.qz.com/1197290/apple-amazon-google-and-microsoft-are-making-big-money-with-smaller-payments/ (discussing how the switch that Apple, Amazon, Microsoft, and Google to recurring payments instead of one-time payments has

do business on[3] and the platform that most people interact on.[4] These companies consistently lead the market in new technology, including the latest phones,[5] computers,[6] and so on.

These companies also lead the way in purchasing other, smaller companies.[7] For example, since 2010, in the category of Artificial Intelligence (AI) startups, Apple acquired 20 companies, Google acquired 14, and Microsoft acquired 10.[8] Acquiring these AI startups created new products and markets for each of these companies.[9] In April 2010, Apple purchased a relatively unknown AI speech recognition software called Siri.[10] A short time later, that technology was integrated into the company's flagship software, iOS.[11] Today, Siri is a household name immediately connected to Apple's brand.[12]

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benefited them). *See also* Christian de Looper, *PayPal vs. Google Pay vs. Venmo vs. Cash App vs. Apple Pay Cash*, DIGITALTRENDS, (June 12, 2020), www.digitaltrends.com/mobile/paypal-vs-google-wallet-vs-venmo-vs-square-cash/ (comparing different virtual wallets used to pay for services or transfer cash to friends).

3. NetMarketShare, *Operating System Market Share,* NET MARKET SHARE, www.netmarketshare.com/operating-system-market-share.aspx. (last visited Oct. 11, 2019).

4. Andrew Hutchinson, *Facebook Reaches 2.38 Billion Users, Beats Revenue Estimates in Latest Update,* SOCIAL MEDIA TODAY (Apr. 24, 2019), www.socialmediatoday.com/news/facebook-reaches-238-billion-users-beats-revenue-estimates-in-latest-upda/553403/.

5. Joshua Swingle, *Google Pixel 4 Might Be Even More Expensive than First Expected,* PHONE ARENA (Oct. 13, 2019), www.phonearena.com/news/Google-Pixel-4-XL-price-leak_id119618.

6. Todd Haselton, *Microsoft's New Dual-Screen Computer is the Company's Most Important Product in Years,* CNBC (Oct. 3, 2019), www.cnbc.com/2019/10/03/surface-neo-will-be-the-most-important-product-microsoft-launches.html.

7. *See* Aaron Hurst, *Google Revealed to Have Acquired the Most AI Startups Since 2009*, INFORMATION AGE, (Feb. 18, 2020), www.information-age.com/google-revealed-acquired-most-ai-startups-since-2009-123487752/ (noting that it is estimated that the top five companies purchasing AI startups are Google, Apple, Facebook, Microsoft, and Amazon. *Id.* Amazon ranked at number five on this list bought nine companies worth an estimated $871 million. *Id*).

8. CB Insights, *The Race for AI: Here Are the Tech Giants Rushing to Snap Up Artificial Intelligence Startups*, CB INSIGHTS (Sept. 17, 2019), www.cbinsights.com/research/top-acquirers-ai-startups-ma-timeline/.

9. Paul Sawers, *How the 'Big 5' Bolstered Their AI Through Acquisitions in 2019*, VENTUREBEAT (Dec. 23, 2019), www.venturebeat.com/2019/12/23/how-the-big-5-bolstered-their-ai-through-acquisitions-in-2019/.

10. Parmy Olson, *Steve Jobs Leaves A Legacy in A.I. with Siri*, FORBES (Oct. 6, 2011), www.forbes.com/sites/parmyolson/2011/10/06/steve-jobs-leaves-a-legacy-in-a-i-with-siri.

11. Erick Schonefeld, *Siri's IPhone App Puts a Personal Assistant in Your Pocket*, TECH CRUNCH (Feb. 4, 2010), www.techcrunch.com/2010/02/04/siri-iphone-personal-assistant.

12. *E.g.,* Liza Lin, *Apple Faces $1.4 Billion Lawsuit in China in Siri Patent Fight*, WALL ST. J. (Aug. 3, 2020), www.wsj.com/articles/apple-faces-1-4-billion-lawsuit-by-chinese-ai-firm-in-siri-patent-fight-11596436018 (discussing a patent lawsuit between Apple and a Shanghai company regarding Siri, with the

Today, Siri is not the only virtual assistant on the market.[13] Amazon's Alexa is integrated into products such as microwaves and rings.[14] However, Alexa itself would not have been developed at all without the purchase of Yap and Evi,[15] two voice recognition companies acquired in the early 2010s.[16]

In recent years, it is common to hear of big mergers and company acquisitions like Walt Disney Company's recent acquisition of 21st Century Fox,[17] and AT&T's recent purchase of Time Warner.[18] These mergers happen frequently enough to make headlines regarding the new power and influence these companies have over our lives.[19] Antitrust laws counteract this concern, protecting competition and preventing anticompetitive practices that may harm the economy.[20]

What does not get as much media coverage, however, is when a large company buys a smaller company, like a new startup or an established company with a niche in the marketplace.[21] Apple CEO

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potential consequence of preventing Apple from selling some products in China).

13. Kate Kozuch, *Alexa vs. Google Assistant vs. Siri: Which Smart Assistant is Best?*, TOM'S GUIDE (July 14, 2020) www.tomsguide.com/us/alexa-vs-siri-vs-google,review-4772.html.

14. Cameron Faulkner, *The Biggest Announcements from Amazon's Fall 2019 Hardware Event*, VERGE (Sept. 25, 2019), www.theverge.com/2019/9/25/20881736/amazon-event-news-products-announcements-updates-highlights-alexa-echo.

15. Joshua Brustein, *The Real Story of How Amazon Built the Echo,* BLOOMBERG (Apr. 19, 2016), www.bloomberg.com/features/2016-amazon-echo/.

16. Arjun Kharpal, *Why US Tech Giants are Buying British AI Start-ups*, CNBC (Feb. 5, 2016), www.cnbc.com/2016/02/05/why-us-tech-giants-are-buying-british-ai-start-ups.html; Matt Weinberger, *How Amazon's Echo Went from a Smart Speaker to the Center of Your Home,* BUS. INSIDER (May 23, 2017), www.businessinsider.com/amazon-echo-and-alexa-history-from-speaker-to-smart-home-hub-2017-5.

17. Matthew Schwartz, *Disney Officially Owns 21st Century Fox,* NPR (Mar. 20, 2019), www.npr.org/2019/03/20/705009029/disney-officially-owns-21stcentury-fox.

18. *See* Dawn Chmielewski, *AT&T Completes $85B Acquisition of Time Warner*, DEADLINE (June 14, 2018), www.deadline.com/2018/06/att-completes-time-warner-acquisition-1202411103/ (describing the merger of AT&T and Time Warner, and the history of the merger).

19. Kif Leswing, *The iPhone Decade: How Apple's Phone Created and Destroyed Industries and Changed the World*, CNBC (Dec. 16, 2019), www.cnbc.com/2019/12/16/apples-iphone-created-industries-and-changed-the-world-this-decade.html. The article discusses how Apple has altered the way people interact with the world, using a smartphone to essentially replace things such as a camera or a flashlight. *Id*. The iPhone shaped and continues to shape markets, making Apple one of the most successful and profitable companies in the world. *Id*.

20. *Guide to Antitrust Laws*, FED. TRADE. COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Nov. 26, 2019).

21. *Cf.* Adam Satariano, *Google Faces European Inquiry Into Fitbit Acquisition*, NY TIMES (Aug. 4, 2020), www.nytimes.com/2020/08/04/busin

Tim Cook revealed that in six months in 2019, "Apple has bought approximately 20 to 25 companies."[22] As Cook explained, "Apple often doesn't announce these deals because the companies are small, and Apple is 'primarily looking for talent and intellectual property.'"[23]

The public tends to look at the larger companies and question how antitrust policies allow this to happen, focusing on the large market power of the resultant company.[24] This focus on the larger mergers at times overshadows the purchasing of smaller companies and startups.[25] These smaller purchases allow these larger corporate entities to dominate a market in its infancy, before the newer startups have a chance to compete.[26] Current regulation places a significant weight on consumer welfare, along with preventing market over-centralization and other traditional factors to analyze current antitrust issues; but this approach may not be sufficient to address market centralization of new and smaller startups or businesses.[27] Many purchases of startups may be innocuous, such as based on adding new talent, but can lead to market dominance and over-centralization if left unchecked.[28] Current antitrust regulation may not be equipped to handle when large companies buy up smaller startups. Existing regulations may also not be enough to ensure that these purchases are not leading to anticompetitive behavior.[29]

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ess/google-fitbit-europe.html (discussing Google facing an investigation for its purchase of Fitbit, which is Google buying an established company).

22. *See* Lauren Feiner, *Apple Buys a Company Every Few Weeks, Says CEO Tim Cook*, CNBC (May 6, 2019), www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html (discussing comments made from Apple CEO Tim Cook regarding Apple's acquisition strategy).

23. *Id.*

24. *See* Nialy Patel, *The Court's Decision to Let AT&T and Time Warner Merge is Ridiculously Bad*, VERGE (June 15, 2018) www.theverge.com/2018/6/15/17468612/att-time-warner-acquisition-court-decision (analyzing the decision by the U.S. District Court for the District of Columbia to allow the AT&T and Time Warner merger to go through and analyzing the decision and the potential future effects of the decision).

25. *E.g.* CB Insights, *supra* note 8 (describing major companies purchases of startup artificial intelligence companies to integrate into their own company's research and development).

26. *Id.*

27. *See* Hurst, *supra* note 7 (illustrating that startups in the AI field are being purchased in mass by a few larger companies).

28. *See* Sawers, *supra* note 9 (noting that Facebook bought a visual search company GrokStyle and closed it to integrate its technology or staff.) *See also* Schonefeld, *supra* note 11 (covering Apple buying Siri, a formerly independent startup and integrating it, rather than starting their own competitor).

29. *E.g.*, Diane Bartz and Nandita Bose, *FTC Demands Data on Small Buys by Google, Amazon, Apple, Facebook, Microsoft*, REUTERS (Feb. 11, 2020), www.reuters.com/article/us-usa-tech-antitrust/ftc-demands-data-on-small-buys-by-google-amazon-apple-facebook-microsoft-idUSKBN205261 (discussing that the FTC has begun investigating mergers that were too small to report).

This Comment explores how antitrust regulations are not adequate to protect the market from the risks inherent in these smaller purchases. In Part II, this Comment will first define and explain the history of U.S. Antitrust law and its current state. In Part III, this Comment will next analyze how Antitrust regulations are enforced against large companies, specifically as to how large firms have been regulated under current law. In Part IV, this Comment will propose how the same current Antitrust law could be better applied to prevent anticompetitive purchases of startups.

II. BACKGROUND

A. Definitions and Theory

Antitrust laws, in general, protect competition.[30] The goal is to protect consumers, ensuring low prices and competition.[31] The government tries to intervene when companies in the marketplace generally begin acting in a way that is not beneficial to the consumers, termed as anticompetitive acts.[32] These acts can range from the companies "raising prices, or to divide business" among themselves, but generally Antitrust laws only cover acts that harm consumers.[33] Harm to consumers can occur in various ways, starting with the threat of higher prices, to the deprivation of new products, and more.[34] Over time, many competing theories battled for dominance, each competing to be the best way to enforce these antitrust policies.

B. Historical Developments

The theories on how to best enforce Antitrust law have shifted throughout history, especially after the New Deal era. During this time, applying economic theory to antitrust issues became a predominant way to analyze potential anticompetitive behavior, rather than solely based on political interests.[35] The post-New Deal approach to antitrust law combined economic insights with the more policy-based goals.[36] The economists set standards for measuring the degree of concentration in a market, impact on competition, and barriers to entry, basing policy off of data.[37] The

30. *Antitrust Enforcement and the Consumer*, DEP'T JUSTICE (Dec. 18, 2015) www.justice.gov/atr/antitrust-enforcement-and-consumer.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. J. BAIN, INDUSTRIAL ORGANIZATION (2D ED. 1968).
36. *Id.*
37. *Id.*

"Chicago School," an approach centered on efficiency and consumer welfare, gained traction and changed the focus to how the activity would affect the consumer.[38] After the Chicago School's approach rose in popularity, the Post-Chicago School emerged, focusing on how predatory behavior may stifle competition, while incorporating some of the Chicago School's approaches.[39]

1. Post-New Deal Approach

Between the 1930s and 1960s, the field of antitrust economics was dominated by scholars, largely based out of Harvard.[40] Instead of regulating due to pressure from politicians, antitrust laws were enforced using data to measure how concentrated the market was.[41] This approach incorporated "market concentration, presence, height, and durability of entry barriers, and the measurement of each of those factors on competition."[42] Using economics to determine market concentration was often paired with a belief that "real competition requires a market structure with a significant amount of competitors."[43] Typical analysis uses economic indicators such as the Herfindahl–Hirschman Index (HHI) to measure the concentration of an industry.[44] HHI serves as an indicator that is understandable enough, as the higher the HHI, the more the market is dominated by a single firm.[45]

However, sometimes standard economic indicators on their own may not be enough to determine if a market participant is acting anticompetitively.[46] Markets can be susceptible to anticompetitive practices that could lead to monopolistic behavior.[47] Currently, big companies purchase some small startups in ways

38. *Id.*

39. *Id.*

40. C. PAUL RODGERS III, STEPHEN CALKINGS, MARK R. PATTERSON & WILLIAM R. ANDERSON, ANTITRUST LAW: POLICY AND PRACTICE 24 (4th ed. 2008).

41. *Id.*

42. *Id.*

43. *Id.* (citing William Shepherd, *Economic Analysis to Guide Antitrust*, 35 NYL. SCH. L. REV. 917, 919-20 (1990)).

44. *See Herfindahl–Hirschman Index*, DEP'T JUSTICE, www.justice.gov/atr/herfindahl-hirschman-index (last visited Nov. 26, 2019) (explaining basics of HHI and generally when they consider a market to be concentrated, with 2,500 points being the threshold for being highly concentrated).

45. *Horizontal Merger Guidelines*, DEP'T JUSTICE, www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c (last visited Nov. 26, 2019).

46. *See* Diane Bartz and Nandita Bose, *supra* note 29 (discussing how certain mergers and acquisitions fell below the reporting requirements whose potential anticompetitive effects may not be noticed).

47. Brianna S. Hills, *When Cheating is Good and Cooperation is Bad: Conspiracies and the Continuing Violations Doctrine Under the Sherman Act*, 83 MO. L. REV. 195, 197 (2018).

that, according to current guidelines, do not require further investigation.[48] Purchases may not raise barriers to entry immediately, but in the long run gives an established company advantages over future entrants.[49] Any new entrants have larger hurdles to cross in order to compete, while the larger company may have a commanding position in the market.[50]

2. The Chicago School

This approach arose at the University of Chicago in the late 1960s, focusing more on the "formal tools of microeconomic analysis."[51] The primary approach focused on an economic efficiency theory, in that, generally, efficient companies are by nature larger."[52] Their size allows them to underbid rivals to achieve their larger market share, to the benefit of the consumer.[53]

When this happens, large companies that underbid rivals "cannot retain a large share except by maintaining superior efficiency, so the company earns not monopoly profits, but only economic rent."[54] This approach favors companies underbidding in the marketplace, allowing them to gain a larger share of the market, leading to a more efficient market.[55] However, the Chicago School approach has led to less enforcement of the Sherman and Clayton Acts.[56]

3. Post-Chicago School Approaches

The Post-Chicago school approaches were developed in response to the acceptance of the Chicago School's approach to

48. *Contra* Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 271 (8th Cir. 2004) (holding that price increases after a merger was not an overt act, but a "inertial consequence of the merger").

49. Jason Furman, *Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth* (Sep. 16, 2016), www.obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf; *see also* Eliot G. Disner, *Barrier Analysis in Antitrust Law*, 58 CORNELL L. REV. 862, 897 (1973) (finding that "large size gives a firm the leverage to price in a manner that discourages entry").

50. Disner, *supra* note 49, at 897.

51. RODGERS, *supra* note 40, at 24.

52. *Id.*

53. *Id.* (citing William Shepherd, *Economic Analysis to Guide Antitrust*, 35 NYL. SCH. L. REV. 917, 919-20 (1990)).

54. Rodgers, *supra* note 40, at 25.

55. *Id.*

56. Maurice Stucke et al., *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HBR (Dec 15, 2017), www.hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement (covering the changes in the antitrust enforcement field); *see also* Division Operations, DEP'T JUSTICE, www.justice.gov/atr/division-operations (last visited Nov. 26, 2019) (showing the agency's own record workload has decreased since the 1970s).

antitrust law and regulations.[57] Modern approaches focus on incorporating the improvements in analysis from the Chicago School with a framework that focuses on predatory behavior and its harm to competition.[58] This was done specifically without expressly overturning the developments of the Chicago School and incorporating the underlying beliefs into a different framework.[59] This approach attempts to bridge the gap between the Chicago School and a more traditional view, focusing on preventing large companies' anticompetitive practices more structurally.[60] Still, these policies focus on the larger, anticompetitive actions from larger companies.[61]

The Chicago School's focus on larger mergers has been directly challenged in recent years.[62] In 2017, the article *Amazon's Antitrust Paradox* was published in the Yale Law Journal by Lina Khan.[63] This article pushed back on the idea that antitrust should focus on consumer welfare and focus more on competitive balance.[64]

This Comment discusses the apparent failures of the Chicago School approach, in that consumer interest are not just the cost of the product.[65] This new focus shifts the discussion away from just consumer welfare and back towards protecting competitive markets as another facet of antitrust policy that should be protected.[66] This specific Post-Chicago School approach focused on the history beyond just consumer welfare, referencing back to the Act's legislative history focusing on benefiting open markets.[67]

C. History

United States antitrust law began developing in earnest in the late 19th century as a reaction to fundamental shifts in industry

57. Jonathan B. Baker*, Competition Policy as a Political Bargain,* 73 ANTITRUST L.J., 483, 512-15 (2006).

58. *Id.*

59. *Id.*

60. *Id.*

61. Richard A. Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925, 933 (1979).

62. Stucke et al., *supra* note 56

63. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017). David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html.

64. *See generally Id.* (discusses how consumers may benefit from low prices, but there are other anticompetitive acts at play). Additionally, Streitfeld mentions the pushback from others in the field in response to the article, and that it "open[s] up a much needed debate." *Id.*

65. Khan, *supra* note 63, at 737.

66. *Id.*

67. *Id.* at 743.

and commerce.[68] As railroads spread across the nation, transporting goods and people became easier.[69] As a result, overall freight costs decreased for shipping goods nationwide.[70] At the same time, railroad companies began to organize and set prices, deciding to charge more than they would have otherwise, which is a practice is called price fixing.[71] Price fixing occurs when nominal competitors in a market, like the railroads in the 19th century, agree to set prices – typically in secret.[72] When competing companies in the same market decide to restrict competition by fixing prices, the end result is usually higher costs for the consumer.[73]

Antitrust laws have been designed to protect the marketplace from anticompetitive acts.[74] Price fixing was an early anticompetitive concern addressed by antitrust regulators.[75] Companies could together charge a higher price for their product, however, "not all price similarities . . . are the result of price fixing."[76] Common products may have similarities in price,

68. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, (Harvard Business School, Working Paper 19–110, 2019) (citing NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985)).

69. *See* Wayne Collins, *Trusts and the Origins of Antitrust Legislation,* 81 FORDHAM L.R. 2279, 2282-83 (2013). Finding that among the many changes in the economy during this time period, the average cost of freight decreased over 90 percent in 50 years. *Id.* at 2283. More telegraph lines, more of energy being consumed and produced, and new manufacturing innovations are just some of the many changes that led to larger businesses. *Id.* at 2286.

70 U.S. v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 312 (1897). The Supreme Court found that any "agreement of such a nature does restrain [trade], the agreement is condemned by [The Sherman Act]." *Id.* The companies in question entered into an association to set rail prices across the country and agree to not compete against each other. *Id.* at 331.

71. *See also* U.S. v. Joint Traffic Ass'n, 171 U.S. 505, 564 (1898) (discussing the agreement being in secret and to prevent competition between nominal competitors in a marketplace).

72. *Compare* U.S. v. Joint Traffic Ass'n, 171 U.S. 505, 576 (1898) (determining that the agreement was designed to keep prices higher), *with* Anderson v. U.S., 171 U.S. 604, 614 (1898) (finding that the agreement "ha[d] nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold").

73. *E.g.*, *Price Fixing*, FED. TRADE. COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Oct. 13, 2019) ("Price fixing is an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms").

74. *Guide to Antitrust Laws*, FED. TRADE. COMM'N, ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Nov. 24, 2019).

75. Swift & Co. v. U.S., 196 U.S. 375, 394 (1905) ("To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States . . . to fix prices at which they will sell …").

76. See *id.,* for the specific example, as common goods with identical prices like commodities such as wheat may have similar market prices that are not

especially when the products are identical, such as wheat, because each individual product is similar to each other.[77] While the price may be the same, it is not because of anticompetitive practices – it is because the underlying product is the same.[78]

Early antitrust law focused not just on price fixing but on a broad swath of anticompetitive practices in the economy.[79] Generally, antitrust regulation is designed so that the agencies tasked with enforcement can "protect American consumers and promote competition."[80] *Standard Oil Co. of New Jersey v. U.S.* is a case that defined the antitrust movement.[81] There, the Supreme Court found that Standard Oil attempted to exclude other companies from the market by restraining trade to monopolize the oil industry.[82] A monopoly is when a single firm has an exclusive hold over the market.[83] This landmark case found that the recently enacted Sherman Act was designed "to protect, not to destroy, rights of property."[84] The Supreme Court enforced the Sherman Act in this instance by forcing the breakup of Standard Oil into 34 separate companies.[85] Eventually, many of these companies did merge again into one corporate entity.[86] After the dissolution of the monopoly, no

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the result of price fixing.

77. *See* Fed. Trade. Comm'n, *Fiscal Year 2018 Agency Financial Report* (Nov 13, 2018), www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2018/ftc_agency_financial_report_fy2018_1.pdf (reiterating the FTC's mandate under the Federal Trade Commission Act of 1914).

78. *Id.*

79. *See* Northern Securities Co. v. U.S., 193 U.S. 197 (1904) (discussing a railroad merger that the federal government determined was designed to prevent competition, and that determination was approved by the Supreme Court).

80. Fed. Trade. Comm'n, *supra* note 77.

81. Standard Oil Co. v. U.S., 221 U.S. 1 (1911).

82. *Id.* at 75 ("prima facie presumption of intent to restrain trade, to monopolize and to bring about monopolization . . . vesting it with such vast control of the oil industry, is made conclusive").

83. *Monopolization Defined*, FED. TRADE. COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Nov. 24, 2019) ("The antitrust laws prohibit conduct by a single firm that unreasonably restrains competition by creating or maintaining monopoly power . . . Section 2 of the Sherman Act also bans attempts to monopolize and conspiracies to monopolize").

84. See *id.* at 78, for a description of what the Sherman Act is intending to protect, consumers and the "fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade." *Id.*

85. John J. Flynn, *Standard Oil and Microsoft - Intriguing Parallels or Limping Analogies*, 46 ANTITRUST BULL. 645, 646 (2001).

86. *See Exxon-Mobil Merger Done,* CNN MONEY (Nov. 30, 1999), www.money.cnn. com/1999/11/30/deals/exxonmobil/ (remarking that the new corporation would be the "biggest of the three 'supermajors,'" the largest oil company in the world). The approval for the merger was a 4-0 vote by the FTC. *Id. See also* Jeff Desjardins, *Chart: The Evolution of Standard Oil*, VISUAL CAPITALIST (Nov. 24, 2017), www.visualcapitalist.com/chart-evolution-standard-oil/ (charting the track of mergers and acquisitions of the entities

oil company dominates the market the same way that Standard Oil did.[87] Currently, the U.S. oil market has various companies that supply the domestic market, with no company dominating as much as Standard Oil did historically.[88]

1. Enforcement Agencies

Two main federal agencies are and have been responsible for federal antitrust enforcement: The Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (Antitrust Division).[89]

a. Department of Justice Antitrust Division

The Antitrust Division at the Department of Justice was officially organized in 1919, but antitrust enforcement has been funded by Congress since 1903.[90] The main characteristic that defines the Antitrust Division is the ability to bring criminal penalties under Section 1 and 2 of the Sherman Act.[91] The Antitrust Division can bring penalties up to ten years in prison or a 1 million dollar fine for an individual.[92] Corporations can also be fined up to 100 million dollars for violations.[93]

The Antitrust Division's main focus in enforcement actions has been towards enforcing against cartels and their actions.[94] Anticompetitive actions by cartels are obvious and easy to spot with a straightforward remedy that can be implemented quickly.[95] The Antitrust Division has the discretion to decide what actions to bring and whether an action should be brought against a company.[96]

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formed after the dissolution of Standard Oil).

87. *Compare Oil: Crude and Petroleum Products Explained,* U.S. ENERGY INFO.ADMIN. (Apr. 24, 2019), www.eia.gov/energyexplained/oil-and-petroleum-products/where-our-oil-comes-from.php (reporting that the U.S. receives oil from many different locations) *with* Elizabeth Granitz & Benjamin Klein, *Monopolization by Raising Rivals Costs: The Standard Oil Case*, 39 J.L. & ECON. 1, 2 (1996) (finding that Standard Oil's share of the refining market was more than 90 percent of the market in 1879).

88. Elizabeth Granitz & Benjamin Klein*, supra* note 87, at 2.

89. William Blumenthal, *Models for Merging the US Antitrust Agencies*, 1 J. ANTITRUST ENFORCEMENT 24, 25 (2013).

90. *Id.* at 24.

91. 15 U.S.C. §§ 1, 2 (2019).

92. 15 U.S.C. § 1 (2019).

93. *Id.*

94. Thomas O. Barnett, *Seven Steps to Better Cartel Enforcement*, DEP'T JUSTICE (June 2, 2006), www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement.

95. *Id.*

96. *See* RODGERS, *supra* note 40, at 36 (citing Donald Baker, *To Indicate Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement,* 63 CORNELL L. REV. 405 (1978)) (remarking that enforcement of the acts is left up to the

b. Federal Trade Commission

The FTC has jurisdiction under the Clayton Act to investigate antitrust issues.[97] The FTC also has exclusive authority to enforce the Federal Trade Commission Act.[98] Historically, the FTC has had the ability to enforce beyond the Sherman and Claytons Acts provisions, allowing the FTC to determine "unfair methods of competition" themselves as time passed.[99] In modern times, courts have shifted to restrict the FTC to what was defined explicitly under the Clayton and Sherman Acts.[100] These restrictions prevent the FTC from investigating and bringing enforcement actions against actions that do not clearly violate the antitrust principles outlined in the Acts.[101] This serves as a limitation preventing the FTC from enforcing against actions that may be seen as normal commercial behavior.[102]

2. Antitrust Acts

While the Sherman Act intends "to protect the public from the failure of the market,"[103] it is not the only regulation and law preventing anti-competitive practices. There are three antitrust laws that have been the cornerstones of antitrust law: the Sherman Act, the Federal Trade Commission Act, and the Clayton Act.[104]

The Supreme Court in *Standard Oil* set forth the first standard for deciding when a company has monopoly power—when the "nature and character of the dealing" is enough to show monopolistic behavior based off of the Sherman Act.[105] The Sherman Act itself was based on previous principles in common law

discretion of the agencies themselves, and that they do not need to be compelled to act).

97. 15 U.S.C. §§ 12-27 (2019).

98. 15 U.S.C. § 45 (2019).

99. F.T.C. v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 310 (1934) (finding that Congress did not intend to restrict the "forbidden acts" that the FTC was attempting to regulate to a few predefined categories). The FTC was able to determine if a new action was unfair or anticompetitive and had the ability to make their own determinations. *Id.* at 314.

100. E.I. du Pont de Nemoirs & Co. v. FTC, 729 F.2d 128, 137 (2d Cir. 1984).

101. *Id.*

102. Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

103. Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993).

104. *The Antitrust Laws,* FED. TRADE. COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust laws (last visited Aug. 14, 2020).

105. *See Standard Oil*, 221 U.S. at 54 (finding that when the "freedom of the individual to deal was restricted," that was one of many indicators of monopolistic behavior).

and updated for the issues of the day.[106] In a broad sense, the Sherman Act covers any attempt of monopolization or a "restraint of trade."[107] Considering the intention of the Sherman Act, "the words 'to monopolize' and 'monopolize' as used in the [Act] reach every act bringing about the prohibited results."[108]

The Federal Trade Commission (FTC) was created in 1914,[109] along with the Clayton Antitrust Act of 1914.[110] The FTC was empowered to broadly prevent unfair competition, create regulation, investigate and seek restitution for unfair or deceptive practices.[111] The Clayton Act expanded the scope of the Sherman Act, covering anticompetitive mergers and acquisitions; and the goal was to prevent certain anticompetitive acts before they happened, giving the FTC and the Department of Justice authority to regulate mergers.[112] Regulating mergers before they occurred prevented companies exploiting a loophole in the Sherman Act, by merging into one entity.[113] The Clayton Act was amended multiple times,[114] as the intent was to remedy these loopholes in the Act ,[115] and cover other types of mergers.[116] The changes to the Clayton Act were designed to prevent companies from utilizing the loophole by purchasing the company differently, and to promote competition.[117] Mergers are now generally seen as falling within the enforcement agencies' ability to regulate and prevent because of these acts.[118]

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106. *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 498 (1940) (finding that "having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law").

107. *Standard Oil*, 221 U.S. at 61.

108. *C.f., Spectrum Sports*, 506 U.S. at 459 (determining that "the conduct of a single firm [is] unlawful only when it actually monopolizes or dangerously threatens to do so") In enforcing the Sherman Act, there needs to be a serious risk of monopolization, but if that initial showing is met, then they may be found liable for anticompetitive practices. *Id.*

109. 15 U.S.C. §§ 47-58 (2019).

110. *Id.* at §§ 12-27 (2019).

111. *Id.* at § 57(a) (2019).

112. *Id.* at § 18(a) (2019).

113. *Id.*

114. *E.g.* Brown Shoe Co. v. U.S., 370 U.S. 294, 315 (1962) (concluding that the purpose was to "plug the loophole" exempting asset acquisitions from coverage under the [Clayton] Act).

115. *See* U.S. v. Von's Grocery Co., 384 U.S. 270, 276 (1966) (noting that the amendments to the act were attempting to prevent consolidation through mergers).

116. U.S. v. Cont'l Can Co., 378 U.S. 441, 449 (1964) (determining that vertical and conglomerate mergers may be "deserving of [Clayton Act] § 7 protection and therefore the basis for defining a relevant product market").

117. *Id.*

118. *Id.*

D. Antitrust Remedies

There are two broad categories of antitrust remedies—structural remedies and conduct remedies.[119] In terms of merger cases, structural remedies are favored "because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[120] Structural remedies are "'simple, relatively easy to administer, and sure to preserve competition."[121] In terms of mergers, conduct remedies are appropriate when the remedies can help the structural solution or if the structural remedy is inefficient.[122]

1. Structural Remedies

Structural remedies are designed to protect competition by requiring the sale, or a divestiture, of part of a company.[123] These remedies focus on making sure that the separated parts are both competitively viable.[124] In an ideal world, the goal is to separate an isolated entity that can be viable on its own.[125] Establishing a separate firm may be difficult if there is a forced relationship, leaving the new firm tied to the actions of the original firm.[126] There may be an agreement to ensure the viability of the separated assets during the transition.[127] However, "the continued interaction

119. *Antitrust Division Policy Guide to Merger Remedies*, DEP'T JUSTICE (Oct. 2004), www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf [hereinafter DOJ Antitrust Policy 2004].

120. *Id.*

121. *Id.* (citing U.S. v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961)) (concluding that "in Government actions divestiture is the preferred remedy for an illegal merger or acquisition").

122. *See id.* (stating that preventing the merger would "sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible").

123. *See* RONAN P HARTY & NATHAN KIRATZIS, MERGER REMEDIES GUIDE 50 (2nd ed. Oct. 2019) [hereinafter MERGER REMEDIES GUIDE] (citing DOJ Antitrust Policy 2004, *supra* note 119) (remarking that the Antitrust Division found that "structural remedies generally will involve the sale of physical assets by merging firms").

124. *See* MERGER REMEDIES GUIDE, *supra* note 123. (seeking to "ensure that the divested assets are likely to be used to preserve competition").

125. *See, Frequently Asked Questions About Merger Consent Order Provisions,* FED. TRADE. COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq# (last visited Jan. 4, 2020) (finding "[t]he divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately").

126. MERGER REMEDIES GUIDE, *supra* note 123, at 56.

127. *Id.* at 57 ("The exact nature of any transition services agreement depends on the specific needs of the divestiture buyer in regards to competing with the divestiture package").

between these competitors raises the risk of improper coordination," so enforcement agencies take the duration of the agreement into account.[128] Overall, structural remedies focus on separating the company to ensure the new firm or assets are independent and sufficient in the marketplace.[129]

2. Conduct Remedies

The other category of remedies are not based on the structure of the firm but on the firm's conduct.[130] These remedies are also sometimes used alongside structural remedies like divestiture.[131] These conduct remedies have swung in terms of which remedies are favored in merger situations.[132] Currently, there is a preference by the enforcement agencies for structural remedies.[133] Under those standards, a conduct remedy would usually be "injunctive provisions that would, in effect, manage or regulate the merged firm's post-merger business conduct."[134] The current trend disfavors conduct remedies, focusing on divestiture as the primary way to discourage and resolve anticompetitive acts and practices.[135]

There are many different conduct remedies available that can address different anticompetitive acts and issues at play.[136] A firewall provision restricts information flows in the case of a merger, "preventing improper information sharing between

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128. *Id.* at 56.

129. *See id.* (noting that "[f]or structural remedies . . . agencies evaluate many factors, including the sufficiency of divested assets, the adequacy of the divestiture buyer and the actual mechanics of the divestiture").

130. *Report on The FTC's Merger Remedies 2006–2012*, at 18–19, FED. TRADE. COMM'N (Jan. 2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

131. MERGER REMEDIES GUIDE, *supra* note 123, at 58.

132. *See* Makan Delrahim, *It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium*, DEP'T JUSTICE (Sept. 25, 2018), www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust (exemplifying this swing in which remedies are favored, with the 2011 policy being replaced in 2018 with the 2004 policy).

133. *See id.* (noting that the most 2011 guidelines are now historical and are replaced by the 2004 standards). *See also Merger Enforcement,* DEP'T JUSTICE (Jul. 30, 2019), www.justice.gov/atr/merger-enforcement (explaining that the 2004 standards are the guidelines the Antitrust Division uses, and the 2011 standards are historical).

134. DOJ Antitrust Policy 2004, *supra* note 119.

135. *See* MERGER REMEDIES GUIDE, *supra* note 123, at 59 (noting that "both antitrust agencies have demonstrated a strong (and growing) trend of disfavouring the use of conduct remedies to resolve competitive concerns").

136. *Id.* at 60. ("include[es] internal firewalls, external remedies, hybrid remedies, third-party consents and approvals, and agency monitoring and reporting requirements").

competitors and anticompetitive conduct."[137] This provision would "minimize[] the risk that the integrated firm will use information to disadvantage a rival competitor."[138] Another remedy is a mandatory licensing program, requiring certain technology or intellectual property to be licensed to others.[139] Mandatory licensing helps ensure that intellectual property used for research and development can still be accessed by other parties.[140] Fair dealing provisions prevent firms from disadvantaging others by "ensur[ing] that equal access, efforts and terms are available to those who contract with the transacting parties."[141] Two other related provisions that the regulatory agencies use are prior notification and prior approval provisions.[142] Overall, these provisions require that merging companies notify the regulatory agency if they attempt to merge in the market that the provision is related to or, alternatively, gain the approval altogether.[143] The regulatory agencies may decide to prohibit restrictive contracting practices from the merged entity through exclusive dealing contracts.[144] An example is the restrictions on Microsoft's licenses in the final consent decree in *U.S. v. Microsoft*.[145] Another conduct remedy is an anti-retaliation provision, "prevent[ing] the merged entity from unreasonably restricting competition".[146] These provisions prevent the firm "from retaliating against customers who conduct business . . . with its competitors.[147] Overall, these remedies can be difficult to draft, but balance "the procompetitive benefits of a transaction while protecting against the risk of potential competitive harm."[148]

III. ANALYSIS

First, this section will examine the benefits and failures of both structure and conduct remedies in the landmark antitrust case *U.S.*

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137. *Antitrust Division Policy Guide to Merger Remedies*, DEP'T JUSTICE (Jun. 2011) [hereinafter DOJ Antitrust Policy 2011]; Richard Feinstein, Director, Bureau of Competition, *Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission* (Jan. 2012).

138. *Id.*

139. DOJ Antitrust Policy 2011, *supra* note 137, at 15–16; Feinstein, *supra* note 137, at 897.

140. MERGER REMEDIES GUIDE, *supra* note 123, at 60.

141. *Id.*

142. *Id.* at 64.

143. *Id.*

144. *Id.* at 61.

145. *E.g.*, U.S. v. Microsoft Corp., 253 F.3d 34, 61 (D.C. Cir. 2001) [hereinafter *Microsoft III*] (discussing the licenses "prohibit[ing] OEMs from modifying the initial boot sequence--the process that occurs the first time a consumer turns on the computer").

146. MERGER REMEDIES GUIDE, *supra* note 123, at 62.

147. *Id.*

148. *Id.* at 66.

v. Microsoft Corp. Next, this section will analyze the potential failures of common antitrust remedies used by the enforcement agencies. Lastly, this section will evaluate current policy used by the enforcement agencies.

A. U.S. v. Microsoft Corporation.

U.S. v. Microsoft Corp. is a case that redefined antitrust regulation.[149] During the 1990's, the FTC began investigating Microsoft over concerns that the company was using its power in the operating system market to dominate in the software development market.[150] This inquiry reportedly was initially covering whether IBM and Microsoft were restricting Windows' acceptance as an operating system in favor of an operating system that was developed jointly.[151] However, other members of the software industry believed that Microsoft was acting uncompetitively and hoped that the FTC investigation would bring to light or address their concerns.[152] As the operating system and modern computing industries were in their relative infancy, Microsoft's early dominance and actions were concerning.[153]

This ended up being the focus of the FTC investigation: Microsoft's potentially anticompetitive acts in the operating systems market as a whole.[154] The FTC began investigating whether "[Microsoft] unfairly monopolized the software market," a very broad investigation covering Microsoft's business practices as a whole.[155] At the time, Microsoft sold "[about] 85 percent of the personal computer operating software . . . in the world," becoming almost a singular force in the operating systems market.[156]

After three years of investigating, the FTC staff voted and could not reach a consensus on whether to take legal action to stop certain market practices of Microsoft."[157] After deadlocking twice,

149. *Microsoft III*, 253 F.3d 34.

150. Lawrence M. Fisher, *Microsoft in Inquiry by F.T.C.*, N.Y. TIMES (Mar. 13, 1991), www.nytimes.com/1991/03/13/business/microsoft-in-inquiry-by-ftc.html.

151. *Id.*

152. *Id.*

153. *Id.* ("Competing software companies have a long list of complaints about Microsoft, ranging from announcements of nonexistent products that promise features matching or beating the competition to using the list of Windows customers for a direct-mail campaign to sell applications programs").

154. Evelyn Richards and Mark Potts, *FTC Expands Microsoft Probe*, WASH. POST (Apr. 13, 1991), www.washingtonpost.com/archive/business/1991/04/13/ftc-expands-microsoft-probe/ee95b8b7-a794-43b5-982d-748bc4c75f91/.

155. *Id.*

156. *Id.*

157. John Burgess, *FTC Deadlocks Again in Microsoft Investigation*, WASH. POST (Jul. 22, 1993), www.washingtonpost.com/ar

the FTC decided to close their investigation.[158] From there, the Antitrust Division began their investigation, "using FTC's extensive investigatory file as its starting point."[159] The Antitrust Division's investigation had the potential to protect smaller companies, without falling into the pitfalls of a structural remedy.[160]

1. Previous Related Antitrust Actions Before U.S. v. Microsoft Corp.

Structural relief and remedies are "designed to eliminate the monopoly altogether."[161] Structural remedies attempt to resolve the antitrust issue by changing the structure of the firm itself.[162] Previous antitrust lawsuits against IBM and AT&T focused on structural remedies and took up a significant amount of time and resources for the Antitrust Division.[163] The case against AT&T was filed in 1974 and took eight years before a consent agreement was reached.[164] AT&T had previously been operating with a consent agreement made in 1956, with litigation beginning in January 1949.[165] In January 1969, the Antitrust Division brought a suit against IBM.[166] That case took almost exactly thirteen years until the Antitrust Division agreed to dismiss the case.[167] The Antitrust Division chose not to pursue a structural remedy to split up the company, rather attempted to change the company's practices.[168]

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chive/business/1993/07/22/ftc-deadlocks-again-in-microsoft-investigation/dd8ce8ed-1d66-4c32-b5af-6334f422e364/. ("Industry sources said that [the July 21, 1993] deliberations focused on the $1 billion-plus market for operating systems").

158. U.S. v. Microsoft Corp., 56 F.3d 1448, 1451 (1995).

159. *Id.*

160. Wendy Goldman, *Oh No, Mr. Bill!*, WIRED (Apr. 1, 1994), www.wired.com/1994/04/gates-6/.

161. *Microsoft III,* 253 F.3d at 106 (citing AREEDA & HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (3rd ed. 1995)).

162. DOJ Antitrust Policy 2004, *supra* note 119, at 7.

163. Goldman, *supra* note 160.

164. U.S. v. American Tel. & Tel. Co., 552 F. Supp. 131, 139-41 (D.D.C. 1982).

165. *Id*. at 136. The initial complaint by the Antitrust Division sought "the divestiture by AT&T of its stock ownership in Western Electric; termination of exclusive relationships between AT&T and Western Electric, [etc.]."

166. *U.S. vs. I.B.M.*, N.Y. TIMES (Feb. 15, 1981), www.nytimes.com/1981/02/15/business/us-vsibm.html.

167. U.S. v. Int'; Bus. Mach. Corp., 539 F. Supp. 473, 474 (S.D.N.Y. 1982); Lilliane Kerjan, *Antitrust Laws: The IBM and AT&T Cases*, 35 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES EDITIONS BELIN 89, 96 (Feb. 1988) ("whereas has concluded that the case is without merit and should be . . . without costs to either side").

168. *See* Goldman, *supra* note 160 (stating that "focusing on relief through

2. Microsoft's Consent Decree

Eventually, Microsoft agreed to the consent agreement which was offered when the suit was filed.[169] The consent decree prohibited Microsoft from engaging in certain anticompetitive acts, both those currently in practice and any future acts.[170] This is an example of a behavioral or conduct remedy – attempting to change the behavior of a company by restricting what it can engage in.[171]

Later in the decade, the Antitrust Division filed suit against Microsoft again over concerns that it was about to violate the consent decree.[172] Microsoft was planning on requiring distributors of the latest edition of its Windows operating system to include Microsoft's Internet Explorer web browser in the installation of Windows.[173] A preliminary injunction against Microsoft was entered, preventing it from requiring the preinstallation of Internet Explorer.[174] The D.C. Circuit Court of Appeals reversed, finding that Microsoft showed the "plausible benefits to its integrated design" of integrating Internet Explorer.[175] The plausible benefits were the benefits that may be provided to the consumer.[176]

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very specific changes in the company's software licensing policies and other business practices [is] deemed to be anti-competitive").

169. Amy Harmon, *News Analysis: Gates Dealt a Humbling, but Instructive, Blow*, L. A. TIMES (Jul. 17, 1994), www.latimes.com/archives/la-xpm-1994-07-17-mn-16804-story.html.

170. *See Microsoft*, 56 F.3d at 1452 (explaining that "prohibits Microsoft from entering into per processor licenses, licenses with a term exceeding one year (unless the customer opts to renew for another year), licenses containing a minimum commitment, and unduly restrictive nondisclosure agreements). To prevent Microsoft from using other exclusionary practices to achieve effects similar to those achieved by the practices challenged in the complaint, the proposed decree also prohibits certain other arrangements such as lump-sum pricing and variants of per processor licensing." *Id.*

171. MERGER REMEDIES GUIDE, *supra* note 123, at 2, (citing *Report on The FTC's Merger Remedies 2006–2012*, at 18–19); FED. TRADE. COMM'N (Jan. 2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

172. *See* U.S. v. Microsoft Corp., 147 F.3d 935, 940 (1998) (explaining that "the [Antitrust Division] became concerned that this practice violated [the Consent Decree] by effectively conditioning the license for Windows 95 on the license for IE 4.0, creating (in its view) what antitrust law terms a 'tie-in' between the operating system and the browser").

173. *See id.* (prohibiting Microsoft from placing a condition on the license that the licensee would have to "also license and preinstall any Microsoft Internet browser software [] including Internet Explorer 3.0, 4.0, or any successor versions thereof").

174. *Id.*

175. *Id.* at 950; *see also id.* at 953 (stating "there is no reason to allow the preliminary injunction to remain in effect pending a proper hearing").

176. *Id.*

While the Internet Explorer suit was pending, the Antitrust Division and 20 state attorneys general sued Microsoft.[177] Specifically, the suit "charged Microsoft with engaging in anticompetitive and exclusionary practices designed to maintain its monopoly." These practices related to a competing browser called Netscape.[178] Eventually, in 2001, the Court reached its decision in *U.S. v. Microsoft Corp.* (*Microsoft III*), finally resolving the investigation that began in 1990.[179]

Initially, the state attorneys general were concerned, believing that the Antitrust Division would push for conduct remedies only."[180] Once they heard how stringent the Antitrust Division's proposals were, they signed on, and the District Court approved.[181] The Court determined that Microsoft had made the "deliberate and purposeful choice to quell incipient competition."[182] It ultimately found that Microsoft violated the Sherman Act.[183] The District Court's final judgment was severe, requiring Microsoft to "separate[e] the Operating Systems Business from the Applications Business."[184] In other words, Microsoft had to structurally separate into two companies, one focused exclusively on the Windows operating system and the other focused on the company's other projects.[185] The assistant attorney general for the Antitrust Division remarked: "This opinion will . . . set the ground rules for enforcement in the Information Age."[186] Indeed, this decision

177. *See generally U.S. v. Microsoft: Timeline*, WIRED (Nov. 4, 2002), www.wired.com/2002/11/u-s-v-microsoft-timeline/ (tracking the timeframe of the action against Microsoft, the new action was filled before the previous case was resolved).

178. *Justice Department Files Antitrust Suit Against Microsoft For Unlawfully Monopolizing Computer Software Markets,* DEP'T JUSTICE (May 18, 1998), www.justice. gov/archive/atr/public/press_releases/1998/1764.htm.

179. Microsoft III, *supra* note 145, at 34.

180. *See* John Heilemann, *The Truth, the Whole Truth, and Nothing But The Truth*, WIRED (Nov. 1, 2000, 12:00 PM), www.wired.com/2000/11/microsoft-7/ (remarking that "the states believed the Justice Department would never ask for a breakup").

181. *Id.*; *see also* U.S. v. Microsoft Corp., 97 F. Supp. 2d 59, 62 (D.D.C. 2000) (finding that a "structural remedy has become imperative: Microsoft as it is presently organized and led is unwilling to accept the notion that it broke the law or accede to an order amending its conduct").

182. U.S. v. Microsoft Corp., 87 F. Supp. 2d 30, 51 (D.D.C. 2000); *see also id.* at 50 (concluding that "it is nevertheless clear that licensees, including consumers, are forced to take, and pay for, the entire package of software and that any value to be ascribed to Internet Explorer is built into this single price").

183. *Id.*

184. *Id.* at 53.

185. *See id.* at 64 (determining that "[n]ot later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the [Antitrust Division] a proposed plan of divestiture").

186. Jube Shiver Jr. & Michael A. Hiltzik, *Microsoft Violated Federal Antitrust Laws, Judge Rules*, L.A. TIMES (Apr. 4, 2000), www.latimes.com/archives/la-xpm-2000-apr-04-mn-15707-story.html.

indicated that the Antitrust Division had learned from the time-consuming actions taken against AT&T and IBM.[187] The effects on Microsoft were significant, as Bill Gates left his role as chief executive of Microsoft – an internal shift attributed to the enforcement action.[188]

However, Microsoft never split into two companies.[189] The D.C. Circuit Court of Appeals determined that Microsoft still had violated the Sherman Act for some practices, but did not require it to break up.[190] The D.C. Circuit found that Microsoft's restriction forbidding manufactures from installing other programs still violated the Sherman Act as it protected Microsoft's monopoly.[191] Where the D.C. Circuit differed was in its determination that Microsoft was not liable for the integration of Internet Explorer into Windows.[192] The D.C. Circuit also differed from the district court in finding that the Antitrust Division failed to prove that Microsoft had attempted to monopolize the market.[193] When examining the appropriate remedies, the D.C. Circuit noted that "divestiture is a remedy that is imposed only with great caution."[194] While "divestiture is a common form of relief in successful antitrust prosecutions," the remedy's appropriateness was an aspect for the district court to reconsider.[195] Divestiture itself is usually used as a remedy when there is a problem with overwhelming corporate control in Sherman Act violations.[196] It is an appropriate remedy when "asset or stock *acquisitions* violate the antitrust laws," and

187. TIME Staff, *"Microsoft Enjoys Monopoly Power . . . "*, TIME (Nov. 15, 1999), www.content.time.com/time/world/article/0,8599,2054223,00.html.

188. David Bank, *Gates Steps Aside as Microsoft's CEO; Ballmer to Take Over Daily Operations*, WALL ST. J. (Jan. 14, 2000), www.wsj.com /articles/SB947799478575341462.

189. *See U.S. v. Microsoft: Timeline*, *supra* note 177 (documenting the timeline of the Antitrust Divisions' actions against Microsoft, and that the Antitrust Division no longer sought Microsoft to be broken up).

190. Alex Fitzpatrick, *A Judge Ordered Microsoft to Split. Here's Why It's Still a Single Company,* TIME (Nov. 5, 2014), www.time.com/3553242/microsoft-monopoly/.

191. *Microsoft III*, *supra* note 145, at 64 ("Accordingly, we affirm the District Court's decision holding that Microsoft's exclusive contracts . . . are exclusionary devices, in violation of § 2 of the Sherman Act").

192. *See id*. (deciding that "all the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification").

193. *Id*. at 67 "The plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs. *Id.* The government did not prove or demonstrate that the act was anticompetitive rather than just a design change in the marketplace. *Id.*

194. *Id.* at 84.

195. *Id.* at 80.

196. *Id.* (citing U.S. v. E. I. du Pont de Nemours & Co., 366 U.S. at 329).

may not be appropriate when the company has naturally grown .[197] Microsoft naturally became a large company, instead of acquiring large competitors, so it can be harder to divide as there are fewer internal divisions.[198] As a final result, the D.C. Circuit found that the District Judge communicated with the press and made statements indicating that he was not impartial.[199] The remedy order was vacated, and the District Judge was disqualified for the rest of the proceedings.[200]

Following that, the Antitrust Division and Microsoft entered an agreed-upon consent decree, but it was far less severe than what the Antitrust Division initially desired.[201] Instead of forcing a split into two companies, the decree forced Microsoft to allow other companies to create third party software on Windows.[202] The decree required Microsoft to ensure that their platform was open to other software users.[203] Additionally, the company was "required to end retaliation against computer makers who use non-Microsoft software."[204]

Netscape, the competing browser, was dominating the browser market before the integration of Internet Explorer, holding 90 percent of the market share.[205] Netscape went from a startup in late 1994 to a 10 billion dollar company when acquired by AOL in 1999.[206] After the integration into Windows, Netscape slowly fell as

197. *Id*. (citing Ford Motor Co. v. U.S., 405 U.S. 562, 573 (1972)).

198. *See id.* at 106 (stating that dividing a merged company is possible even after some time because "identifiable entities preexisted to create a template for such division as the court might later decree"); *see also* U.S. v. Aluminum Co. of America, 91 F. Supp. 333, 416 (S.D.N.Y. 1950) (finding that "[a] corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency").

199. *Id*. at 107 (by talking to reporters for an impending case, his "violations were deliberate, repeated, egregious, and flagrant").

200. *Id.* at 117 (the District Judge was disqualified "retroactive only to the imposition of the remedy," so on remand *Microsoft III* was before a different judge to determine the remedy, not to rehear the entire case).

201. *See generally* U.S. v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002) (discussing the scope of the consent decree's provisions, which was far less than the breakup that the Antitrust Division initially sought).

202. Diane Bartz, *Microsoft Antitrust Decree Ends, Google Eyed*, REUTERS (May 12, 2011), www.reuters.com/article/us-microsoft-antitrust-idUSTRE74B4R520110512.

203. *Id.*

204. *Id.*

205. Kurt Mackie, *The Microsoft Consent Decree Expires*, VISUAL STUDIO MAG. (May 13, 2011), www.visualstudiomagazine.com/articles/2011/05/13/wnews_consent-decree-expires.aspx; *see also* Nate Mook, *Firefox Usage Passes 15 Percent in US*, BETANEWS (Jul. 10, 2006), www.betanews.com/2006/07/10/firefox-usage-passes-15-percent-in-us/.

206. Sean Cooper, *Whatever Happened to Netscape?*, ENGADGET (May 10, 2014), www.engadget.com/2014/05/10/history-of-netscape/.

the browser of choice to less than one percent of the marketplace.[207] It stopped competing in the market altogether in 2008.[208] Afterwards, Netscape itself faded away as an organization, subsumed into AOL.[209] Eventually, Microsoft even bought the patents that Netscape was built on.[210]

Microsoft relatively got off easy from the enforcement action taken by the Antitrust Division, while still being restrained in some key areas.[211] Generally, while Microsoft was not an unchecked giant, the conduct remedies imposed were effective in constraining future anticompetitive practices.[212] The suit itself and the remedies made Microsoft more cautious, leading other firms like Google and Amazon to grow.[213] Microsoft used its position to protect their free product, Internet Explorer, by restricting other manufactures from installing competing browsers.[214] The conduct restrictions allowed other competitors to enter and grow, while Microsoft focused on making products that worked on other platforms, not just Windows.[215] *Microsoft III* helped show that the enforcement action itself is enough to change companies conduct, and that courts may be amendable to more stringent remedies.[216]

B. Benefits and Detractions of Antitrust Remedies

When looking at the two broad types of remedies, each have

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207. Mackie, *supra* note 205.

208. *Id.*

209. W. Joseph Campbell, *The '90s Startup That Terrified Microsoft and Got Americans to Go Online*, WIRED (Jan. 27, 2015), www.wired.com/2015/01/90s-startup-terrified-microsoft-got-americans-go-online/.

210. Matt Blitz, *Later, Navigator: How Netscape Won and Then Lost the World Wide Web*, POPULAR MECHANICS (Apr. 4, 2019), www.popularmechanics.com/culture/web/a27033147/netscape-navigator-history/.

211. *Cf.*, David S. Evans, *U.S. v. Microsoft, Did Consumers Win?,* NAT'L BUREAU ECON. RES. (determining that "Microsoft is prone to anticompetitive . . . then one must believe that the remedy is likely to prevent future at least some violations that might harm consumers").

212. *Id.*

213. Richard Blumenthal & Tim Wu, *What the Microsoft Antitrust Case Taught Us*, N.Y. TIMES (May 18, 2018), www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html.

214. *Id.*, *see also* U.S. v. Microsoft Corp., 253 F.3d at 64 (D.C. Cir. 2001) (remarking that Microsoft prevented manufacturers from adding other products to Windows through their licensing agreements).

215. *See* Brian Feldman, *U.S. v. Microsoft Proved That Antitrust Can Keep Tech Power in Check*, N.Y. MAGAZINE (Dec. 12, 2017), www.nymag.com/intelligencer/2017/12/u-s-v-microsoft-proved-that-antitrust-can-check-tech-power.html (answering the question of whether or not "the lawsuit play[ed] a significant role in opening up the field for new or small tech companies like Google and Apple? — seems to have a clear answer: Yes").

216 *See id.* (finding that the enforcement action in the end allowed for more competition).

their own key benefits and detractions. They fall into two broad categories: structural remedies and conduct remedies.[217] When dealing with merger cases, there is a preference towards structural remedies because the company itself can organize a clean break without much government involvement.[218] When dealing with mergers, a conduct remedy is considered to be more appropriate when it can help the structural solution.[219] Historically, when larger companies purchased startups or other small companies, the purchase would sometimes lead the company into a new market.[220] Other times the purchases would augment a preexisting product or service to gain a larger competitive advantage.[221] The first situation described is closer to a vertical merger – buying a company to enter a new market place.[222] The second situation is an example of a horizontal merger, where one buys a company to gain market share and technology.[223]

1. Structural Remedies

Structural remedies are considered to be relatively easy to administer and are the remedy of choice to preserve competition.[224] Structural remedies intend to protect competition by requiring the sale or divestiture of part of a company.[225]

The primary concern is to make sure that each separated part is equally viable.[226] This can be a problem, however, if there is not a complete break between the two parts of the company: A forced relationship can make the new firm or division of another company too tied to the initial company's decisions.[227] This relationship can be even more impactful if the original company needs to ensure that the new company is viable.[228] The new firm is still heavily reliant

217. DOJ Antitrust Policy 2011, *supra* note 137, at 7.

218. *Id.*

219. *See id.* (preventing the merger would "sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible").

220. Schonefeld, *supra* note 11.

221. Weinberger, *supra* note 16.

222. MERGER REMEDIES GUIDE, *supra* note 123, at 7.

223. *Id.*

224. *Id.* (citing U.S. v. E.I. du Pont de Nemours & Co., 366 U.S. at 331); California v. American Stores Co., 495 U.S. 271, 280-81 (1990)) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition").

225. DOJ Antitrust Policy 2004, *supra* note 119, at 7 ("structural remedies generally will involve the sale of physical assets by merging firms").

226. *Id.* at 12.

227. MERGER REMEDIES GUIDE, *supra* note 123, at 56.

228. *See id*. at 57 (finding that "[t]he exact nature of any transition services agreement depends on the specific needs of the divestiture buyer in regards to competing with the divestiture package").

on the decisions of the former parent, and does not have as much independence to pursue other acts.[229] Limiting the duration of the agreement helps lower the risk of improper coordination but could harm the viability of the new firm if it is not long enough.[230]

2. Conduct Remedies

Conduct remedies, as the name suggests, restrict the firm's conduct, rather than changing the structure of the firm.[231] Currently, these remedies are disfavored, instead with the enforcement agencies preferring structural remedies, such as divestiture of a business unit.[232] Conduct remedies, however, are still used in current policy, as these remedies can be incorporated into the structural remedy that the enforcement agency creates.[233]

Conduct remedies focus on monitoring the firm's actions through injunctive provisions, with the enforcement agencies making sure there are no violations of these provisions.[234] These conduct remedies effect different things, focusing on restricting one specific aspect of a company's operation.[235] A firewall provision, for example, would restrict the flow of information between the acquired business unit and the rest of the company.[236] While this provision may minimize the risk of disadvantaging rivals with new information, it reduces the efficiency of the parent company.[237] If the acquisition of the company was completed in order to buy knowledge or a skill set for the parent company, a firewall provision could prevent that from happening, making the purchase potentially useless.[238]

A prior notice or approval provision requires that a company notify the enforcement agency before future purchases or obtain

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229. *Id.*

230. *Id.* at 56.

231. *Id.* at 58.

232. Makan Delrahim, *It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium*, DEP'T JUSTICE (Sept. 25, 2018), www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust (discussing how the 2004 standards are preferred and currently in use by the Antitrust Division).

233. MERGER REMEDIES GUIDE, *supra* note 123 at 58.

234. DOJ Antitrust Policy 2011, *supra* note 137, at 7.

235. *See* MERGER REMEDIES GUIDE, *supra* note 123, at 60 ("include[es] internal firewalls, external remedies, hybrid remedies, third-party consents and approvals, and agency monitoring and reporting requirements").

236. *Id.* (citing DOJ Antitrust Policy 2011, *supra* note 137, at 13-14); Richard Feinstein, Director, Bureau of Competition, *Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission* (Jan. 2012).

237. *Id.*

238. *Id.*

approve of the purchases beforehand.[239] Enforcement agencies utilize this provision in various ways.[240]

Typically, enforcement agencies usually only require the companies to notify them if a merger is valued at over 90 million dollars.[241] As such, smaller companies and startups can be purchased without notification to the agencies based on their size alone.[242] For example, startups in early stages have a median value of around 29 million dollars – a value well below that which requires reporting.[243] Since these valuations fall below the reporting requirements, the enforcement agency may not be aware of these purchases.[244] Additionally, the market concentration from these purchases may fall below the Herfindahl-Hirschman Index measure for initial scrutiny.[245]

Mandatory licensing programs can help ensure that certain technology or intellectual property is available to others to prevent a monopoly of the technology.[246] Access is useful to allow for continued research and development, but can have the downside of giving away a key part of the business.[247] Fair dealing are cut and dry, ensuring that the company will not attempt to disadvantage others.[248] Restricting how a company can act towards others as in *Microsoft III* ensures that the markets are open and everyone would

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239. *Id.*

240. *C.f.*, Fed. Trade Comm'n*, Frequently Asked Questions About Merger Consent Order Provisions,* www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq *with* MERGER REMEDIES GUIDE, *supra* note 123, at 60 (citing Wm Randolph Smith & Megan Louise Wolf*, Prior Notice: How a Merger Remedy Can Be Anticompetitive,* BNA (Mar. 8, 2013), www.antitrust.bna.com/atrc/7033/split_display.adp?fedfid=29966136&vname=atrcnotallissues&wsn=499977000&searchid=31260640&doctypeid=1&type=oascore4news&mode=doc&split=0&scm=7033&pg=0) (comparing the FTC use of the provision depending on the market versus the Antitrust Division's changing practices, utilizing them more frequently).

241. FED. TRADE. COMM'N, *Merger Review,* www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review (last accessed Jan. 4, 2020).

242. *E.g., id.* (noting that any merger over the notification threshold should be reported for review, allowing for mergers below that notification to not be reported).

243. Alex Frederick, Cameron Stanfill, & Van Le, *VC Valuation 1H 2019,* PITCHBOOK (2019).

244. *See Merger Review*, *supra* note 241 (noting there is only a requirement to report if the merger is over the notification threshold, so mergers less than that amount may not be noticed).

245. *See Herfindahl–Hirschman Index*, DEP'T JUSTICE www.justice.gov/atr/herfindahl-hirschman-index (last visited on Nov. 24, 2019) (stating that agencies generally look for a concentration shift of 100-200 points in the market, depending on the concentration in that market).

246. *See* MERGER REMEDIES GUIDE, *supra* note 123, at 60 (citing DOJ Antitrust Policy 2011, *supra* note 137, at 13-14).

247. *Id.*

248. *Id.*

be treated equally.[249]

However, the company may not want to deal with a competitor by having to treat them the same as a company who does not compete with them. Anti-retaliation provisions can mitigate the damage from restricting competition, but depending on the scope, can be less applicable.[250] These provisions are best suited to prevent retaliation against consumers, rather than retaliation against a firm.[251] As shown by *Microsoft III*, conduct remedies can work to restrain some anticompetitive practices effectively but do not cover modern problems.

C. New Possibilities for Remedies

Recently, there has been some discussion from the FTC in how to regulate tech companies, as "there is no safe harbor for eliminating future competitors."[252] Section 7 of the Clayton Act prevents companies from acquiring another company if the "the effect of such acquisition may be substantially to lessen competition."[253] It also limits the restriction of commerce, or any acquisition that "tend[s] to create a monopoly."[254] In two actions focusing on restricting competition or future harm, the FTC intervened, leading to the quick resolutions.[255] The FTC intervened because one firm could become a greater threat in the future, as only one firm would remain in the market.[256] While no remedies were enforced, the threat of intervention by the FTC to protect future competition was enough to resolve the potential anticompetitive acts.[257]

IV. PROPOSAL

First, the FTC and the Antitrust Division should incorporate structural remedy provisions into their conduct remedies when enforcing mergers against larger, established companies. Specifically, the FTC and the Antitrust Division should learn from

249. *Microsoft III*, *supra* note 145.

250. MERGER REMEDIES GUIDE, *supra* note 123, at 62.

251. *Id.* (citing DOJ Antitrust Policy 2011, *supra* note 137, at 18).

252. *See* D. Bruce Hoffman, Director, Bureau of Competition, *Antitrust in the Digital Economy: A Snapshot of FTC Issues***,** Remarks at GCR Live Antitrust in the Digital Economy (May 22, 2019) (discussing possibility of enforcement by the FTC under Section 7 of Clayton Act, due to effect on future competition).

253. 15 U.S.C. § 18 (2020).

254. *Id.*

255. *See* Hoffman, *supra* note 252 (determining that "[t]he complaint alleged harm to current competition, but focused even more sharply on harm to future, or nascent competition").

256. *Id.*

257. *Id.*

the Antitrust Division's successes and failures against Microsoft in fashioning these remedies. Finally, these enforcement agencies should utilize Section 7 of the Clayton Act to bring actions against certain acquisitions of smaller companies by larger, institutional companies.

A. Solutions Through Prior Notification

Stronger conduct remedies can provide both a solution and a deterrence to large companies purchasing small or startup companies. While structural remedies provide a clean break between companies previously connected, conduct remedies are better tailored to vertical merger issues.[258] Incorporating both structural and conduct remedies into a unified approach would provide a more comprehensive remedy for prohibiting anticompetitive actions.[259] Enforcement agencies should specifically enter a prior notification provision into consent decrees.

Often companies purchase startups or other small companies to lead the company into a new market, which would be a case of expanding the business vertically.[260] Other times the purchases may give the company a competitive advantage, providing a horizontal merger.[261] The main problem for antitrust enforcement in any merger situation is the size of the company being bought. As the enforcement agencies usually only require merger notifications if the company is valued at over 90 million, smaller companies are not on the radar.[262] Most startups do not have a large market valuation, so purchases of these companies would not fall under the 90 million reporting requirement.[263] Additionally, the market concentration from these purchases may fall below the Herfindahl-Hirschman Index measure for initial scrutiny.[264] The challenge is fashioning a remedy that addresses smaller changes that may not affect the market immediately but have potential future anticompetitive effects.

Structural remedies alone would not address this problem, as the forced divesture of a business unit would not be appropriate to resolve anticompetitive concerns here.[265] If the purchase is to improve a business unit or gain technology for the company, it may

258. DOJ Antitrust Policy 2011, *supra* note 137, at 1-2.

259. *Id.*

260. *See* MERGER REMEDIES GUIDE *supra* note 123, at 7.

261. *Id.*

262. *Merger Review*, *supra* note 241.

263. *See* Alex Frederick, Cameron Stanfill, Van Le, *VC Valuation 1H 2019,* PITCHBOOK (2019) (determining that early stage startups typically have a median value around 29 million).

264. *See Herfindahl–Hirschman Index*, *supra* note 245 (noting that agencies look for a concentration shift in an already concentrated market).

265. MERGER REMEDIES GUIDE, *supra* note 123*,* at 52.

be effective to block the purchase. However, intervening and blocking a purchase every time is inefficient. That is where conduct remedies come into play. The enforcement agencies should expand their use of prior notification and approval provisions to prevent other purchases in the same market.[266] This remedy has been disfavored by the FTC, which has instead preferred the system of notification based on dollar valuation.[267] Because that system allows for smaller anticompetitive acts, it must be supplemented with a prior notification and approval provision.[268]

Combining prior notification and approval provisions can help enforcement agencies track when a previously offending large company purchases a smaller company.[269] It would also provide a deterrence to companies, providing another avenue and a middle ground solution not available before.[270] The prior notification provision would still allow companies to attempt acquisitions for their best interest. The provision allows the enforcement agency to determine if any acquisition would violate the consent decree, which covers smaller companies as well as larger ones. Any potentially anticompetitive purchase of a smaller company requiring notification helps deter the truly anticompetitive purchases but would still allow the purchases in the event of a clear business rational. Having a middle ground gives an option for the enforcement agencies without needing to threaten dissolution of the entire company.[271]

B. Learning from U.S. v. Microsoft Corp.

While *U.S. v. Microsoft* was not a runaway success for the Antitrust Division, there are some important takeaways that can shape future enforcement policy. Microsoft was not broken up, but it was effectively restricted by the enforcement action by the threat of being broken up.[272] Bill Gates, the former Microsoft CEO, argues that Microsoft was not able to dominate the mobile phone market

266. *See generally Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal*, DEP'T JUSTICE (May 1, 2016), www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal (showing how enforcement agencies have the authority to threaten to block mergers, and the authority and investigation were enough to end the merger).

267. MERGER REMEDIES GUIDE, *supra* note 123, at 64.

268. *Id.*

269. *Id.*

270. Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 L. & CONTEMP. PROBS. 127, 139 (1997).

271. *See id*. at 138 (noting that enforcement actions did not survive a court challenge because of the severity of the remedies but may have survived if there was a lesser remedy available).

272. *Microsoft*, 97 F. Supp. 2d at 62.

as a direct result of the government's antitrust case because it could not take action before other companies could develop and compete.[273] This is especially clear today, as Apple and Google are the two major companies in the mobile phone software marketplace, with Microsoft dropping support for their own operating system in 2016.[274] Without the action by the Antitrust Division, Microsoft could have moved in and dominated the mobile operating system market, as they did in the desktop market.[275]

As companies may be more cautious after an enforcement action, having a prior notification provision in the final consent decree can provide a combined deterrence. Entering a decree requiring notification of any purchase of another company in a related marketplace after entering the market puts the company on notice. The company then knows that while they have now entered a new marketplace, they cannot dominate it by buying the entire market.

C. How to Get a Prior Notification Provision

There is still one hurdle to getting a prior notification provision in an antitrust decree, which is the initial enforcement action itself. When the purchased company is valued at less than 90 million dollars, a prior notification provision would not apply. Without that notice, the enforcement agency would have no reason to begin an investigation.

Section 7 of the Clayton Act provides a solution.[276] Instead of the current policy, enforcement agencies should be actively investigating. This section provides them with the authority to bring an action when an acquisition may substantially lessen competition.[277] All that they need to do next is actually begin investigating. This provides an avenue to getting a prior notification and consent decree, and with the appropriate backing, can put pressure on companies to agree.[278] For example, while it took eight

273. Tom Warren, *Bill Gates Thinks Windows Mobile Would Have Beaten Android Without Microsoft's Antitrust Woes*, VERGE (Nov. 6, 2019), www.theverge.com/2019/11/6/20952370/bill-gates-windows-mobile-android-competition-comments-microsoft-antitrust.

274. Tom Warren, *Microsoft to End Windows 10 Mobile Updates and Support in December*, VERGE (Jan. 18, 2019), www.theverge.com/2019/1/18/18188054/microsoft-windows-phone-windows-10-mobile-end-of-support-updates.

275. *See* Matt Binder, *Windows 10 is Now the Most Popular Desktop Operating System in the World*, MASHABLE (Jan. 2, 2019), www.mashable.com/article/microsoft-windows-10-most-popular-os-in-the-world/ (stating that Windows 10 has over a 39 percent share of desktop operating systems, Windows 7 has less than a 37 percent share).

276. 15 U.S.C. §§ 14-18 (2020).

277. Hoffman, *supra* note 252.

278. *Id.*

years, AT&T eventually agreed to break up its monopoly after feeling the pressure of an investigation.[279] By AT&T agreeing to the decree, the Antitrust Division ended a large monopoly without forcing its breakup through the courts. By putting pressure on AT&T, they were able to get AT&T to agree to dissolve its own monopoly.

However, D. Bruce Hoffman, the Director of the Bureau of Competition, has discussed some potential problems with this type of enforcement: The enforcement agencies have had almost 5,000 filings annually to review for potential anticompetitive activity, wasting departmental resources for other serious investigations.[280] Changing the value notification requirement in any way was meant to resolve this resource issue.[281] Nonetheless, moving away from the reliance on the value notification as the primary way of notifications of acquisitions of new competitors can prevent anticompetitive actions.

In order to have a decree to enforce, there needs to be a substantive anticompetitive act that the enforcement agency can investigate and bring an action. Once the action begins, the decree can be tailored to the specific market that the company is trying to purchase its way into. Beginning an investigation from a smaller transaction issue can allow for a decree, which requires a prior notification provision.[282] Removing the cap can provide enough starting groundwork for enforcement and getting a decree entered.[283] From there, future purchases can be covered and investigated. If Apple were to continue to buy 20-25 companies every six months, a prior notification provision would alert the enforcement agencies directly.[284] This would center the investigations on the specific actors instead of sifting through thousands of reports, focusing on the right wording of the provision. For a decree entered for anticompetitive acts in an unrelated market, the decree should be worded for notification for all unrelated purchases. This would cover purchases of smaller, unrelated companies, allowing the enforcement agencies to investigate and determine if there was an anticompetitive act. Ultimately, removing the current notification procedure can allow for more enforcement actions and open an avenue for a decree to be entered preventing anticompetitive purchases.

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279. U.S. v. American Tel. & Tel. Co., 552 F. Supp. 131, 139-41 (D.D.C. 1982).

280. Hoffman, *supra* note 252.

281. *Id.*

282. *See id.* (referencing the problems with detection beforehand, and that setting a requirement for notice solved some issues with being notified of potential anticompetitive purchases).

283. *Id.*

284. Feiner, *supra* note 22.

V. CONCLUSION

Antitrust enforcement has evolved over time, with the targets of both consumers and enforcement agencies shifting. First, the focus was on the monopolies of the gilded age. Then, it shifted in the mid-century to corporations like AT&T and IBM. Today, the focus is on larger companies, usually in the technology sector, such as Apple, Google, and Amazon. Their reach is far and extends into markets well beyond what initially made them popular. Many of these successes came from the purchases of smaller companies. Acquiring small companies early allowed for Siri and Alexa to thrive.[285] In augmenting their products and expanding their company, they may have prevented others from thriving, but there has been little enforcement or investigation. Enforcement agencies have a wide variety of remedies available, from divestment, to mandatory licensing, to fair dealing, to prohibiting restrictive contracts.[286]

However, the enforcement agencies have a tool that could be effective at restricting anticompetitive purchases of small companies: the prior notification provision. While other remedies change how companies act, the prior notification provision gives enforcement agencies the ability to know and address anticompetitive actions at an early stage. Prior notification or approval provisions give the enforcement agencies the notice that they need to determine if these actions are anticompetitive.[287] Enforcement agencies should become more proactive by utilizing their authority under Section 7 and using prior notification provisions to investigate and determine if anticompetitive acts are ongoing. Otherwise, companies like Apple, Google, and Amazon may continue to dominate new markets by buying the market itself. The problem that the FTC faces of needing to ask about these mergers could have been resolved if a notification provision was in place to notify enforcement agencies about these purchases.[288] Instead of asking, enforcement agencies can know earlier and be proactive in investigating and enforcing, instead of reacting to purchases that were concluded long ago.[289]

285. *See* Schonefeld, *supra* note 11 (describing how purchasing these smaller startups led them to integrating and creating popular products).

286. MERGER REMEDIES GUIDE, *supra* note 123, at 49-69.

287. *Id.* at 64.

288. *See* Bartz and Bose, *supra* note 29 (discussing that the FTC has begun investigating mergers that were too small to report).

289. *Id.*