Hastings Science and Technology Law Journal

Volume 11
Number 2 *Summer 2020*

Article 3

Summer 2020

The Antitrust Impact of Venture Capital Firms on Concentration in the Technology Sector

Bushra Samimi

The Antitrust Impact of Venture Capital Firms on Concentration in the Technology Sector

BUSHRA SAMIMI
University of California Hastings, College of the Law
Advisor: Jared Ellias

Abstract

Technology plays a significant and crucial role in the current global economy. It impacts consumer welfare, the job market, economic progress, and the emergence of innovative technology. Due to the fact that the technology sector provides necessary and critical services, technology companies exercise immense power over consumers who rely on their products. The rising concentration in the technology sector magnifies the potential anticompetitive forces at play. This article argues that venture capital financing leads to anticompetitive effects in the technology industry. Although most startups intend to eventually go public through an initial public offering ("IPO"), the liquidity pressures from venture capital firms positions startups for an acquisition. Under these circumstances, venture capital policies create economic opportunities for tech giants to swoop in and acquire startups. This escalation in M&A activity in the technology space increases the market power of tech giants such as Google, Facebook, and Amazon. The result is a highly concentrated technology market which stunts innovation, heightens barriers to entry into the market, and reduces consumer welfare.

Introduction

The purpose of this paper is to demonstrate that venture capitalist's behavior gives rise to anticompetitive conduct in tech because it enhances the dominance of tech giants through M&A. This Note has three major parts: Part 1 explains how VCs induce startups to sell, Part 2 describes the legal framework for antitrust and bridges the connection between VCs and M&A

activity, and Part 3 outlines a remedy for strengthening merger enforcement and potentially altering VC behavior towards startups in the tech industry.

Technology startups increasingly view themselves as auditioning for sales to technology giants rather than creating long-term viable businesses. Corporate consolidation in tech deals is changing the startup ecosystem. Apple acquired Beats by Dre for $3 billion, Cisco bought AppDynamics at $3.7 billion a day before it was set to go public, Amazon purchased Whole Foods for $13.7 billion, and Facebook's acquisition of Instagram amounted to $1 billion while its acquisition of WhatsApp totaled $22 billion.[1] IBM topped this all off with the largest software M&A through its acquisition of Red Hat for $34 billion. These MegaTech deals indicate that lucrative acquisitions are becoming a more typical occurrence in the startup ecosystem.[2]

For technology giants, these sorts of acquisitions of early stage firms serve the dual purposes of growth and disabling potential competitors. For instance, Applied Insight, an AI company, grew its revenue to $140 million and expanded to 500 employees through the acquisition of Applied Technology Group.[3] Similarly, Aquicore, a commercial real estate software developer, acquired Entic.[4] With this acquisition, Aquicore has been able to expand to Florida, Massachusetts, and California and grow its team by an additional 65 employees.[5]

Federal regulators are beginning to examine the anti-competitive aspects of these types of deals, but it is not obvious that current antitrust law has much to say about them even though they threaten to concentrate consumer data in a relatively small number of hands. The FTC has noted that it is time to "closely examine technology markets to ensure consumers benefit from free and fair competition."[6] However, mergers are not inherently harmful or anticompetitive and simply possessing monopoly

1. Todd Campbell, *9 Near Monopolies That Are Legal in America*, THE MOTLEY FOOL (July 3, 2018), https://www.fool.com/slideshow/9-near-monopolies-are-legal-america/.

2. Alastair Rimmer, *Tech Deals Bring New Challenges to M&A*, STRATEGY+BUSINESS (May 16, 2018), https://www.strategy-business.com/article/Tech-Deals-Bring-New-Challenges-to-M-A.

3. Michelai Graham, *M&A Moves: These 3 DC-area Companies are Growing Via Acquisition*, TECHNICAL.LY (Mar. 27, 2019, 12:44 PM), https://technical.ly/dc/2019/03/27/these-3-dc-area-companies-are-growing-via-acquisition.

4. *Id.*

5. Graham, *supra* note 3.

6. *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, FED. TRADE COMM'N (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

power is not sufficient to establish a violation of antitrust laws.[7] Moreover, antitrust analysis is a fact-intensive inquiry driven by the mechanics and market structure of the particular industry.[8] Congress intended mergers to be viewed in light of industry qualities such as trends towards domination by a few leaders, barriers of entry to new companies, and access to the market.[9] Here, the tech industry is becoming increasingly consolidated and controlled by a few key players.[10] Thus, antitrust should look beyond relevant market share data because the large tech companies' strength lies in the way they leverage consumer data to gain power and eliminate competition.

Part 1. The Role of VCs in the Startup Ecosystem

The evolution of the technology sector began in the Silicon Valley in the 1970s of Silicon Valley and was accompanied by the development of a new type of financing provided by a new type of institutional investor: venture capitalists.[11] Venture capital funding significantly contributed to funding and building Apple, eBay, Yahoo, Google, and Facebook. Because banks were more risk averse than venture capitalists, startups relied on venture capital funding. As a result, it accelerated innovation and technological progress in Silicon Valley and the tech market.[12] Corporate governance presents a fitting environment to unveil the ways in which different startup players' conflicting interests affect exit strategy, the power that VCs yield over startups, and how VCs use that power to induce startups to sell.

As an asset class, venture capital has evolved to what is described as high-risk private investment, usually in the form of a type of equity, in young, putatively high-growth businesses.[13] VCs provide substantial funds,

7. Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

8. *Id.* at 411.

9. Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962).

10. *America's Concentration Crisis*, OPEN MARKETS INST. (June 2019), https://concentrationcrisis.openmarketsinstitute.org.

11. Team Wall Street Survivor, *The History of Silicon Valley: Start-ups and Their Forefathers*, WALL STREET SURVIVOR (Feb. 22, 2017), https://blog.wallstreetsurvivor.com/2017/02/22/history-of-silicon-valley.

12. *Starting Up: Silicon Valley's Origins*, NPR (Apr. 5, 2012, 3:20 AM), https://www.npr.org/transcripts/149992521?storyId=149992521.

13. *What is Venture Capital?* THE LAW DICTIONARY, https://thelawdictionary.org/venture-capital.

as well as managerial and technical expertise for emerging companies.[14] Although these deals are very risky for investors, there is a strong potential for high returns. Over the years, VCs have become a fundamental part of the startup ecosystem and a major source for startups to raise capital. VC funding is more widely available than other funding like private equity or bank loans which is crucial to startups attempting to begin or grow their businesses. In spite of its pivotal role in the accelerated growth of Silicon Valley and technological innovation, other challenges have arisen.

The provision of access to capital comes at the cost of startup founders losing equity in the company and the loss of independence.[15] The loss of equity by founders occurs because venture capital funds are bound by duties to their limited partners. Money invested in the fund is used to buy shares in high risk high reward startups which the VC firms hope will turn a substantial profit.[16] Because of the high-risk nature of the investment, VC firms gain ownership and agency in the business decisions of startups. This allows them to ensure the security of their investments by actively providing guidance and often requesting board positions. Thus, with the gradual influx of capital, founders lose equity and decision-making power in the future of the startup at each stage of the financing.

There are three main pathways to liquidate VC investment and reap the gains: 1) by IPO, 2) acquisition or 3) dissolution. Not only has the IPO market weakened, but regulatory measures like the Sarbanes-Oxley Act of 2002 make IPOs more costly for emerging companies in the startup tech space. The Sarbanes-Oxley Act of 2002 imposes heightened compliance requirements which influence startups to abstain from going public. With the weakening of the IPO market, and dissolution truly an unsavory and unviable option, mergers have become the preferred liquidation event.

VCs cultivate incredible influence over a startup through ownership and board representation. As preferred stock shareholders, the VCs interests are protected through contractual rights requiring their approval for certain transactions. This gives them privileges over the common-stockholders and opportunities to appoint VC-approved board members. The cash flow rights of preferred stock incentivize VCs to concentrate more on liquidation in the

14. James Chen, Venture Capital, Investopedia (Feb. 25, 2020), https://www.investopedia.com/terms/v/venturecapital.asp.

15. *What is VC Funding? Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/what-is-vc-funding.

16. Gary J. Ross, *How Venture Capital Funds Work*, ABOVE THE LAW (June 15, 2017, 3:03 PM), https://abovethelaw.com/2017/06/how-venture-capital-funds-work/?rf=1.

short term rather than the sustainability of the company in the long run.[17] Preferred stockholders can even invest in future financing rounds, giving them more authority and ownership in the company.[18]

Staged investments affect the balance of power in the early stage of venture-backed startups. Typically, venture capitalists acquire majority votes and protection rights through each round of financing.[19] VCs are able to acquire such power by leveraging the startup entrepreneurial team's need for additional financing because initial investments are often not enough to jumpstart the business and fully develop the idea or product.[20] As a result, the startup founders dilute their ownership rights in subsequent early stages of funding.[21] To illustrate the evolution of emerging startups, the pattern of shifting control from founders to investors happens within the first few rounds of venture financing.[22] Startup entrepreneurs play easily into the hands of VCs and inadvertently surrender control because they are motivated to complete their innovative project, and they fear that without VC funding, the startup will fail. The future of the startups depends upon the VC's decision to either continue to fund the project, and in the process gain more power in the company, or to abandon the startup altogether.[23] Staged investments formally and informally function to make startups and their founders ultimately comply with exit strategies favorable to VC interests. This occurs because venture capital has limited partnerships to whom they owe a fiduciary duty to vest the money, usually in ten-year term investments. This informs VCs interest in desiring to liquidate the fund's portfolio as soon as possible.[24] Therefore, each round of staged financing enables VCs to accumulate significant authority within the startups to drive it towards an M&A exit.

VCs attempt to gain a foothold in startup boards in order to control key strategic decisions and dictate the future of the company. Startup boards

17. Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 987–88 (2006).

18. *Venture Capital Definitions: Common v. Preferred Shares*, ALACRITY CANADA (Aug. 4, 2016), https://www.alacritycanada.com/2016/08/04/venture-capital-definitions-common-v-preferred-shares/.

19. D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 323–24 (2005).

20. Ronald J. Gilson, *Engineering A Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1072–75 (2003).

21. *Supra* note 19, 323–24.

22. Elizabeth Pullman, *Startup Governance*, 168 U. PA. L. REV. 155, 181(2019).

23. *Supra* note 20, 1072–75.

24. *Id.* at 1072–75.

function uniquely in that the board members heavily participate in the decision-making process and actively engage in the operation of the startup.[25] As VCs gain control over the board through each round of financing, VCs attain power and influence to make key critical decisions in how to allocate their investment and dictate the startups' growth goals. Specifically, VCs obtain the ability to block unfavorable transactions, and to initiate and influence the acquisition route as a means of liquidation.[26] In addition, studies show that in VC backed startups one-fifth of the startup founders are replaced.[27] Moreover, swing votes in VC supported startups are held by independent directors, chosen by both the VCs and common stockholders.[28] These board members interests may align with the VCs, thereby granting significant autonomy and power to VCs to push for liquidation and mergers, as opposed to allowing a startup to operate independently and grow sustainably. In essence, startup boards serve as an illustration of the way in which VCs ensure that their interests in being acquired prevail over the interests of startup entrepreneurs.

Corporate governance issues arising from VC-backed startups create legal and economic scandals such that an M&A exit strategy becomes preferable.[29] VC-backed startups are pressured to scale quickly due to the grow-at-all costs mentality fostered by VC funds. Since the structure of staged financing does not provide sufficient time to raise revenue, valuations rely on factors like: the portfolio of the entrepreneur, size of the market opportunity, traction, progress towards a minimally viable product, capital efficiency, and whether the company is hot.[30] Also, each startup valuation across Series-A, B, C, D, E funding is unique and assessed differently. Due to the complexity and difficulty in ascertaining the valuation of a startup, such valuations are considered to be a black box.[31] Thus, valuations largely depict an inaccurate snapshot of a startups true worth. This form of

25. Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 987–88 (2006).

26. *Id.*

27. Michael Ewens & Matt Marx, *Research: What Happens to a Startup When Venture Capitalists Replace the Founder*, HARVARD BUSINESS REVIEW (Feb. 14, 2018), https://hbr.org/2018/02/research-what-happens-to-a-startup-when-venture-capitalists-replace-the-founder.

28. *See* Jesse M. Fried & Mira Ganor, *supra* note 25 at 987–988.

29. Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 181(2019).

30. Mike Sullivan & Richard D. Harroch, *A Guide to Venture Capital Financings for Startups*, FORBES (Mar. 29, 2018), https://www.forbes.com/sites/allbusiness/2018/03/29/a-guide-to-venture-capital-financings-for-startups/#15f9a77e51c9.

31. Will Gornall & Ilya Strebulaev, *Squaring Venture Capital Valuations with Reality*, JOURNAL OF FINANCIAL ECONOMICS, forthcoming (Dec. 2, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955455.

information asymmetry can manifest itself as a culture of quick, unsustainable growth at the cost of compliance and good corporate governance. VCs encourage (or rather demand) accelerated growth as a means of staying afloat and gaining more funding.[32] Founders use traction and "fake it until you make it growth" to become a hot topic and increase their valuation profile. Doing so plants the seed of corporate governance dysfunction which inhibits founders from continuing to grow their company privately and independently. It can also burden startups to the point where IPO compliance costs are too heavy to bear. And even if attempts at scaling the company in the name of growth do not kill the company, it can result in harmful corporate scandals.[33] Some of the major examples of startup governance failures include: Zenefit, SoFi, Theranos, Uber, WrkRiot, Skully, and Hampton Creek.

Although the structure of VC-backed startups provides VCs the ability to facilitate startup maturity through monitoring, internal controls, and screening processes, it is not enough. Simply acquiring more control and ownership over startups does not prevent startups from being embroiled in massive corporate scandals. For example, Zenefits' employees were found to be cheating on their insurance state brokerage exams. Zenefits is an online software system automating health insurance and other essential office services. Their product promised to streamline and reduce HR costs for business around America.[34] Initially, it appeared that Zenefits was the ideal startup with a visionary founder, tapping into the health software space while bringing in revenue through insurance brokerage commissions.[35] In three years, Zenefits expanded from fifteen employees to 1600 employees.[36] However, this growth did not occur naturally, but from pressure to keep expanding and moving faster. Zenefits soon realized that its place in the market was not as secure as it believed because certain states banned the product and other companies did not have the technological capacity to

32. Luke Kanies, *If You Take Venture Capital, You're Forcing Your Company to Exit*, MEDIUM (Nov. 9, 2017), https://medium.com/s/understanding-venture-capital/if-you-take-venture-capital-youre-forcing-your-company-to-exit-fc08fcdb32cc.

33. Renata Quintini, *Growth at All Costs? It's Gonna' Cost You*, MEDIUM (Apr. 10, 2018), https://medium.com/@renata.quintini/growth-at-all-costs-its-gonna-cost-you-821eb79c7f2f.

34. Claire Suddath & Eric Newcomer, *Zenefits Was the Perfect Startup. Then It Self-Disrupted*, BLOOMBERG BUSINESS WEEK (May 9, 2016), https://www.bloomberg.com/features/2016-zenefits/.

35. *Id.*

36. *Id.*

accommodate Zenefits' services.[37] Minimal diligence and screening led to errors in insurance claims.[38] On the operational level, there was no office manager to address site issues.[39] The founder was adamant in closely managing HR decisions of Zenefits' employees, a responsibility that should have been deferred to the HR team in Zenefits. In addition to this internal dysfunction, Zenefit's insurance brokers were not properly licensed in their respective states to sell or advise people on insurance plans.[40] Since each state had different insurance brokerage exams, and training requirements, it would be costly to sell Zenefits products across the country.[41] To cut costs and bypass this licensing requirement, Zenefits created a Google Chrome browser extension that made it seem as if Zenefits' employees were working on the course when they were not.[42] Some Zenefit brokers did not even pass these tests.[43] There was no system in place to track which employees had licenses or reciprocal licenses.[44] The Zenefits case illustrates that such rapid growth may be dangerous and unsustainable as it leads to corporate governance failures. And, it shows that startups face unpredictable challenges in building a sustainable business which should trigger scrutiny and wariness of overly optimistic valuations.[45]

Another key example is Hampton Creek Foods, a Silicon Valley startup producing plant-based food. It was a hot company with lots of traction and products aimed at disrupting the biotech market.[46] However, Hampton Creek fell short of its promises and produced a number of corporate governance failures. The startup overhyped its capabilities to investors and the market by promising to deliver an impossible 43 new products.[47] One of these products, a cake mix, was proposed to garner the interest of a Walmart buyer.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Eric Newcomer, *Predicting the Future Is Hard, Especially at a Startup. Just Ask Zenefits*, BLOOMBERG, https://www.bloomberg.com/news/articles/2016-02-19/predicting-the-future-is-hard-especially-at-a-startup-just-ask-zenefits (last visited Apr. 4, 2020).

46. Helen Holmes, *Is This Embattled Start-Up the Theranos of Mayonnaise?*, OBSERVER, (Feb. 21, 2019, 1:03 PM), https://observer.com/2019/02/just-inc-mayonnaise-controversies-theranos-comparison/.

47. Monica Watrous, *What Happened To Hampton Creek?*, FOOD BUSINESS NEWS (Apr. 4, 2018), https://www.foodbusinessnews.net/articles/11575-what-happened-to-hampton-creek.

The startup has since scaled back to more realistic product launch goals.[48] Additionally, the startup was accused of artificially boosting sales of its products by having employees buy its plant-based products from stores. Moreover, Target removed Hampton Creek's products from its stores after allegations of food safety concerns. Employees anonymously tried to inform the startup about the inaccurate nutritional and health claims, and the misrepresentation of scientific research regarding its plant-based food products.[49] Also, the company's board of directors all stepped down. Because of these scandals, the company tried to rebrand itself as Just Inc.[50] This case study demonstrates that rapid growth as a measure of viability puts immense pressure on startups to rely upon exaggerated claims and generating popularity as a means of maintaining VC support. In the process, startups end up forsaking quality control, compliance, and best business practices to satisfy VC interests.

Uber, another VC backed startup, engaged in an endless stream of harmful corporate behavior. Aside from numerous rape and sexual harassment rumors, Uber's major corporate governance issues lie in their questionable business practices. In August 2014, Uber attempted to undermine its competitor Lyft by hiring independent contractors with burner phones and credit cards to book thousands of fake rides.[51] Uber repeated this behavior with a competitor in New York City, Gett Ride. In New York City, Uber's contractors posed as pedestrians in order to poach drivers and cancel scheduled rides. This type of spamming negatively impacts the competitors' revenue by wasting their drivers' time and spiking up the ride prices. Furthermore, Uber misrepresented information about drivers' potential earnings which eventually led to a $20-million settlement with the FTC. To circumvent cities' local laws and regulations, Uber used Greyball to identify and avoid sting operations where they committed violations. Uber also used another tool called God View, which allowed them to track cars and gain access to the personal information of drivers in the car. The use of this tool was problematic because there was a lack of data and security protocols in place. Thus, even after a huge data breach occurred, Uber was unable to disclose and remedy the breach in a timely manner. Uber's case illustrates that VC investment, and the desire to raise capital is not always aligned with

48. *Id.*

49. Ian Agar, *Just Inc. Raising $200M Amid Controversial Past*, PITCHBOOK (Feb. 20, 2019), https://pitchbook.com/news/articles/just-inc-raising-200-million-amid-controversial-past.

50. *Id.*

51. Sam Levin, *Uber's Scandals, Blunders and PR disasters: The Full List*, GUARDIAN (June 27, 2019, 19,14 EDT), https://www.theguardian.com/technology/2017/jun/18/uber-travis-kalanick-scandal-pr-disaster-timeline.

transparency and accountability. As long as a company is growing, and more capital can be raised, VCs are content. With that being said, not every startup will become a unicorn or become as large as Uber. This spells disaster for a lot of young, emerging startups whose revenue stream cannot be realized as easily or quickly as Uber's ride hailing service was. Early stage innovative startups take much longer than Uber to amass a stable revenue stream. Consequently, startups will be induced to sell because it is unlikely that they will achieve unicorn status or be highly profitable within the timeframe that suits VC interests. In the process of pursuing exponential growth and unicorn status, startups do not focus on compliance which can become costly and burdensome to remedy as the startup expands. Uber is not the norm and although they may have the capital to deal with compliance issues, many startups will not have the same luxury which leaves them in a disadvantageous position. Overall, this makes acquisitions far more attractive and practical than IPOs for VCs and young startups.

The fact that VCs have been the strongest drivers of technological innovation and growth in the startup ecosystem makes them an influential part of startup culture. With the influx of VC capital flooding the startup ecosystem, startups are pressured to "go big or go home." Not only that, but startup entrepreneurs have risen to celebrity status and resort to exaggerating their successes in order to garner more attention and more VC capital. Theranos is a prime example of how a founder, enamored by VC investment and the prospect of rapid growth, promised products that they were ultimately unable to deliver upon. Theranos claimed that they created a miniaturized blood analyzer that would transform the blood testing industry. However, Theranos' scientific claims were neither tested nor verified. The medical product did not function properly. Theranos' founder, Elizabeth Holmes, rose to prominence quickly, gaining fame and media attention. Internally, Theranos was different. The corporate culture did not value transparency or compliance, and instilled fear and secrecy. Theranos did not heed customer complaints about the flawed inaccurate blood test results. Moreover, employees who spoke up about questionable ethical practices were ignored and often fired. Theranos's founder grossly misrepresented the success of the product, resorting to hyping itself up, in order to continue to receive support and funding from investors. No one was willing to question Theranos' product; not even Walgreens, which spent millions of dollars to work with Theranos.[52] The power of the entrepreneurial celebrity status is so compelling that it can persuade companies like Walgreens to forego due

52. Rashmi Airan, *Theranos Scandal Highlights Need for Effective Corporate Governance*, Rashmi (June 8, 2018), https://www.rashmiairan.com/theranos-scandal-highlights-need-for-effective-corporate-governance/.

diligence just to have access to a popular technology.[53] Fear of disappointing the investors, not developing the product fully, and focusing on what the product could be instead of what it was caused it to fail.[54]

Although Theranos is an extreme example, there are many startups like Theranos in their initial stages, who possess strong talent, solid ideas, and a thriving business. To grow, they resort to exaggerations about their products, hype themselves up and rely on bad business practices to gain ludicrously high inaccurate valuations. As these fledgling startups continue to grow, these bad business practices become ingrained in their corporate culture. This type of growth coupled with more capital than a startup needs can lead startups to grow their businesses to scale with only short-term goals in mind, ending in burnout. For example, Homejoy, an on-demand home cleaning services platform, completed a $38 million round of financing in a little over a year.[55] However, two years later in 2015, it shut down due to its failing growth strategy. Rather than focusing on user retention of its services, Homejoy was focused on customer acquisition since VCs cared about rapid growth.[56] And rapid growth for platform companies means gaining a larger number of customers. Homejoy relied heavily on discounting their cleaning services as a means of getting more customers.[57] But this strategy was very costly and came at the expense of little revenue and minimal customer retention. Homejoy also was unable to create a consistent high-quality service and was burdened by lawsuits due to compliance issues regarding worker classification.[58] Before it could be acquired, Google poached the engineers and talent team. Thus, in the long term, bad corporate governance inhibits startups' ability to achieve good quality growth. With such high valuations, a volatile market, and the burden of compliance, companies are positioned for an M&A or dissolution. And before dissolution can occur, as it did for Homejoy, VCs pressure startups to sell while their products have not yet been duplicated by tech giants and they are still "hot" on the tech scene.

To pursue this point further, even when companies are on a strong track, VCs pressure for exit through an acquisition as seen in the case of harmon.ie,

53. *Id.*

54. *Id.*

55. Alex Moazed, *How to Avoid Crashing and Burning Like This $150 Million Company*, INC.COM (Aug. 13, 2015), https://www.inc.com/alex-moazed/3-tips-to-avoid-crashing-and-burning-a-150-million-startup.html.

56. *Id.*

57. Christina Farr, *Why Homejoy Failed*, WIRED (Oct. 26, 2015), https://www.wired.com/2015/10/why-homejoy-failed/.

58. *Id.*

a software tech startup creating collaboration tools.[59] At the end of the VCs seven-year investment cycle, the VC expected harmon.ei to sell in order to return profit to their limit-partner investors. The co-founder and CEO pushed back against an exit, believing it to be premature and not in line with the interests of the startup in the long term.[60] The VCs interest in selling is driven by their fiduciary duties to their investors and tied to the lifecycle of the investment. Thus, the priority is often VC profit and interests, rather than innovation, quality of the product, sustainability of the business, and customer welfare.[61] In response to this demand, harmon.ie turned to banks for loans to buy out the VC shares and gain their independence. This case illustrates VCs obsession with an exit, driven by the lifecycle of their investment, and their fiduciary duties to their limited partners.

Part 2. Legal Framework

Antitrust law is intended to protect consumer welfare and promote healthy vigorous competition. It serves as a check against companies who have monopolistic power and use it to suppress competition. Monopoly power is defined as the "power to control prices or exclude competition."[62] The Court acknowledges that antitrust doctrine is not static but is "constantly evolving with new circumstances and wisdom."[63] Currently, the sheer amount of M&As in the technology space signifies an alarming rise in the level of concentration, and the disproportionate allocation of market power to a small number of companies.

Robust M&A activity, in part, stems from VCs inducing startups to position themselves for an acquisition. The data demonstrates that venture capitalists are more incentivized to actualize their investment by selling rather than going public through IPO.[64] More startups heavily rely on VC funding and venture capitalists look to M&A to generate growth and entrepreneurship. Additionally, VC funding plays a huge role in the

59. Rosalie Chan, *A Startup's VCs Were Pressuring the Company to Sell Itself So Employees Bought Out the VCs Instead. The CEO Explains Why He's Done with Venture Investors*, BUSINESS INSIDER (Apr. 6, 2019), https://www.businessinsider.com/harmonie-ceo-yaacov-cohen-explains-why-employees-bought-outs-its-vcs-2019-4.

60. *Id.*

61. *Id.*

62. United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956).

63. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 905 (2007).

64. GORDON M. PHILLIPS & ALEXEI ZHDANOV, VENTURE CAPITAL INVESTMENTS AND MERGER AND ACQUISITION ACTIVITY AROUND THE WORLD, 1, 1 (2018).

professionalization of startups.[65] Empirical results demonstrate that while 13.74% of exits are IPOs, mergers constituted 76.61% of exits.[66] According to Prequin data on exits, M&A embody almost six times the incidence of IPO. The implications of this is that mergers are a viable and preferred exit strategy. The fact that M&A waves, not IPO waves predict VC behavior further illustrates the connection between VCs and M&A activity.[67]

Merger policy is lenient regarding potential competition mergers. Historically, the FTC and DOJ primarily focused on mergers and acquisitions between established firms. However, this does not accurately reflect the current economic reality. In the technology market, the majority of acquisitions occur between a tech giant and an emerging small startup. At face value, these acquisitions do not appear anticompetitive because the relative market share is small. On the contrary, these acquisitions harm the technology industry in the long term and lead to higher levels of concentration. The outcome is high barriers to entry, decreasing population of technology companies, diminishing innovation, and monopolistic tech companies yielding dominance over consumers. Preventative merger control policy fosters a fair environment for competition and entrepreneurship to flourish because it screens out the anticompetitive effects of these types of acquisitions. This is especially crucial because emerging startups play a critical role in spurring innovation, job creation, and productivity in the economy.[68] The governing law for mergers is the Clayton Act as well as the Horizontal and Vertical Merger Guidelines.

The underlying theme of the Clayton Act Sec. 7 and its subsequent 1950 amendment is to combat the rising levels of concentration in American industries.[69] To establish a violation under the Clayton Act, the effect of an acquisition of stock by one corporation of another may substantially lessen competition or create a monopoly.[70] Also, mergers which result in a significant increase in concentration of firms in the market, and produce a company with undue share of the relevant market, is inherently disposed to substantially lessen competition.[71] The Court reasoned that competition is

65. *Id.* at 5.

66. *Id.*

67. *Id.* at 18–19.

68. Ryan Decker, et al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamics*, JOURNAL OF ECONOMIC PERSPECTIVE (2014), http://econweb.umd.edu/~haltiwan/jep_dhjm.pdf.

69. United States v. Phila. Nat'l Bank, 374 U.S. 321, 362-63 (1963).

70. Clayton Act, § 7, 15 U.S.C.A. § 18; Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

71. *Phila. Nat'l Bank*, 374 U.S. at 362–63.

greatest when there are many sellers rather than a few who hold significant market share.[72] For purposes of merger analysis, the primary inquiry is whether the proposed merger enhances market power or facilitates its exercise.[73] There are two main types of mergers[74]: 1) vertical, between companies at different levels in the market[75] 2) horizontal, between direct competitors.[76] Historically, the FTC and the DOJ have challenged horizontal mergers more vigorously than vertical mergers because the perceived risk to competition is more apparent. Additionally, the Hart-Scott-Rodino Act authorizes antitrust agencies to review mergers and their effects prior to the completion of the merger.[77]

The first problem with the current law is that it focuses on price-setting, which is an inadequate starting point for analysis in a world where services are often free. Google's online search engines and Facebook's social media are free for customers. Facebook became massive in the market because they provided services and products consumers needed. Thus, the threshold definition of market power and competition should be adjusted to account for such innovations in the product market. The FTC should have challenged Facebook's acquisition of WhatsApp and Instagram in the same way that it blocked the merger of Franklin Electric and United Dominion.[78] In the Franklin Electric and United Dominion case, both companies entered into a joint venture agreement.[79] It resembled a near monopoly as both companies were the only two producers of submersible turbine pumps used for gasoline.[80] The DOJ found that entry would be difficult by other competitors and that there would be no competition, thus it blocked the merger to prevent the formation of a monopoly and prohibit anticompetitive effects.[81]

---

72. *Phila. Nat'l Bank*, 374 U.S. at 363.

73. US. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; horizontal merger guidelines 3.0.

74. Fed. Trade Comm'n, *Guide to Antitrust Laws - Competitive Effects*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects.

75. Ford Motor Co. v. United States, 405 U.S. 562 (1972).

76. Brown Shoe Co. v. United States, 370 U.S. 294, 334-35 (1962).

77. Fed Trade Comm'n, *Guide to Antitrust Laws – Mergers*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers.

78. Fed Trade Comm'n, *Commentary on Horizontal Merger Guidelines 26*, (2006), https://www.ftc.gov/sites/default/files/attachments/mergers/commentaryonthehorizontalmergerguidelinesmarch2006.pdf.

79. *Id.*

80. *Id*.

81. *Id.*

Similarly, Facebook's acquisition of WhatsApp and Instagram created barriers to entry for other platform competitors.

The second issue with merger review is that it does not sufficiently assess an acquisition's potential risk profile. Due to these standards, many acquisitions fall through the cracks of the merger review process and results in tech companies blocking the formation and survival of new rival companies. Facebook's acquisitions of startups have created a virtual monopoly leaving Facebook as the dominant company with high barriers to entry for other viable competitors. Particularly revealing is the way in which Facebook has utilized its acquisition of Instagram and WhatsApp to eliminate them from becoming potential competitors, kill Snapchat, and block Vine from its API. In allowing the merger to occur, the FTC has effectively lessened competition and potentially harmed consumers in the future. Since data functions as a currency of control in the tech market, the combined personal data of all three social application networks offers Facebook a steady stream of revenue from advertisers,[82] and blocks newer social networks from forming. Facebook's acquisition of WhatsApp and Instagram raises serious concerns about Facebook's digital monopoly, anticompetitive effects, and the impact on consumer welfare especially in the area of digital security. Both WhatsApp and Instagram were vital competitors alongside Facebook in the social media and messaging services market. WhatsApp is a unique messaging service allowing people to stay connected without bombarding them with ads while providing end-to-end encryption security.[83] Although the high-level platform integration from the combination of Instagram, WhatsApp and Facebook is convenient for users, ultimately it limits consumer choices and impacts the quality of the services.[84] For example, the acquisition of WhatsApp threatened the unique quality of the end-to-end encryption messaging feature. The chief executive of WhatsApp, Jan Koum, resigned after the recent Cambridge Analytica scandal which further revealed the flaws in Facebook's data collection services, as well as the weaknesses of their privacy and security policies. If WhatsApp and Instagram continued to compete independently Facebook in

82. John Shinal, *How Mark Zuckerberg Has Used Instagram to Crush Evan Spiegel's Snap*, CNBC (July 12, 2017), https://www.cnbc.com/2017/07/12/how-mark-zuckerberg-has-used-instagram-to-crush-evan-spiegels-snap.html.

83. Anthony Cuthbertson, *Why Facebook Might Be About to Ruin WhatsApp*, INDEPENDENT (May 1, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/features/facebook-whatsapp-change-privacy-encryption-messaging-app-jan-koum-a8330626.html.

84. Makena Kelly, *Facebook's Messaging Merger Leaves Lawmakers Questioning the Company's Power*, THE VERGE (Jan. 28, 2019), https://www.theverge.com/2019/1/28/18200658/facebook-messenger-instagram-whatsapp-google-congress-markey-blumenthal-schatz-william-barr-doj-ftc.

the social/media messaging market, Facebook would have been compelled to innovate and increase the security and privacy quality of their services.[85]

Furthermore, Facebook's motivations for attempting to acquire Snapchat, and its response when its proposal got rejected indicates another reason why VCs induce their startups to sell. Snapchat entered in the social network space, attracting customers and businesses across the spectrum with millions of daily active users.[86] Facebook recognized that Snapchat could pose a potential threat because it was continuing to attract users, and content usually posted on Facebook or Instagram, would be posted on Snapchat first.[87] In order to quell this competition, they offered to purchase Snapchat for $3 billion in 2013.[88] And when Snapchat rejected Facebook's offer, Facebook copied and added a version of Snapchat's Stories features on WhatsApp, Instagram and Facebook networks.[89] Facebook also copied and built upon Snapchat's face filters and disappearing messages features. It is important to note that while the Stories feature appeared in all three social networking apps, it was only really successful on Instagram. Facebook struggled to integrate the Stories Feature into their app and had to resort to giving Instagram users the ability to double-post on Instagram and Facebook.[90] They even created Facebook Poke, an app intended to mirror Snapchat's features and crush Snapchat.[91] However, it failed.[92] Without its acquisition of Instagram, Facebook would not have been able to stunt Snapchat's growth and surpass Snapchat's millions of daily active users. Thus, Facebook's acquisition gave them the ability to gain dominance in the social network space, not by sheer efficiency but by copying all of Snapchat's features and incorporating these features with its acquisition of Instagram. Facebook's retaliatory actions contributed to Snapchat's falling valuation. Many developing startups, like Snapchat, may not be willing to sell. However, although Snapchat survived Facebook's copying tactics, most

---

85. *Id.*

86. Billy Gallagher. *How Facebook Tried to Squash Snapchat*, WIRED (Feb. 16, 2018), https://www.wired.com/story/copycat-how-facebook-tried-to-squash-snapchat/.

87. *Id.*

88. *Id.*

89. Gallagher, *supra* note 86.

90. Chris Welch, *No One is Using Facebook Stories, So Facebook is Borrowing Instagram's*, THE VERGE (Sept. 6, 2017), https://www.theverge.com/2017/9/6/16264166/facebook-stories-fail-instagram-please-help.

91. Seth Fiegerman, *Snapchat CEO Reveals Why He Rejected Facebook's $3 Billion Offer*, MASHABLE (Jan. 6, 2014), https://mashable.com/2014/01/06/snapchat-facebook-acquisition-2/#ANROAAMpWZqK.

92. *Id.*

startups may not have the scale, funding or time to respond to aggressive tactics. Because of this, when startups are approached for acquisition, VCs will be even more motivated to sell rather than undertake a risk that a tech giant will swoop in, copy the technology and significantly lower the value of the startup.

The third problem is that lenient merger policies give rise to increased market concentration and consolidation which creates opportunities for tech giants to acquire a larger consumer base and veer closer to monopolization.[93] To illustrate, Amazon's acquisition of Twitch, a video game streaming service, means that they can market to Twitch's viewer base.[94] Additionally, Amazon's purchase of Whole Foods permits them to gain unique shopping data which Amazon can use to expand into the online grocery business.[95] Customer insights are the key to dominating a larger consumer base, attaining more economic influence and power. For this reason, Amazon can target ads and narrowly tailor shopping experiences more efficiently than typical companies in the grocery business.[96] Namely, Amazon would be able to utilize the cross-platform data to target consumers with its own commercial products and sponsored products. This business expansion is not derived from natural development or growth, but from willful acquisition.

Such a phenomenon is not limited to Amazon. Google's search engine processes around three billion searches each day. Amazon has approximately 197 million unique visitors a month while Facebook has roughly 2.32 billion active users each month.[97] As tech giants consolidate and acquire smaller startups, they create a plethora of services from these deals to dominate the digital arena, driving these tech giants closer to near monopolization. This is evident in the way Facebook is cutting off access to its social networking platforms. Socials networks platforms are intended to be open, and increase connectivity by encouraging double-posting, finding contacts, and sharing various types of contents. Facebook blocked Vine's access by preventing

93. Asher Schechter, *Is There a Concentration Problem in America*, STIGLER CTR., UNIVERSITY OF CHICAGO (May 2018), https://promarket.org/wp-content/uploads/2018/04/Is-There-a-Concentration-Problem-in-America.pdf.

94. Sandra Lee, *Tech Companies are Consolidating like Crazy*, UNIVERSITY OF SANTA BARBARA – THE BOTTOM LINE (Mar. 15, 2019), https://thebottomline.as.ucsb.edu/2019/03/tech-companies-are-consolidating-like-crazy.

95. Lauren Hirsch, *A Year after Amazon Announced Whole Foods Deal Here's Where We Stand*, CNBC (June 15, 2018), https://www.cnbc.com/2018/06/15/a-year-after-amazon-announced-whole-foods-deal-heres-where-we-stand.html.

96. *Id.*

97. Lee, *supra* note 94.

Vine users from locating their Facebook Friends who use the Vine app.[98] In doing so, Facebook makes it difficult for new social networking platforms to emerge.[99] Not only will this function as a huge barrier to expand the user base, but startups working with this limitation will likely aim to get acquired since competition with dominant networks is not realistic.[100] Additionally, even if startups created an innovative tool, it can be easily duplicated. VCs would be further motivated to position the startup for acquisition, and not IPO.

Part 3. Potential Remedy

The FTC should take a more dynamic and forceful approach to merger review. By taking enforcement actions against mergers in the high-tech startup space, it will alter to some extent VC preference for mergers as a viable exit strategy. The FTC's merger review policy has no bite as indicated by data demonstrating that between 1996 and 2012, the FTC did not challenge mergers that resulted in five or more remaining firms.[101] Antitrust laws were designed to stop network monopolies.[102] The tech giants of today are monopolizing the digital tech space through vertical integration and swallowing up startups before they can lay a claim to the digital tech market. Thus, the FTC and the DOJ should step in and strengthen their enforcement actions against mergers as it has done so before.

First, the FTC should place more emphasis on enforcing guidelines more strongly in order to prevent potentially anticompetitive mergers from happening. As an illustration, AT&T forfeited its proposed acquisition of T-Mobile when the DOJ filed an antitrust suit in an attempt to block the merger.[103] Here, enhanced merger enforcement not only compelled a change in AT&T's behavior, but improved competition in the long term for wireless

98. Molly McHugh, *How Social Networks Are Ruining Social Networks*, DIGITAL TRENDS (Jan. 25, 2013), https://www.digitaltrends.com/opinion/facebook-cuts-off-access-to-vine/.

99. Isobel Asher Hamilton, *Emails Show Mark Zuckerberg Personally Approved Facebook's Decision to Cut Off Vine's Access to Data*, BUSINESS INSIDER (Dec. 5, 2018, 8:53 AM), https://www.businessinsider.com/facebook-documents-mark-zuckerberg-restricted-vine-data-access-2018-12.

100. McHugh, *supra* note 98.

101. Asher Schechter, *Is There A Concentration Problem in America?*, (Guy Rolnik 2018); *supra* note 95.

102. *Id.* at 10.

103. *Benefits of Competition and Indicators of Market Power*, Council of Economic Advisers Issue Brief (Apr. 14, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

carrier services. The DOJ argued that the merger was harmful to consumer welfare because it would reduce competition in the mobile carrier's sector, decrease innovation, and result in higher prices with poorer quality services.[104] Both AT&T and T-Mobile competed nationally and locally as T-Mobile had positioned itself as a disruptor in the market, offering high quality, low price accessible smartphones to the average American consumer. The merger would eliminate T-Mobile as a competitor and significantly reduce competition.[105] Thus, any efficiency arising from the merging parties' proposal did not offset the considerable adverse effects on consumers and competition in the industry.[106] Had the merger proposal succeeded, smaller providers would not be able to survive or enter into the market because of the combined network power of AT&T and T-Mobile. Furthermore, the mobile carrier services industry would suffer from a lack of innovation and a suite of versatile mobile services that T-Mobile had achieved. Namely, T-Mobile introduced the first Android phone, Blackberry email and Sidekick.[107] The merger would eliminate T-Mobile's lower priced data and voice plans. It otherwise would not have incentivized big market players like AT&T, Verizon, or Sprint to continue to innovate and transform mobile services as they have done today.[108] Without the merger, T-Mobile could not have partnered with MetroPCS or challenged Sprint's Family plans with their own modified family plans. [109] The DOJ's strong stance against this particular acquisition served to promote competition and the continued innovation of mobile contracts and services.

CDK Global Inc.'s ("CDK") proposed acquisition of Auto/Mate is another merger that the FTC took action against, causing CDK to abandon the merger. Both parties in the merger are competitors functioning as

104. *Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile*, U.S. DEP'T OF JUST. (Aug. 31, 2011), https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile.

105. U.S. v. AT&T Inc., T-Mobile USA, Inc. and Deutsche Telekom AG, U.S. D. OF COLUM., https://www.justice.gov/atr/case-document/file/487776/download.

106. *Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile*, *supra* note 104.

107. *U.S. v. AT&T Inc., T-Mobile USA, Inc. and Deutsche Telekom AG*, *supra* note 105.

108. *Id.*

109. Mark Rogowsky, *There's Be No Wireless Wars Without the Blocked T-Mobile Merger, So Where Does That Leave Comcast-TWC?*, FORBES (Aug. 27, 2014, 7:52 AM), https://www.forbes.com/sites/markrogowsky/2014/08/27/t-mobile-and-sprint-continue-to-battle-thanks-to-the-government/#511efa563160.

franchise dealer management systems providers.[110] Their business software is used by vehicle dealerships for all aspects of business operations ranging from HR, inventory to scheduling and accounting.[111] CDK was one of two largest competitors in the market. On the other hand, Auto/Mate was a disruptor in the market through aggressive pricing and by offering customized software updates. Auto/Mate was becoming a lethal competitor to CDK, thus CDK sought to acquire it at a price excessively higher than Auto/Mate's valuation.[112] The consummation of the merger would result in reduced competition through high concentration an dominance of the dealer management services franchise product market, stifled innovation and lower quality services.[113] The FTC recognized the harm it could bring to the market and sought a preliminary injunction to prevent the parties from completing the merger.[114] Shortly after, CDK withdrew its merger proposal.[115] Competition and innovation was preserved in the market. Here, the FTC saw that even though Auto/Mate itself had a comparatively small market share, it had the potential to gain a significant share of the market. The FTC's action demonstrates that they possess the power to change the economic behavior of firms seeking to acquire potential competitors. Additionally, it illustrates that the FTC can be successful in high tech cases even where there is no clear-cut high market share of one party in the merger.

Second, the FTC and DOJ should analyze potential mergers in light of their impact on innovation.[116] For the tech market, price as a metric of anticompetitive behavior is insufficient because tech companies often offer their services for free. Additionally, the benefit of an acquisition does not rest upon the ability to raise or lower prices, but the ability to gain access to technology and consumer data. However, a difficulty with innovation effects is that it may be hard to identify the true competitors at the time of the transaction. For example, when Facebook first proposed to merge with

110. *In the Matter of CDK Global, Inc., et al., Docket No. 9382, Order Dismissing Complaint*, (Mar. 26, 2018) https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

111. *Id.*

112. *Id.*

113. *Id.*

114. *FTC Challenges CDK Global, Inc.'s Proposed Acquisition of Competitor Auto/Mate, Inc.*, Federal Trade Commission (Mar. 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-cdk-global-incs-proposed-acquisition-competitor.

115. *Id.*

116. John Kwoka, *Reviving Merger Control A Comprehensive Plan for Reforming Policy and Practice*, (Oct. 9, 2018), at 37, *available at* https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

WhatsApp and Instagram, federal regulators could not determine if there would be anticompetitive effects because the products were not perceived to be actual substitutes. To mitigate such uncertainties with identifying harmful mergers, regulators should take into account how technology products fit with each other, and the position of startups in the tech market. A startup's role in the tech market is to be a disruptor to the benefit of the customer. If a startup gets acquired, it is essentially eliminated from competing against incumbent tech firms. This leads to stagnation of innovation because startups will not have the opportunity to innovate new technology, create business models or push other companies to innovate.[117] With VCs positioning startups for acquisition, startups may not be able to fulfil their roles in generating more competition and innovation. VCs prefer the M&A exit strategy because M&As are rarely challenged. Antitrust regulation focusing on innovation effects challenges more tech acquisitions, which could disincentivize the VC preference for M&A exit strategies in the long run.

Conclusion

Antitrust protects competition, not competitors.[118] Not all mergers are the enemy of competition. For example, a merger between two small startups to enable them to compete effectively against dominant players is valid.[119] Similarly, a merger between a financially stable company and company which is failing, does not impede competition.[120] However, a merger which tends to substantially lessen competition will adversely affect competition. Such mergers are becoming more prevalent in the startup ecosystem as a preferred exit strategy due to VC pressures. VCs are driven by their fiduciary duties to realize the investment within the investment period. Often, this brief period is not adequate enough for startups to scale sustainably and build a quality product. During each stage of VC financing, VCs gain significant ownership and power over startup operations and corporate governance. VCs push for growth as a measure of success, thereby causing rapid low-quality growth that sacrifices legal compliance. As the investment period draws near, VCs pressure startups to sell rather than continuing to support them financially or encouraging them to do the IPO route. The pressure to sell is further enhanced by poor corporate governance policies which make it

117. *Horizontal Merger Guidelines*, THE U.S. DEP'T OF JUST. (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2f.

118. Brown Shoe Co. v. United States, 370 U.S. 294, 319-20 (1962).

119. *Id.*

120. *Id.*

extremely costly to be compliant by public firm standards. Furthermore, VCs fear falling valuations stemming from the tech giants potentially duplicating the startup's idea or from a fear that the startup will no longer be a hot topic, and thus their goal is to prematurely sell at the highest valuation they can. This prevents startups from becoming vital competitors as disruptors in the tech market and gives tech giants leverage to acquire the companies to maintain their dominance.

In order to incentivize investors from relying heavily upon the M&A exit strategy, there needs to be more forceful merger control policy. Although the FTC and DOJ do not always prevail in blocking an acquisition, the mere fact that take enforcement action has been enough to compel companies to abandon the merger or draw scrutiny to industry practices is a positive development. For instance, the DOJ filed a lawsuit to block AT&T's proposed acquisition of Time Warner for $85 billion.[121] Ultimately, this effort did not prevail, but it did send a message to tech companies that the government is able to hold companies accountable and is willing to apply the same force to tech giants who are acquiring emerging promising startups.[122] To effectively fortify the position of antitrust enforcement actions, the agencies and courts should incorporate the following substantive approaches: 1) focus more heavily on market impacts of innovation, potential competition, and barriers to entry 2) bring more antitrust actions against technology companies as a deterrence measure and 3) adopt a cautious approach to approving mergers. The combination of these approaches permits the DOJ and FTC to block anticompetitive mergers, thereby cultivating a precedent for stricter scrutiny of acquisitions. Essentially, it will be more difficult for mergers to pass DOJ and FTC standards. VCs and M&A waves correspond with each other and these remedies may alter to an extent, VC behavior towards startups, encouraging them to consider other exit strategies or longer-term investments.

121. Klint Finley, *Government Move to Block AT&T Merger Bodes Ill for Big Tech*, WIRED (Nov. 21, 2017, 6 AM), https://www.wired.com/story/government-move-to-block-atandt-merger-bodes-ill-for-tech/.

122. *Id.*