

UNCLOUDING THE CRYSTAL BALL: HOW TO DEMYSTIFY AND REFOCUS ANTITRUST LAW FOR DYNAMIC MARKETS

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I. INTRODUCTION

The Fourth Industrial Revolution¹ has brought about a rise in dynamic and complex markets, defined by frequent and disruptive innovation.² These markets—such as telecommunications, augmented reality, and artificial intelligence—are becoming essential to and integrated into society. While dynamic markets benefit consumers through increasingly innovative products and services, they pose unique challenges to the existing framework of American antitrust law.

From its inception in the late 1800s, antitrust law in the United States has sought to balance the positive and negative effects of market consolidation to protect market competition.³ One opportunity for regulators to monitor consolidation is through the review of horizontal mergers. But horizontal merger analysis—which examines a proposed union of two market

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1. See Klaus Schwab, *The Fourth Industrial Revolution*, BRITANNICA, <https://www.britannica.com/topic/The-Fourth-Industrial-Revolution-2119734> (last visited Nov. 9, 2020) [<https://perma.cc/3JLJ-RRE4>]. This Fourth Industrial Revolution will include the “convergence of digital, biological, and physical innovations” and will rapidly change the products and services offered to consumers. These markets include science, artificial intelligence, telecommunications, and augmented reality. *Id.*

2. See Gregory Sidak & David Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMP. L. & ECON. 581, 581 (2009); Gregory Sidak & David Teece, *Rewriting the Horizontal Merger Guidelines in the Name of Dynamic Competition*, 16 GEO. MASON L. REV. 885, 885 (2009) (“[S]uch competition does more than bring price competition – it tends to overturn the existing order.”).

3. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/C5XB-QVME>] (last visited Sept. 12, 2020); David S. Evans & Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and its Implications for the Objectives of Antitrust*, 4 COMPETITION POL’Y INT’L 203, 206 (2008).

competitors—is a daunting task. Courts are asked to do the near-impossible: ascertain the effects of a *potential* merger on a market and determine if those effects will be anticompetitive.⁴ In essence, courts take on the role of “fortuneteller[s]” and must “peer[] into a crystal ball” to predict the future.⁵

Analyzing the impact of a merger on an entire market could easily lead judges down an unadministrable rabbit hole. There are hundreds of potential effects and several different market players, including consumers, producers, and state and federal governments. Each player has their own objectives within a market, and these objectives may conflict. A court facing this rabbit hole must narrow its analysis if it hopes to reach a decision. But this raises difficult questions: Which effects matter? Whose interests should be protected, and how?

Courts and regulators face added difficulties when addressing these questions in dynamic markets. Unlike non-dynamic (static) markets, where the overarching structure of the market remains stable from year to year, dynamic markets are consistently upset by rapid technological innovations.⁶ For example, the milk market is static: while there might be new entrants, such as producers of almond and oat milk, the overall structures in which milk is made, bought, and sold have not significantly changed in the last hundred years. In contrast, the telecommunications market, a dynamic market, has seen constant, dramatic shifts in the underlying technologies, deployment, and types of services provided in the last thirty years, and it has become essential to consumers’ everyday lives.⁷ The unpredictable nature of dynamic markets adds difficulty to the jobs of regulators in protecting the market and its players.⁸

The predominant Chicago School framework of antitrust has narrow answers to the questions of which effects and whose interests the law should consider: it focuses only on short-term economic market effects, including price and innovation, and their impact on consumers.⁹ Practitioners and scholars have dubbed this focus as “consumer welfare.”¹⁰ In a horizontal merger analysis, the consumer welfare approach directs courts and regulators to assess the potential anticompetitive effects of a merger, as well as its

4. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187–89 (S.D.N.Y. 2020).

5. *Id.* at 186, 188.

6. Gregory Sidak & David Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMP. L. & ECON. 581, 581 (2009).

7. *Deutsche Telekom*, 439 F. Supp. 3d at 189–190.

8. *See id.*

9. *See generally* Douglas H. Ginsburg, *Bork’s “Legislative Intent” and the Courts*, 79 ANTITRUST L.J. 941 (2014).

10. *Id.* at 942–43.

potential efficiencies.¹¹ Generally, consumer welfare increases when efficiencies in the market allow producers and sellers to offer better products and services at cheaper prices, and when these efficiencies outweigh any reduction in competition.¹²

However, the Chicago School framework is ill-equipped to predict the effects of mergers in dynamic markets, which are increasingly commonplace in the twenty-first century. The recent case *New York v. Deutsche Telekom AG*,¹³ litigated in the Southern District of New York, shows why. In this case, the court found that the proposed merger of two telecommunications services, Sprint and T-Mobile, would not lead to anticompetitive effects for market consumers and thus did not violate antitrust law. Adhering in large part to the Chicago School framework, the court concluded that the short-term efficiencies and increases in network abilities outweighed any potential harms to competition from the merger. This Note argues that two errors in *Deutsche Telekom* represent deficiencies in modern antitrust law that must be corrected to accurately regulate mergers in dynamic markets like the telecommunications industry. Namely, merger analysis in these markets should account for both the effects of the merger in the long term, and on the economy as a whole.

Part II of this Note discusses the basics of antitrust law and provides a primer on horizontal mergers. Part III presents an overview of *Deutsche Telekom* and highlights evidence used by the court in its efforts to predict the future of the telecommunications market. Part IV analyzes the merits of the court's decision in two sections. First, it discusses three errors made in the case. The court: (1) focused only on short-term efficiencies, (2) primarily studied consumer effects, ignoring overall effects on the economy, and (3) incorrectly prioritized witness testimony over documentation. Second, it examines how the first two of these errors reflect broader inadequacies in antitrust law. To accurately predict the future of dynamic markets, courts must broaden their efficiency analyses to account for the long-term effects of a merger and expand their goals to examine effects on the overall economy. In broadening their efficiency analyses, courts should balance potential short-term gains in efficiency with the long-term harms of consolidation of capital and power in dynamic markets, which can lead to higher prices and less innovation. Courts focusing on broader economic effects will better protect consumer, business, and government interests, as well as economic success. Both regulators and

11. U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 4 (2010).

12. Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471 (2013).

13. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187–89 (S.D.N.Y. 2020).

judges should leverage the deficiencies in this case and the renewed political focus on antitrust law today to promote larger structural antitrust reform.

II. BACKGROUND

Reviewing antitrust law in the United States illuminates the policies and practices at play in *Deutsche Telekom*. This Part provides relevant background on antitrust law in the United States. First, it presents a brief history of the laws that form the cornerstone of antitrust enforcement. Second, it summarizes the prevailing analytical framework of antitrust law, the Chicago School, which heavily emphasizes consumer welfare and which the court relied upon in *Deutsche Telekom*. Third, it provides an overview of the horizontal merger doctrine and reviews courts' rationales in deciding previous merger cases. This background will help inform the policies and practices at play in *Deutsche Telekom*.

A. A BRIEF HISTORY OF ANTITRUST LAW

The late 1800s and early 1900s ushered in a consolidation of power in U.S. markets through the creation of monopolistic trusts.¹⁴ The most famous example is Standard Oil, a trust owned by only one businessman that controlled almost all oil production and transportation in the country.¹⁵ Standard Oil amassed its large market concentration through anticompetitive behaviors such as buying out other firms.¹⁶ These practices gave Standard Oil great leverage in setting prices above the competitive level.

In response to the rise of trusts and their anticompetitive practices, Congress enacted the first major antitrust laws. Congress passed the Sherman Act in 1890 to curb attempted or successful monopolization and market collusion.¹⁷ In 1914, Congress reinforced the Sherman Act with the passage of the Clayton Act.¹⁸ Provisions of the Clayton Act advanced the Sherman Act by “prevent[ing] competitive conditions from deteriorating even when competition [is] not clearly problematic at the time.”¹⁹ Specifically, § 7 of the Clayton Act outlaws horizontal mergers that would “substantially . . . lessen

14. See generally John Morley, Essay, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145 (2016).

15. See generally *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

16. *Id.*

17. FED. TRADE COMM'N, *supra* note 3; Evans & Hylton, *supra* note 3, at 217.

18. FED. TRADE COMM'N, *supra* note 3.

19. William J. Baer, Assistant Attorney General, Antitrust Division, Origin of the Species: The 100 Year Evolution of the Clayton Act, Remarks Before the ABA Clayton Act 100th Anniversary Symposium (Dec. 4, 2014), in 6 HEALTH CARE & ANTITRUST L., 2020, at App. E237.

competition, or . . . tend to create a monopoly.”²⁰ Together, these laws enable courts to remedy anticompetitive conduct²¹ and, along with the FTC Act, are to this day the “core federal antitrust laws.”²²

Each act promotes the goal of antitrust: protecting “economic freedom and opportunity by promoting free and fair competition in the marketplace.”²³ Free and fair competition results in lower prices, better quality, more quantity and choice, and greater innovation.²⁴ These benefits are achieved by balancing the positive and negative effects of market consolidation.²⁵ On the one hand, consolidation of power and limited competition can increase investment and innovation through economies of scale.²⁶ On the other hand, they can also lead to monopolistic behaviors that increase prices and reduce supply.²⁷ While monopolies themselves are not inherently unlawful, a monopoly’s behavior can be unlawful if it has undue anticompetitive market effects. Therefore, antitrust law depends heavily on the distinction between pro-competitive and anticompetitive behavior to protect consumers.²⁸

B. FRAMEWORKS OF ANTITRUST LAW

This Section briefly summarizes the current conceptual framework for antitrust analysis and provides background to the later discussion of its deficiencies in dynamic markets.

The predominant framework for antitrust analysis is the Chicago School framework. Named after the various lawyers and economists at the University of Chicago, the Chicago School’s approach to the goals of antitrust is purely economic.²⁹ Courts and regulators ignore potential political and moral implications of mergers (or horizontal agreements, alleged monopolization, etc.); instead, they assess only the economic harms and gains in a market, such

20. Clayton Act § 7, 15 U.S.C. § 18.

21. Most notably, in 1911 the Supreme Court ordered the split of Standard Oil into various smaller companies that would compete against each other. *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

22. FED. TRADE COMM’N, *supra* note 3.

23. *Mission*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/mission> [<https://perma.cc/K3SC-3CSZ>] (last visited Nov. 1, 2020).

24. *Id.*

25. *Id.*

26. *See* Hovenkamp, *supra* note 12, at 2486. Selling a larger quantity of goods usually leads to a reduction in price of each good, a principle called economies of scale. *See* Economies of Scale, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/economies-of-scale> (last visited Apr. 3, 2021).

27. *See* Evans & Hylton, *supra* note 3, at 203.

28. *Id.* at 206.

29. *See* Bruce Kobayashi & Timothy Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 149–152 (2012).

as higher prices or higher-quality products.³⁰ This reliance on economics has “rendered antitrust a more mathematically rigorous and technically demanding field” than other areas of law.³¹

Economic analysis in the Chicago School focuses on “consumer welfare,” a term made famous by Judge Robert Bork.³² While scholars disagree on the exact definition of consumer welfare, courts in merger cases often conduct consumer welfare analysis by measuring the short-term effects of a merger on consumers in the aggregate, examining whether they will receive better prices, quality, quantity, and innovation from a merger.³³ One of the most important ways that antitrust regulators assess the effects of a merger on consumer welfare is by examining the potential realization of efficiencies,³⁴ which can positively impact consumers in a market.³⁵ Economic efficiency gains occur when a merger allows the merged firm to compete more effectively—for instance, by consolidating resources or combining human capital—resulting in lower prices and higher quality goods.³⁶ But efficiency analysis is never exact, as determining potential efficiencies is a forward-looking exercise and judges

30. See Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 180–181 (2018).

31. See Michael Baye & Joshua Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J. L. & ECON. 1, 2 (2011).

32. See Hovenkamp, *supra* note 12, at 2472.

33. See *id.* Economists generally have two market concerns. First, there is a concern that some consumers will be priced out of the market because they will not pay higher prices for the goods. This loss is called the deadweight loss. See Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 6 (1989). The second concern is while the total surplus (or the total of both consumer and producer welfare) might remain the same or even grow in monopolistic markets, producer surplus will grow more than consumer surplus. This imbalance in surplus is caused by producer profits from selling higher cost products to remaining consumers. In general, economists look for growth in overall total surplus as this number indicates the growing wealth of an economy. See *id.* At 6. The Chicago School's misleading emphasis on consumer welfare refers only to total surplus, and not to specific consumer surplus. See Ginsburg, *supra* note 9, at 942–43. In championing a focus on total surplus, a Chicago view analysis of antitrust only considers the first concern of deadweight loss caused by lower output and higher prices in the market. See Hovenkamp, *supra* note 12, at 2473. Chicago School followers do not think it is relevant to discern producer profits from consumer profits, as this wealth shift “had no discernible net impact on consumer welfare” since both producers and consumers can adjust their spending based on their preferences. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 846 (2014).

34. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 11, at 4.

35. See John B. Kirkwood & Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 193–95 (2008).

36. See DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 11, at 4; Lina Khan, *Amazon's Antitrust Paradox*, YALE L.J. 710, 716 (2017).

must make predictions based only on information available to them in the present.

While the Chicago School remains the dominant antitrust framework, a new approach to antitrust, the Neo-Brandeisian School, has gained popularity.³⁷ Neo-Brandeisians criticize the Chicago School for permitting companies to consolidate capital and power so long as prices remain low,³⁸ arguing that this consolidation can create a cyclical effect of propping up powerful individuals at the expense of the working class.³⁹ In contrast, Neo-Brandeisians want antitrust law to focus on the welfare of all individuals and the general society, not just direct consumers.⁴⁰ To that end, Neo-Brandeisians argue that instead of focusing solely on short-term economic effects, antitrust regulators should consider the aggregation of political power stemming from concentration, the protection of small businesses, and other fairness concerns unrelated to direct economic indicators.⁴¹ Further, Neo-Brandeisians believe that the Chicago School is unequipped to deal with dynamic markets, many of which are structured in a way that traditional economics cannot fairly evaluate. For example, the well-known Neo-Brandeisian scholar Lina Khan has asserted that Amazon, a large dynamic player in the supply chain and home goods market, cannot be adequately regulated under the Chicago School framework because Amazon strives for low prices for direct consumers—the basic criteria for the Chicago School—at the expense of their workers and potential competitors in the internet sales market.⁴²

C. HORIZONTAL MERGER ENFORCEMENT: THE SEMANTICS

While the New Brandeis School is gaining steam in academic circles, the Chicago School still dominates the current judicial regulation of mergers. This Section examines how courts evaluate horizontal mergers under the Chicago School's consumer welfare framework. This context is necessary to understand the analysis and critique of *Deutsche Telekom*, discussed in Parts III and IV.

37. See Jonathan Sallet, *Louis Brandeis: A Man for This Season*, 16 COLO. TECH. L.J. 365, 368 (2018); David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES, Sept. 7, 2018, <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> [<https://perma.cc/7GK7-PWDP>].

38. See Stucke and Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<https://perma.cc/LB4N-RKBC>].

39. See Khan, *supra* note 36 at 740.

40. See *id.* at 720.

41. See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 120 (2019).

42. See generally Khan, *supra* note 36.

Horizontal mergers refer to the combination of two potential or actual competitors in a market and are regulated under § 7 of the Clayton Act.⁴³ In a § 7 analysis, courts must establish a “reasonable probability,” not just a possibility, of anticompetitive behavior by the merged entity to block a merger.⁴⁴ Courts must essentially predict the competitive effects of the merger, including economic efficiencies and gains or losses in consumer welfare. While merger analysis is quite case- and fact-specific, courts follow general guidelines and use a variety of tools and economic indicators to aid their predictions.⁴⁵

To comport with the goals of antitrust law and allow each side a fair hearing, courts utilize a three-step burden-shifting test during horizontal merger analyses.⁴⁶ As a threshold step before applying this test, courts establish the relevant market in terms of geography and products to help determine where their focus should be.⁴⁷

In the first step, plaintiffs must establish a prima facie case showing that the merger will significantly decrease competition through evidence of consolidation and lack of viable competitors in the defined market.⁴⁸ Plaintiffs can use one of two common economic methods to establish a presumption of anticompetitiveness:⁴⁹ they can show that the newly merged company will have greater than thirty percent of the market share, or use the Herfindahl-Hirschman Index (HHI) to indicate that the merged company’s market share will reach a certain threshold that the Department of Justice (DOJ) and Federal Trade Commission (FTC) have deemed “presumptively anticompetitive.”⁵⁰ Each method uses market concentration as a proxy for market power. This proxy assumes that as a firm gains market share, it will wield more control and

43. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 11, at 1.

44. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 198 (S.D.N.Y. 2020).

45. *See id.*

46. *Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm’n*, 534 F.3d 410, 423 (5th Cir. 2008).

47. *See, e.g., Deutsche Telekom*, 439 F. Supp. 3d at 189–90; *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).

48. *See, e.g., Deutsche Telekom*, 439 F. Supp. 3d at 189–90; *Brown Shoe Co.*, 370 U.S. at 321.

49. *See Deutsche Telekom*, 439 F. Supp. 3d at 199.

50. *Id.* at 206. The HHI is “calculated by adding the squares of [all] the individual firms’ market shares” in the market. *Id.* Moderately concentrated markets have an HHI between 1500 and 2500, while highly concentrated markets have an HHI above 2500. *Id.* If a merger increases HHI by 200 points or more and is above 2500, the merger is presumed to be anticompetitive and plaintiffs will have met their burden of proof. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 11, at 19. Hence, this is a fairly objective and economic parameter by which one can assess the potential level of concentration in the market.

can exercise its power through anticompetitive behaviors.⁵¹ If met, the plaintiff's prima facie case creates a presumption that the merger will be anticompetitive and should be enjoined.⁵²

In the second step, defendants may bring evidence rebutting this presumption and showing the court that the merger will, on balance, not have anticompetitive effects.⁵³ This evidence should “cast doubt on the accuracy” of the prima facie case.⁵⁴ Defendants can successfully rebut a plaintiff's case with different sources of evidence, including unique market circumstances that show the merger will not harm market competition.⁵⁵ Defendants can also present indicators showing ease of market entry—which increases the likelihood of competition—and evidence of market trends towards competition.⁵⁶

Finally, in the third step, the burden shifts back to the plaintiff, who can bring additional evidence to the court, such as market trends or documents showing that the market would suffer from the merged firm's likely anticompetitive behaviors.⁵⁷ Courts will weigh all the evidence to make a final decision.⁵⁸

D. A WINDOW INTO MERGER ANALYSIS

This Section highlights the various types of evidence that courts can examine within a horizontal merger analysis. Current antitrust law values economic measures of consumer welfare and uses efficiencies as a measure of this welfare. The cases below show how courts have used different efficiency measures, including past behavior, barriers to entry, and market circumstances, to predict merger effects on consumer welfare.⁵⁹

In *FTC v. Heinz Co.*, the D.C. Circuit ruled that the merger of two baby food producers would be anticompetitive because of high market

51. Monopoly Power and Market Power in Antitrust Law, DEP'T OF JUSTICE (last updated June 25, 2015), <https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law> [<https://perma.cc/6978-L5GQ>].

52. *Deutsche Telekom*, 439 F. Supp. 3d at 206.

53. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1996 (2018).

54. *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).

55. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

56. *Id.* One example of market trends towards competition would be more competitors entering the market in recent years.

57. *Chi. Bridge & Iron Co.*, 534 F.3d at 423.

58. *See id.*

59. Market barriers to entry are defined as “any characteristic that impedes, discourages, or delays, for a significant period of time, entry into a market.” Horizontal mergers—Other factors—Rebuttal evidence—Entry, 1 HEALTH CARE & ANTITRUST L. § 6A:9 (2020).

concentration and minimal efficiency gains.⁶⁰ The FTC easily established a prima facie case using an HHI calculation indicating that the market share exceeded the threshold for presumptive anticompetitiveness.⁶¹ Defendants attempted to rebut this presumption by arguing that there would be no significant competitive loss from the merger.⁶² Specifically, defendants argued that consumers did not view the products as substitutes and that the merger would increase efficiencies.⁶³ The court noted that the large increase in HHI (an increase of 510 points to a total of 5,286) meant that it needed to complete a “rigorous analysis” to ensure that the efficiencies were not false promises and would actually offset the negative effects of market concentration.⁶⁴ Defendants argued that the merger would allow the companies to aggregate resources, use resources more efficiently, and compete aggressively against the market leader, all leading to a reduction in prices.⁶⁵ However, the court concluded that this argument was speculative and that high barriers to entry in the baby food market would only increase the anticompetitive effects of the merger, as fewer companies could join the market and compete.⁶⁶ After weighing the evidence, including documents from Heinz that discussed ending competition, the court ruled in favor of the FTC.⁶⁷

Similarly, in *FTC v. University Health, Inc.*, the Eleventh Circuit ruled against the potential merger of two hospitals because of anticompetitive effects and the defendants’ inability to prove concrete efficiencies in the market.⁶⁸ Defendants argued that the efficiencies of the merger would include streamlining capital and sharing software between the two hospitals.⁶⁹ While they estimated a dollar value the merger would save in operational costs, the

60. 246 F.3d 708, 7116–18 (D.C. Cir. 2001).

61. *Id.* at 715–16.

62. *Id.* at 718. Courts have commonly taken into account potential efficiencies from a merger as a successful way for defendants to rebut a presumption of anticompetitive behavior. *See, e.g.*, *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73 (D.D.C. 2018); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011).

63. *Heinz Co.*, 246 F.3d at 718.

64. *Id.* at 721.

65. *Id.* at 722.

66. *Id.* at 722, 718.

67. *Id.* at 717, 727. Other courts have also taken into consideration internal documents to establish the intent of market players when analyzing the potential effects of a merger. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1166–68 (N.D. Cal. 2004) (reviewing documents where companies who were merging noted each other as “closest competitors”). Courts have also relied on barriers to entry; if barriers to entry are low, then the presumption of anticompetitive behavior is likely be rebutted as new players could easily enter the market. *H&R Block, Inc.*, 833 F. Supp. 2d at 73.

68. 938 F.2d 1206, 1222–24 (11th Cir. 1991).

69. *Id.* at 1223.

court was unconvinced, as defendants provided no specifics on how these efficiencies would be “passed on to consumers.”⁷⁰ The defendants also argued that their status as non-profit hospitals and their past procompetitive behavior should persuade the court that they would not engage in anticompetitive behavior.⁷¹ The court was not persuaded by this evidence, which it deemed not probative in value.⁷² It declared that no business was bound by its prior actions, and therefore, the court would not rely on past behaviors to predict future behaviors.⁷³ The court ruled the merger to be anticompetitive.⁷⁴

These two cases exemplify how courts rely on a variety of economic indicators to determine the potential short-term effects and market efficiencies of a merger. In each case, the court’s ruling was ultimately determined by its prediction of the merger’s effects on consumers and their welfare.

III. NEW YORK V. DEUTSCHE TELEKOM

In *Deutsche Telekom*, multiple states brought a lawsuit under the Clayton Act against the merger of two telecommunications providers, Sprint and T-Mobile, claiming that the merger would decrease market competition and lead to anticompetitive behavior.⁷⁵ This Part first provides background on the telecommunications market and then presents an overview of the case’s facts, the court’s holding, and the evidence considered.

A. THE TELECOMMUNICATIONS MARKET

The modern telecommunications services market (namely, mobile devices) is an integral part of society. What began as a simple “method of voice communication” is now a practical tool for individuals to “manage countless facets” of their lives, including banking, transportation, social media, and audio and visual streaming.⁷⁶ As of 2019, over ninety-six percent of Americans owned at least one cellphone, and this growth has facilitated a fast-paced and “on-the-go” lifestyle.⁷⁷ Retail mobile wireless telecommunications services (RMWTS, or telecommunications companies), provide the products and services to consumers in this market (cell phones and data plans).⁷⁸ Generally,

70. *Id.*

71. *Id.* at 1224.

72. *Id.*

73. *Id.*

74. *FTC v. University Health, Inc.*, 938 F.2d 1206, 1225–26 (11th Cir. 1991).

75. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

76. *Id.* at 189–90.

77. Pew Research Center, *Mobile Fact Sheet*, <https://www.pewresearch.org/internet/fact-sheet/mobile/> [https://perma.cc/QM5C-L4HL] (last visited Oct. 4, 2020).

78. *Deutsche Telekom*, 439 F. Supp 3d at 190.

consumers choose their provider based on factors including price, options to bundle devices, and the speed and consistency of networks.⁷⁹

Telecommunications companies provide service through spectrum, which is the range of radio waves used for the transmission of cellular data.⁸⁰ Spectrum is limited in quantity, highly regulated by the federal government, and sold to companies through auction by the Federal Communications Commission (FCC).⁸¹ Both limited supply and high demand make spectrum “the most critical resource” for providers.⁸²

The telecommunications market is constantly innovating, in part due to the ever-growing uses for spectrum (e.g., phone calls, data sharing, and artificial intelligence), making the telecommunications market dynamic.⁸³ Dynamic markets are defined by disruptive innovations that create constant churn and can “overturn the existing order” of a market.⁸⁴

Disruptive innovation in the telecommunications market comes primarily from the generations of telecommunications technology, more commonly known as “G’s.”⁸⁵ G’s improve the speed, capabilities, and efficiencies of networks with each iteration, and are being developed at an increasingly rapid rate.⁸⁶ For example, the first generation, developed in the 1980s, allowed for voice calls to be transmitted over spectrum.⁸⁷ 2G was developed a decade later and allowed for text messages, and 3G provided access to the internet in the 2000s.⁸⁸ 4G has enabled application development and high-speed data travel.⁸⁹ 5G rollout is predicted to bring even faster speeds and the advent of virtual

79. *Id.*

80. *Id.*

81. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 190 (S.D.N.Y. 2020).

82. *Id.*

83. *Id.* at 192.

84. Sidak & Teece, *supra* note 2, at 582–83; Pedro Gonzaga, *Merger Enforcement in Dynamic and Innovative Markets*, 4 EUR. COMPETITION & REG. L. REV., V, 6 (2020). While no product or service market is completely static, some markets are more structurally static than others. Markets such as the milk or shoe market, for example, are structurally static; while new products might be introduced into these markets, the way in which the market operates has not changed from decade to decade. Legislators and courts have been focused on antitrust law through the lens of static competition for the last fifty years through their economic heavy framework.; Sidak & Teece, *supra* note 2, at 581.

85. *Deutsche Telekom AG*, 439 F. Supp. 3d at 192.

86. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 192 (S.D.N.Y. 2020).

87. *Id.*

88. *Id.*

89. *Id.*

reality applications.⁹⁰ Current projections indicate that consumers will use almost five times as much data for 5G than is currently being used, incentivizing a successful 5G rollout for providers.⁹¹ However, 5G will need its own exclusive and unshared spectrum, making the rollout more difficult and expensive than previous generations.⁹² Providers will have to reshape their services to meet 5G standards.

The telecommunications market is not only dynamic but also capital-intensive. To deploy spectrum and send information to mobile devices, telecommunications providers require a robust infrastructure network.⁹³ This network includes physical cell towers that transmit radio waves, fiber cables connecting these structures, and a “core network” of computers to direct cell traffic.⁹⁴ A provider’s coverage and capacity is determined by this network, referred to as Radio Access Network (RAN).⁹⁵ Strong networks will provide coverage regardless of geographical location but face data limitations when many consumers are using the network at once.⁹⁶

There are currently two types of service providers in this market:⁹⁷ Mobile Network Operators (MNOs) and Mobile Virtual Network Operators (MVNOs).⁹⁸ MVNOs lease RAN access from MNOs.⁹⁹ Examples of MVNOs include Altice and TracFone.¹⁰⁰ MNOs own their own RAN.¹⁰¹ The four MNOs in the United States—AT&T, Verizon, T-Mobile, and Sprint—are common household names, but they differ in size and capacity.¹⁰² Verizon and AT&T are the largest of the MNOs; each provider has sizable spectrum holdings, close to 100 million subscribers, upwards of four billion dollars in yearly revenue, and reputations for high quality services.¹⁰³ T-Mobile, the third largest MNO, has grown rapidly in the past decade after an influx of cash from a previous merger proposition and a bold creative strategy from CEO John

90. *Id.* at 192–93. The 5G rollout will likely create new jobs. These jobs will include construction of the physical network infrastructure as well as development of new 5G applications and tools.

91. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 192 (S.D.N.Y. 2020).

92. *Id.* at 209.

93. *Id.*

94. *Id.* at 191.

95. *Id.* at 191, 191 n.4.

96. *See id.* at 191–92.

97. *Id.* at 193.

98. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 193 (S.D.N.Y. 2020).

99. *Id.*

100. *Id.* at 195. MVNOs make up less than two percent of the national market share. *Id.*

101. *Id.* at 193.

102. *See id.* at 193–95.

103. *Id.* at 193.

Legere.¹⁰⁴ This strategy included successful investments in spectrum and marketing services at lower prices to contrast their products with those of AT&T and Verizon.¹⁰⁵ T-Mobile now counts approximately eighty million subscribers and three billion dollars in yearly revenue.¹⁰⁶ Sprint, the smallest MVO, has seen a decline in quality of service over the past ten years, due in part to unsuccessful investments in spectrum holdings.¹⁰⁷ Sprint serves forty million subscribers and records two billion in yearly revenue.¹⁰⁸

B. THE DUETSCHTE TELEKOM CASE: SETTING THE STAGE

In 2018, T-Mobile and Sprint announced that they planned to merge and would retain the name T-Mobile (this Note will refer to the merged company as New T-Mobile).¹⁰⁹ The companies filed the proposed merger with the DOJ and the FCC. After negotiations and concessions by Sprint and T-Mobile, both agencies approved the merger in 2019.¹¹⁰ After this approval, ten state attorneys general, including those of New York and the District of Columbia (hereinafter “Plaintiffs”), filed a lawsuit in the Southern District of New York to prevent this consolidation.¹¹¹

Plaintiffs claimed that the proposed merger of T-Mobile and Sprint (hereinafter “Defendants”) violated § 7 of the Clayton Act because it would reduce competition in the RMWTS market and result in increased costs to consumers, estimated at 4.5 billion dollars a year.¹¹² However, after a lengthy analysis of the evidence, the court found that the merger would not lead to anticompetitive behavior in the market and allowed it to proceed.¹¹³

104. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 193–94 (S.D.N.Y. 2020).

105. *Id.* at 194.

106. *Id.* at 193.

107. *Id.* at 194.

108. *Id.*

109. Andrew Limbong, *T-Mobile Completes Takeover of Rival Company Sprint*, NPR (Apr. 1, 2020, 5:57pm ET), <https://www.npr.org/2020/04/01/825523250/t-mobile-completes-takeover-of-rival-company-sprint> [<https://perma.cc/CY7C-DHV7>].

110. Yuki Noguchi, *T-Mobile and Sprint Merger Finally Wins Justice Department's Blessing*, NPR (July 26, 2019, 11:30 AM ET), <https://www.npr.org/2019/07/26/745544033/t-mobile-and-sprint-merger-finally-wins-justice-departments-blessing> [<https://perma.cc/VT7S-328F>]. These concessions include agreements not to raise prices for three years and to deploy a working 5G network as quickly as possible. Merrit Kennedy, *10 State Attorneys General Sue to Block T-Mobile, Sprint Merger*, NPR (June 11, 2019, 2:15 PM ET), <https://www.npr.org/2019/06/11/731695613/10-state-attorneys-general-sue-to-block-t-mobile-sprint-merger> [<https://perma.cc/V587-NTSY>].

111. Kennedy, *supra* note 110.

112. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 186 (S.D.N.Y. 2020); Noguchi, *supra* note 117.

113. *Deutsche Telekom*, 439 F. Supp. 3d at 189.

Before discussing the case itself, Judge Marrero of the Southern District of New York provided his own thoughts on the difficulties of antitrust cases.¹¹⁴ Judge Marrero wrote that “antitrust disputes virtually turn[] the judge into a fortuneteller” because judges must predict the potential effect of mergers on competition and on consumers.¹¹⁵ Both parties spend millions of dollars on expert witnesses, economic research, and documentation, all of which speaks favorably to their position. However, in most cases the data for each side will “cancel each other out.”¹¹⁶ This cancellation leaves judges with nothing but “competing crystal balls.”¹¹⁷ Instead of juggling these competing interests, judges rely on their own “tried and tested version of peering into a crystal ball”—looking at past behavior, weighing the credibility of witnesses, and using experience to employ “behavioral measures” that numbers fail to establish.¹¹⁸

C. THE HORIZONTAL MERGER ANALYSIS

After conducting a complete horizontal merger analysis, Judge Marrero concluded that Defendants’ evidence and witnesses successfully rebutted Plaintiffs’ presumption of anticompetitive behavior and allowed the merger to move forward.¹¹⁹

As a threshold matter, the court established the relevant product market (products that consumers use interchangeably) to include only MVOs¹²⁰ (larger telecommunications companies that own their own infrastructure and can set their own rates).¹²¹ Regarding the geographic market (where the product is marketed), the court found both a large national market and local markets, each using different marketing strategies.¹²²

1. Plaintiffs’ *Prima Facie* Case

As discussed *supra*, plaintiffs must first establish a *prima facie* presumption that the merger will “result in undue market concentration in an area of effective competition” in the product and geographic markets, thereby

114. *See id.* at 186–90.

115. *Id.* at 186.

116. *Id.* at 187.

117. *Id.*

118. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 188 (S.D.N.Y. 2020).

119. *Id.* at 189.

120. *Id.* at 199–202. The court did not include MVNOs because it found that MVNOs were quite restrained by the MVOs they lease from and had no price setting power; therefore, the market shares of MVNOs were attributed to the MVOs from which they leased. *Id.*

121. *Id.*

122. *Id.* at 203.

harming competition.¹²³ In *Deutsche Telekom*, both a calculation of overall market share and the HHI index suggested the merger would significantly increase market concentration: Plaintiffs showed that New T-Mobile would have over thirty percent of the market share and that the HHI would increase by 679 points, totaling 3,186.¹²⁴ The court found that this satisfied Plaintiffs' burden.¹²⁵

2. Defendants' Rebuttal

The court then analyzed Defendants' evidence and found that it rebutted Plaintiffs' prima facie case.¹²⁶ Defendants brought three arguments at this stage: (1) the merger would bring efficiencies to the market through a new 5G network and lower costs, (2) Sprint was a weakened competitor, and (3) DISH Network's entrance as a new competitor, paired with additional government remedies, would increase competition in the market.¹²⁷

a) Efficiencies

The court found that efficiencies from the merger would reduce prices and improve the quality of telecommunications services, thus increasing consumer welfare.¹²⁸ Defendants predicted that consumers would benefit from decreased prices because New T-Mobile would operate at reduced costs due to streamlined networks and infrastructure.¹²⁹ New T-Mobile would continue to offer aggressive rates to compete with Verizon and AT&T and siphon off those competitors' customers.¹³⁰ Further, New T-Mobile would run on a network consisting of only the strongest portions of both T-Mobile and Sprint's networks, enhancing the quality of customers' service.¹³¹ Finally, New T-Mobile's increased spectrum capacity would also lead to improved product offerings and a faster 5G rollout.¹³²

The court accepted all of Defendants' economic efficiency claims and noted that previous mergers in this market had led to greater efficiencies,

123. *Id.* at 199.

124. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 206 (S.D.N.Y. 2020).

125. *Id.*

126. *Id.* at 207.

127. *Id.*

128. *Id.* at 208. Previous courts, as well as the DOJ, have established that "evidence of efficiencies" in the market can rebut the plaintiffs' presumption of competition. *Id.* at 208–09.

129. *Id.* at 208.

130. *Id.*

131. *Id.*

132. *Id.* at 208–09. As discussed *infra*, the merger included stipulations mandated by the DOJ and FTC, including that New T-Mobile meet strict deadlines for rolling out 5G (with associated fines if deadlines were not met). *Id.* at 225.

thereby boosting the credibility of Defendants' arguments.¹³³ The court found that the predicted efficiencies were merger-specific, meaning that neither company by itself could achieve these results.¹³⁴ For instance, while it was theoretically possible for Sprint and T-Mobile to buy spectrum through FCC auctions, increasing their individual capacity, no auctions were scheduled for the near future.¹³⁵ Plaintiffs disagreed that the efficiencies were merger-specific. They argued that a new technology, Dynamic Spectrum Sharing, would allow providers to use the same spectrum for both 4G and 5G simultaneously.¹³⁶ Through Dynamic Spectrum Sharing, Sprint and T-Mobile could individually gain efficiencies in spectrum that would strengthen their 5G services, rendering the merger efficiencies unnecessary.¹³⁷ However, because this technology was still experimental, the court found that it was not reliable.¹³⁸

The court also went further to acknowledge additional benefits of the merger beyond efficiencies. It wrote in a footnote that the speedy development of 5G in the United States provided a broader advantage to the public interest because it would allow the United States to remain a top innovator and out-compete other technologically advanced countries such as China and Korea.¹³⁹

b) Sprint was a Weakened Competitor

Defendants successfully argued that Sprint was a weakened competitor and, if it continued as an individual business, it would not “compete effectively in the future.”¹⁴⁰ The court discussed various reasons for this weakened status, including Sprint's neglect in network investment and its financial difficulties.¹⁴¹ Because Sprint's decreasing viability in the telecommunications market meant that it could allegedly not continue as a competitive standalone firm, the court stated that Sprint's merger with T-Mobile would not hurt competition.¹⁴² While there is specific case law and guidance on the viability of a weakened

133. *Id.* at 216–17.

134. *Id.* at 211.

135. *Id.*

136. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 212 (S.D.N.Y. 2020); *see also Breakthrough 5G data call using dynamic spectrum sharing to accelerate nationwide 5G deployments* (Sept. 4, 2019) <https://www.ericsson.com/en/news/2019/9/ericsson-spectrum-sharing> [<https://perma.cc/KDM9-ZUF8>] (providing more information on Dynamic Spectrum Sharing).

137. *Deutsche Telekom*, 439 F. Supp. 3d at 212.

138. *Id.*

139. *Id.* at 209 n.12.

140. *Id.* at 217.

141. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 219–20 (S.D.N.Y. 2020).

142. *Id.* at 189.

competitor defense, the implications of this defense are beyond the scope of this Note.¹⁴³

c) DISH and Other Market Remedies

Defendants argued that the entry of DISH as a fourth competitor in the telecommunications market would mitigate any residual anticompetitive effects of the merger. Before this litigation, both the DOJ and the FCC reviewed the merger and added stipulations to reduce anticompetitive effects, including requirements for DISH to join the market.¹⁴⁴ These stipulations were considered part of the merger by the court.

Among other requirements, the stipulations mandated that New T-Mobile divest one of Sprint's MVNOs, Boost, to DISH.¹⁴⁵ DISH is currently a TV network provider, but it has a low and mid-band spectrum portfolio equivalent in size to Verizon and has previously indicated interest in entering the telecommunications market.¹⁴⁶ This large spectrum holding made DISH a strong candidate for entering the market,¹⁴⁷ which it would do by obtaining Boost and entering a licensing deal to use New T-Mobile's network while DISH started building out its own MVO network.¹⁴⁸ The court believed that DISH's entry as an MVO "maverick" to the market would be timely, likely, and sufficient to mitigate any anticompetitive effects of the merger as it would add new competition in the market.¹⁴⁹

While DISH would face a capital-intensive process to build out a competitive network, the court believed that two technologies would help lower DISH's barriers to entry. First, Dish claimed it would cut costs by building their virtualized network on top of software and cloud services, rather than building their software on hardware that it builds from scratch.¹⁵⁰ Second, DISH planned to build an Open Radio Access Network (ORAN) that would enable use of multiple vendors' hardware and software, thereby reducing the

143. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 11, at 32 ("Failure and Exiting Assets").

144. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 224 (S.D.N.Y. 2020).

145. *Id.* at 225. The court established that DISH's attainment of Boost, with its near-ten million customers and high satisfaction rates, would help the network's market entrance. *Id.* at 227.

146. DISH, [https://www.dish.com/\[https://perma.cc/Z292-YTKU\]](https://www.dish.com/[https://perma.cc/Z292-YTKU]); *Deutsche Telekom*, 439 F. Supp. 3d at 224–26.

147. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 224–27 (S.D.N.Y. 2020).

148. *Id.* This lease agreement would last seven years at low wholesale rates and would have no cap on usage for the first three years.

149. *Id.* at 225–37.

150. *Id.* at 229.

costs of relying on one vendor to build out a RAN.¹⁵¹ The court accepted Defendants' argument that these two technologies, along with access to some of Sprint's decommissioned infrastructure, would reduce market barriers to entry.¹⁵²

3. *Plaintiffs' Last Burden*

Plaintiffs brought additional evidence of anticompetitive effects to invalidate Defendants' rebuttal. First, Plaintiffs submitted evidence indicating that New T-Mobile might engage in anticompetitive behavior post-merger.¹⁵³ Documents from both Sprint and T-Mobile showed that executives had "considered the prospect of anticompetitive coordination."¹⁵⁴ These documents also indicated that executives believed a "consolidated market would be more profitable" and that price signaling had started between the companies.¹⁵⁵ However, the court noted that since the creation of those documents, price signaling had stopped.¹⁵⁶ Disregarding these documents, the court instead considered the history of the market.¹⁵⁷ It claimed that because T-Mobile had always been a "maverick" and had disrupted prices, New T-Mobile would continue to do so.¹⁵⁸ The court highlighted that it had spent "two full weeks assessing the credibility of each witness and their claims."¹⁵⁹ It relied on testimony from CEOs stating that collusion would not fit with T-Mobile's previous strategies and therefore believed that New T-Mobile would not behave in an anticompetitive manner.¹⁶⁰

Second, statements from executives indicated that DISH had overstated its commitment to entering the market.¹⁶¹ Plaintiffs entered documents showing that Defendants believed DISH's bid to enter the market was a "stupid bluff[]" and the company would just "build a meaningless thin network" to avoid fines with the FCC.¹⁶² An executive stated that the network would be "something the lawyers can use, but not something customers can use."¹⁶³ Additionally, Plaintiffs brought evidence that DISH's spectrum

151. *Id.*

152. *Id.*

153. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 235 (S.D.N.Y. 2020).

154. *Id.*

155. *Id.* at 235–36.

156. *Id.* at 236.

157. *Id.* at 235–36.

158. *Id.* at 237.

159. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 236 (S.D.N.Y. 2020).

160. *Id.* at 236–37.

161. *Id.* at 230.

162. *Id.* (internal quotation mark omitted).

163. *Id.*

portfolio was actually “speculative hoarding”: many people believed DISH was holding spectrum so it could resell it once other providers became desperate enough to pay higher prices.¹⁶⁴ However, the court did not believe that these statements accurately reflected DISH’s intent.¹⁶⁵ Instead, it relied on the FCC and DOJ’s commitment that DISH would enter the market.¹⁶⁶

Lastly, Plaintiffs countered Defendants’ assertion that DISH’s use of New T-Mobile’s RAN would help it compete in the market.¹⁶⁷ They argued that New T-Mobile would have strong incentives for DISH to fail at becoming a viable competitor and would hurt their chances of market entry.¹⁶⁸ New T-Mobile would hold a powerful position because it would be leasing DISH the RAN needed to enter the market.¹⁶⁹ New T-Mobile could manipulate prices or slow down speeds to hurt DISH.¹⁷⁰ However, the court believed the appointment of an independent monitor would remedy this problem.¹⁷¹ This monitor would oversee New T-Mobile’s relationship with DISH and create fixed formulas to calculate pricing.¹⁷² These formulas would ensure DISH a fair chance to compete and secure the network against anticompetitive prices.¹⁷³

Overall, the court found that Defendants’ evidence weighed heavily in favor of the merger, and Plaintiffs’ evidence was not sufficient to prove likely anticompetitive effects. The court believed that efficiencies from the merger and the addition of a new competitor would increase quality and decrease prices for consumers.

IV. DYNAMIC MARKETS AS UNDERSTOOD THROUGH THE LENS OF NEW YORK V. DEUTSCHE TELEKOM

This Note argues that because the court in *Deutsche Telekom* did not properly account for the unique characteristics of dynamic markets, its analysis was incomplete and incorrect. If the court had used an analysis specific to dynamic markets, it may have found the merger to be anticompetitive. But regardless of the outcome, considering the specifics of dynamic markets would

164. *Id.* at 231.

165. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 230–31 (S.D.N.Y. 2020).

166. *Id.* The court also noted that the DOJ and FCC would levy fines against DISH if it did not enter the market or meet its other commitments. *Id.*

167. *Id.* at 228.

168. *Id.*

169. *See id.*

170. *See id.*

171. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 228 (S.D.N.Y. 2020).

172. *Id.*

173. *Id.*

have ensured that the court fully assessed the true implications of the merger. Lessons learned from this case should be carried forward to ensure antitrust analysis is more accurate for future mergers in dynamic markets.

While the *Deutsche Telekom* court did not subscribe to a strict Chicago School analysis of antitrust, the issues in its holding are reflective of broader deficiencies in the framework. The court veered from the usual Chicago School analysis in two ways. First, it criticized antitrust law's focus on competing economic measures and briefly mentioned other public benefits of the merger, neither of which would be a concern in a strict Chicago analysis.¹⁷⁴ Second, the court recognized the dynamic structure and rapid innovations of the telecommunications market.¹⁷⁵ Importantly, however, these acknowledgments did not result in a more expansive analysis. The court instead focused on the same traditional Chicago School metrics of innovation, quantity, quality, and low prices.¹⁷⁶ Therefore, the weaknesses in this court's analysis and lessons learned from this case are still relevant to the Chicago School at large. When applied to dynamic markets, the Chicago School's focus on short-term consumer welfare measured through prices and quality is insufficient.

This Part proceeds in two sections. Section A critiques three specific problems in the analysis of *Deutsche Telekom* and discuss how these problems exist in analyses of all dynamic markets. Section B explores how to implement changes in antitrust law to avoid two of these problems in the future. It argues that, as currently applied, the Chicago School framework is incomplete. To accurately assess the effects of mergers in dynamic and integrated markets, the approach to promoting the current goals of the Chicago School must be altered, and the goals themselves must be expanded. This new approach must consider both short and long term effects of efficiency and the impacts of a merger on individuals outside of direct consumers, including laborers, retailers, and other global players.

A. A CRITIQUE OF DEUTSCHE TELEKOM

The court's analysis in *Deutsche Telekom* was flawed on two grounds.¹⁷⁷ The court: 1) conducted only a narrow and short-term economic efficiency analysis;

174. *Id.* at 193, 232.

175. *Id.* at 242–43.

176. *See generally* *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 242–43 (S.D.N.Y. 2020); DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 11.

177. The court was also flawed in its evidentiary prioritization of witness statements over documentation. While witnesses pledge an oath to tell the truth, they can be motivated by different factors, such as professional and career goals and personal success. Additionally, there is a healthy churn of executives (who act as witnesses in these trials) in corporate

and 2) focused on the effects of the merger for consumers without considering global-scale effects.

1. *Economic Efficiency Analysis*

Because *Deutsche Telekom*'s efficiency analysis did not account for disruptive innovation in dynamic markets, the court incorrectly concluded that short-term efficiencies from the merger would benefit consumers and promote better service and quality.¹⁷⁸ The court's analysis was incomplete in two ways. First, the court should have examined the long-term effects of efficiencies, specifically effects on barriers to entry. Second, it should not have relied overwhelmingly on past firm behavior as a predictor for future behavior.

a) An Overview of Deutsche Telekom's Incomplete Short-Term Efficiency Analysis

In *Deutsche Telekom*, the court accurately noted the potential short-term efficiencies resulting from the merger. These efficiencies are particularly important to study in capital-intensive markets such as the telecommunications market, where firms must invest in expensive physical infrastructure to compete.¹⁷⁹ In this case, the court highlighted the positive effects that efficiencies from combined spectrum and consolidated capital investment might have on consumers, including lower prices and better service.¹⁸⁰

While the court's efficiency analysis was appropriate under the Chicago School framework, it was incomplete in this context because it did not evaluate the long-term tension between investment and innovation in dynamic markets.¹⁸¹ More specifically, it failed to consider that efficiencies may have pronounced long-term effects in dynamic markets that ultimately undermine competition. While efficiencies such as consolidation of infrastructure can

management structures. Even if a witness is reliable on the stand, she could be replaced by someone who holds disparate views. As a germane example, T-Mobile's own CEO, John Legere, announced he would be leaving the company in early 2020, soon after the *Deutsche Telekom* trial ended. See Chris Weich, *John Legere Abruptly Resigns from T-Mobile Board of Directors "To Pursue Other Options,"* THE VERGE (Apr. 24, 2020, 6:01 PM ET), <https://www.theverge.com/2020/4/24/21235226/john-legere-resigns-tmobile-board-directors> [<https://perma.cc/S5NX-8JFC>]. Even if the court's reliance on Legere's testimony and his dedication to keeping T-Mobile competitive was well founded, New-T-Mobile will now be run by new management that could easily change strategies. See *id.*

178. See *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207–10 (S.D.N.Y. 2020).

179. See *id.* at 191–92.

180. *Id.* at 207–10.

181. See *id.* at 167–68; see also John Kwoka, *The Effects of Mergers on Innovation: Economic Framework and Empirical Evidence*, THE ROLES OF INNOVATION IN COMPETITION LAW ANALYSIS 13, 13 (Paul Nihoul and Peter Van Cleyenbruegel eds., 2018).

lower prices in the short term by reducing overhead costs, such consolidation can limit dynamic innovation in the long term by reducing incentives to entirely disrupt the industry. As discussed in Part III, dynamic markets rely on disruptive innovation to bring better and often transformative services and products to the market.¹⁸² However, if service providers such as New T-Mobile amass enough capital investment through merger efficiencies, they will no longer have the incentive to promote disruptive innovation, as this disruption would likely render many of the company's capital investments obsolete.¹⁸³ The same investment efficiencies that created short-term price reductions could therefore lead to long-term innovation stagnation in the market and reduce the quality of services.¹⁸⁴ For example, if in ten years 6G were developed¹⁸⁵ and based on an entirely new type of spectrum or transmission infrastructure, New T-Mobile would face little incentive to embrace 6G as it would leave the company's current spectrum holdings useless. Even though 6G would benefit consumers, New T-Mobile and other providers, equipped with market concentration and domination, could slow the rollout of this hypothetical 6G.

Because the efficiency analysis is different in dynamic and static markets, courts must more carefully protect long-run competition in dynamic markets to incentivize firms to continually embrace disruptive technologies and developments. Long-term efficiency consideration is rarely needed in static markets, even if the markets are capital intensive, because firms are incentivized to innovate within static market structures to differentiate themselves from competitors and attract new customers.¹⁸⁶ Consumers benefit from this innovation by receiving higher-quality products. But courts must take extra care in allowing disruptive innovation to flourish in capital intensive, dynamic markets.

Specifically, in *Deutsche Telekom*, the court should have not just studied short-term efficiencies, but balanced these efficiencies with the long-term effects on innovation and competition. A more effective analysis would have

182. Sidak & Teece, *supra* note 2, at 581.

183. Kwoka, *supra* note 181, at 16–17.

184. *Id.* at 16–17; see also Paul Krugman, *Monopoly Capitalism Is Killing US Economy*, THE IRISH TIMES, (April 19, 2016, 12:00), <https://www.irishtimes.com/business/economy/paul-krugman-monopoly-capitalism-is-killing-us-economy-1.2615956> [<https://perma.cc/C2UB-KZMH>] (explaining that it did not make sense for Verizon's profit margin to expand its own high speed network even though there was strong demand from consumers).

185. See Klint Finley, *Trump Shouldn't Plan to Tweet From a 6G Phone Anytime Soon*, WIRED (Feb. 21, 2019, 8:44 PM), <https://www.wired.com/story/trump-shouldnt-plan-tweet-from-6g-phone-soon> [<https://perma.cc/E8B3-TL68>].

186. See Kwoka, *supra* note 181, at 16–17.

carefully examined barriers to market entry and would not have relied on past behavior to predict future behavior. The next two Sections address the balancing of short- and long-term efficiencies.

b) Analysis of Barriers to Entry

To effectively analyze long-run competition in *Deutsche Telekom*, the court should have conducted a more thorough analysis of DISH Network's potential entry as a new fourth competitor in the telecommunications market and its likelihood of mitigating the merger's anticompetitive effects. Although the court devoted nearly ten pages to this analysis,¹⁸⁷ it placed undue weight on DISH's claims that it would build a "virtualized network" and operate an Open Radio Access Network (ORAN), and incorrectly dismissed the plaintiff's contradicting evidence.¹⁸⁸ The court misunderstood—or failed to examine—key technologies that were unproven in the market and incorrectly concluded that DISH would be a viable market entrant because it assumed with certainty that DISH could rely on these technologies. Instead, it should have looked only to currently viable technologies to assess DISH's likelihood of entry.

The court accepted DISH's arguments that virtual network technologies would decrease construction and network costs by reducing the need for physical infrastructure.¹⁸⁹ But virtualized networks were a nascent concept at the time with the "hype around [them] exceed[ing] the reality at the moment."¹⁹⁰ These underdeveloped networks could prevent DISH from becoming a successful competitor.¹⁹¹ The theoretical cost benefits of virtual networks depended on the fact that their price would be lower than traditional RAN; however, if implementation issues arose, such as problems developing a network strong enough to support a large customer base, the price would skyrocket, causing major financial troubles for DISH.¹⁹² The court acknowledged that even with its current spectrum holdings, DISH would require substantial time and money to build a full MVO network and mitigate anticompetitive merger effects.¹⁹³ Despite this, it still relied on unproven technologies to find that DISH would be a viable future competitor.

187. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 224–33 (S.D.N.Y. 2020).

188. *See id.* at 229.

189. *Id.*

190. Matt Kapko, *Dish Faces Challenges on Virtualized Network Vision*, SDX CENTRAL (July 30, 2019, 1:45 PM), <https://www.sdxcentral.com/articles/news/dish-faces-challenges-on-virtualized-network-vision/2019/07> [<https://perma.cc/8RZR-TZEY>].

191. *See Deutsche Telekom*, 439 F. Supp. 3d at 228.

192. *See id.*

193. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 228 (S.D.N.Y. 2020).

In so concluding, the court ignored expert testimony rebuking these technologies. Experts testified that DISH would likely respond to problems with virtual networks by reverting to the more expensive and time-intensive RAN network, reducing the likelihood of market entry success.¹⁹⁴ Additionally, DISH's own CEO admitted outside of trial that a virtual network could cost billions of dollars to implement and recognized the possibility that it might fail.¹⁹⁵ Telecommunications executives also acknowledged this possibility in documents.¹⁹⁶

Instead of relying on unproven technologies, the court should have analyzed the potential of entry using only currently viable technology. Innovations in dynamic markets can occur so rapidly that it is imprudent to depend on the successful implementation of a specific nascent technology. In other words, in these markets, courts should “ignore innovation possibilities that are too remote to see.”¹⁹⁷ In the case of the telecommunications market, neither ORAN nor virtualized networks had been fully endorsed by a majority of experts as viable options.¹⁹⁸ If the court had relied on current technologies, it would have concluded that the barriers to entry—namely the capital costs of developing a RAN system in a timely period—would be impossible for DISH to successfully overcome, even with DISH's agreement with T-Mobile. DISH's inability to enter the market would reduce competition in the long run, inhibiting innovation and hurting consumers and producers in the market.

c) Analysis of Past Behavior

The court's balancing of economic efficiencies with potential anticompetitive effects was also tainted by its reliance on past behavior. Throughout *Deutsche Telekom*, the court assumed that market players' past competitive practices predicted strong post-merger market competition.¹⁹⁹ But past behavior is an ineffective and inaccurate indicator of future behavior in dynamic markets, where rapid innovation can quickly render past practices obsolete.

194. Dan Meyer, *Dish Networks Views Virtualization as 5G's "Real Paradigm Shift,"* SDX CENTRAL (Apr. 11, 2019, 9:37 AM), <https://www.sdxcentral.com/articles/news/dish-networks-views-virtualization-as-5gs-real-paradigm-shift/2019/04/> [https://perma.cc/8RZR-TZEY].

195. *Id.*

196. *Deutsche Telekom*, 439 F. Supp. 3d at 198.

197. Herbert J. Hovenkamp, *Schumpeterian Competition and Antitrust*, FACULTY SCHOLARSHIP AT PENN L. 10–11 (Oct. 15, 2008), https://scholarship.law.upenn.edu/faculty_scholarship/1788/.

198. Kapko, *supra* note 190.

199. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 236 (S.D.N.Y. 2020).

The nature of dynamic markets—new technologies or innovations dramatically altering the market landscape—can make previous assumptions irrelevant and necessitate a shift in market strategies.²⁰⁰ As discussed above, once a firm dominates a market, its “interest in creative destruction becomes greatly diminished” because it will not want its new market position to “erod[e].”²⁰¹ Accordingly, the likelihood of the firm continuing to innovate will decrease, meaning that past behavior will not predict future behavior.²⁰² As antitrust scholar Professor Hovenkamp aptly stated, “the small firm seeking entry must shake up the pot” but the “dominant firms are well established and . . . tend to profit from stable growth.”²⁰³

While in past years, T-Mobile was the underdog seeking market power and therefore relied heavily on innovation and creative thinking, this mindset changed as it gained market power.²⁰⁴ T-Mobile’s former position as third-largest competitor allowed it to become a maverick, and T-Mobile accordingly “built its identity and business strategy on . . . challenging AT&T and Verizon” to capture their customer base.²⁰⁵ Relying on testimony from T-Mobile CEO Legere, the court concluded that New T-Mobile would not stop these practices post-merger, but instead continue to aggressively compete.²⁰⁶ However, the merger could change the company’s priorities, making it no longer profitable to upturn the market. For example, if New T-Mobile invested in a 5G network that enabled it to build a customer base of similar size to AT&T or Verizon, it might no longer invest in continuously improving its network and shaking up the standards for telecommunications providers, but instead spend its money on protecting its customer base.

2. *Consumer and Global Impacts*

In addition to focusing solely on short-term efficiency at the expense of fully understanding long-run effects on competition, the court in *Deutsche Telekom* confined its review to individual-level effects on consumers and did not consider the effects of the merger on a global scale. The Chicago School usually defines a consumer as “a person or entity that engages in

200. Gonzaga, *supra* note 84, at 5.

201. Hovenkamp, *supra* note 197, at 6–7.

202. *Deutsche Telekom*, 439 F. Supp. 3d at 193–94.

203. Hovenkamp, *supra* note 197, at 6. While DISH’s entry might not be small in spectrum size, it would be small in that DISH would have to build its customer base and market reputation from scratch.

204. *Deutsche Telekom*, 439 F. Supp. 3d at 193–94.

205. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 237 (S.D.N.Y. 2020).

206. *Id.*

consumption.”²⁰⁷ Consumers are directly involved in the market through their purchases of goods and services. In line with this definition, the court exclusively focused on the merger’s effects on the prices and quality of services in the telecommunications market (including types of cellular networks) because those were the primary ways in which market consumers would be impacted.²⁰⁸ However, unlike static markets that can be studied in isolation—such as the milk, shoe, or grocery store markets—the telecommunications market is highly integrated in today’s global economy.²⁰⁹ Services that the market provides help fuel the gig economy, retail shopping, banking, development, and various other markets.²¹⁰ Therefore, a merger not only affects consumers, but also other individuals and institutions throughout the economy. While studying consumer effects is essential, courts must expand their analyses to also consider global economic effects that impact all entities the market indirectly touches. In the case of the telecommunications market, these indirect markets include labor, global trade, and national security. In focusing only on direct markets, courts risk neglecting important consequences of the merger.

Deutsche Telekom’s failure to thoroughly consider the importance of building an American 5G network illustrates this concern. The race to develop the first fully functional 5G network is the single largest issue in the telecommunications market.²¹¹ As discussed in greater detail below, it affects the labor market, technological developments in numerous sectors, and national security. Because it is so important to the market and the global economy, the court should have considered the effects of the merger in light of this race.²¹² While the court acknowledged that the merger would allow a quicker rollout of 5G and briefly noted these impacts, they were relegated almost exclusively to a single footnote.²¹³

The U.S. economy, and almost all individuals, would greatly benefit from the development of a robust 5G network. In building out the first 5G network, the United States would hold its place as a top global innovator and

207. Caron Beaton-Wells, *Antitrust’s Neglected Question: Who Is “The Consumer,”* 65 ANTITRUST BULLETIN 173, 175 (2020).

208. *Deutsche Telekom*, 439 F. Supp. 3d at 208–09.

209. *See id.* at 189–90.

210. *See id.*

211. *See* Clint Finley & Joanna Pearlstien, *The WIRED Guide to 5G*, WIRED (Sept. 10, 2020, 7:00 AM), <https://www.wired.com/story/wired-guide-5g> [<https://perma.cc/K9B4-VW6P>].

212. *See* *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 209 n.12 (S.D.N.Y. 2020).

213. *Id.*

outcompete other technologically advanced countries such as China and Korea.²¹⁴ The United States would also set telecommunications standards and solidify global dependence on, and sales of, American products and services.²¹⁵ More importantly, a 5G network would create new economic opportunities for many industries, including those involving self-driving cars, telemedicine, automated factories, and smart appliances.²¹⁶ In turn, these opportunities would have large impacts on employment and economic growth.²¹⁷

Additionally, the race to 5G has serious national security implications. The federal government has already banned U.S. companies from purchasing 5G products or technology from certain Chinese companies, including Huawei, because of fears that these products will allow the Chinese government to conduct cyber espionage on the American government.²¹⁸ There are also fears that Huawei will allow Chinese officials and businesses to steal American intellectual property.²¹⁹ While the impacts of national security on the economy are less direct than on job growth, they can be crucial to the safety of individuals and businesses.²²⁰

The court should have carefully discussed each of these considerations, as the merger of Sprint and T-Mobile could significantly change the rollout of 5G. The promise of New T-Mobile developing a successful 5G network might have supported the court's decision to let the merger proceed, as it would mitigate national security concerns and stimulate the overall economy. If New

214. *Id.*

215. See Jeremy Hsu, *How the U.S. Can Prepare to Live in China's 5G World*, IEEE SPECTRUM, (Apr. 23, 2019), <https://spectrum.ieee.org/tech-talk/telecom/standards/how-america-can-prepare-to-live-in-chinas-5g-world> [<https://perma.cc/2NPF-7ZM5>].

216. See Brian Fung, *The Race to 5G Wireless Tech is on. A Report Finds Americans May Have an Early Lead*, WASH. POST, (Feb. 19, 2019, 11:44 AM PST), <https://www.washingtonpost.com/technology/2019/02/19/race-g-wireless-tech-is-report-finds-americans-have-an-early-lead> [<https://perma.cc/G2QY-ZLYE>, <https://perma.cc/6QS3-YZJY>].

217. *See id.*

218. See David McCabe, *F.C.C. Designates Huawei and ZTE as National Security Threats*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/technology/fcc-huawei-zte-national-security.html> [<https://perma.cc/P3GQ-CPY3>].

219. See Lindsay Maizland & Andrew Chatzky, *Huawei: China's Controversial Tech Giant*, COUNCIL ON FOREIGN RELATIONS (August 6, 2020 8:00 AM EST), <https://www.cfr.org/backgrounder/huawei-chinas-controversial-tech-giant> [<https://perma.cc/S79Z-UUM7>].

220. In the fall of 2020, President Trump announced he would take actions to ban WeChat, the popular messaging app, in the United States because he believed that the Chinese app infringed on the data security and privacy of its American users. Geoffrey Gertz, *Why is the Trump Administration Banning TikTok and WeChat?*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/08/07/why-is-the-trump-administration-banning-tiktok-and-wechat> [<https://perma.cc/Q6LZ-3PS8>]. While this ban did not go through, it exemplifies potential national security issues that can affect lives of ordinary citizens. *See id.*

T-Mobile is not able to build out this network, the United States might not see a strong 5G network at a fast timeline. However, if they successfully and rapidly build out a network, other individuals might suffer the consequences of this prioritization of a 5G network. A focus on 5G prices for consumers alone cannot capture these larger effects.

The court should have analyzed these important international and broader economic and labor considerations in its merger analysis. While overarching economic considerations are not part of a traditional Chicago School analysis, their importance demonstrates why the Chicago School must be updated.

B. DEUTSCHE TELEKOM AND THE FUTURE OF ANTITRUST LAW

Antitrust law must adapt to reflect the emergence of dynamic markets and to avoid the missteps in *Deutsche Telekom*. As the court discussed in the case, the job of predicting a merger's effects is difficult and onerous.²²¹ A court faced with this inquiry must somehow make sense of conflicting facts and unclear evidence to decide what will affect competitors, consumers, and the market.²²² It must do so without the guidance of straightforward formulas or checklists. Instead, the court must weigh competing evidence and rely on its own knowledge of market behavior.²²³ Predicting this behavior has become even more complex in dynamic markets that are constantly changing and inextricably integrated to the broader economy.²²⁴ Technological advancements and globalization have made it harder to isolate markets and predict their effects, as the world has become increasingly interdependent.²²⁵ But these difficulties should not lower antitrust standards. Instead, courts, enforcement agencies, and the legislature should review and adjust the ways in which they analyze markets to ensure that scrutiny of mergers within dynamic markets continues to promote the goals of antitrust.

American jurisprudence must make two distinct changes to correctly regulate and monitor dynamic markets. First, courts must expand their efficiency analysis to balance the tension between short-term market efficiencies and the long-term need for disruptive innovations. Second, courts must account for merger effects on both individual market consumers and the global economy, recognizing that shifts in a dynamic and integrated market

221. *Id.* at 187–88.

222. *See id.*

223. *See id.*

224. *See generally* Kwoka, *supra* note 181.

225. *See* Christine Lagarde, *The Interconnected Global Economy: Challenges and Opportunities for the United States—And the World*, INT'L MONETARY FUND (Sept. 19, 2013), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp091913> [<https://perma.cc/97CQ-EDZB>].

can have profound effects on numerous international markets. Courts should examine the various ways in which these changes will depart from the Chicago School as it currently exists. While the Chicago School (and antitrust generally) promotes necessary goals such as innovation, quantity, quality, and low prices for consumers, the efficiency analysis used to measure these objectives must be changed. Additionally, the goals themselves must be expanded to account for the effects of mergers on the broader economy, including long-term effects and connected markets.

These shifts align generally with the Neo-Brandeisian view of antitrust.²²⁶ While this Note does not discuss the intricacies of the various Neo-Brandeisian arguments, *Deutsche Telekom* illustrates why Neo-Brandeisians' broader focus on political and social concerns—as well as the protection of non-consumer players in the market and the competitive process as a whole—should be applied to dynamic, integrated markets. For example, the implications of an American 5G market include labor concerns and international power relations in addition to consumer prices. These concerns are better analyzed under a Neo-Brandeisian framework.

Some might argue that it is futile to ask judges to consider broader economic impacts or longer-term efficiency analyses because these considerations might become overwhelming, unadministrable, and political.²²⁷ However, judges have tools to help them conduct these broader investigations. First, judges should rely on documentary evidence, especially over witness testimony, as a signal for pertinent considerations in the market, given that many of these documents come from market experts who have special knowledge about trends and technologies.²²⁸ Second, and as Judge Marrero himself stated, judges can use their “own skills and frontline experience[s]” to make determinations and parse out larger considerations.²²⁹ Unlike relying on witnesses who might have varying rationales and hopes for an outcome, a judge can use her own skills, as well as amici documents, to determine the relevance and importance of a merger. While assessing every potential downstream effect from a merger would be unadministrable and imprecise, judges can use their discretion to focus on salient areas with broader impacts. For instance, the *Deutsche Telekom* court recognized, though it did not deeply analyze, the global economic impact in the telecommunications industry as

226. See Sallet, *supra* note 37, at 368.

227. See generally Thibault Schrepel, *Antitrust Without Romance*, 13 N.Y.U. J.L. & LIBERTY, 326, 326 (2020) (lamenting what the author deems to be the shortcomings of the revitalization movement of antitrust law, and describing the changes proposed to make antitrust more robust as “romanticizing” antitrust).

228. See Albert Foer, *Prediction and Antitrust*, 56 ANTITRUST BULLETIN 505, 520 (2001).

229. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 188 (S.D.N.Y. 2020).

jobs and national security.²³⁰ Because judges can see the evidence simultaneously, they are in the best position to recognize the unique considerations of each case.

Courts cannot update this framework alone but must partner with governing agencies and regulatory bodies to bring about cohesive and unified change. There are several ways that the judicial and government branches of government can achieve this change. First, the Department of Justice should revise its merger guidelines to explicitly consider dynamic markets and the effects of disruptive innovation.²³¹ As Professors Gregory Sidak and David Teece argue, these guidelines must reflect an understanding that dynamic markets, unlike static markets, are directly driven by innovation and therefore require different analyses.²³² Second, Congress should pass a comprehensive bill updating the 1914 Clayton Act to reflect the differences in analyzing dynamic markets, such as the importance of protecting incentives to innovate. Most recently, Senator Klobuchar proposed a bill in 2017 that would tighten the standard for acquisitions in the Clayton Act.²³³ While this bill did not pass, it illustrated the possibility of introducing these amendments in Congress. This adoption would take an adjustment period, but updating antitrust in dynamic markets will best prepare all parties to properly regulate the new dynamic markets of the twenty-first century.

Today's antitrust climate is ideally suited to advocate for structural updates, and the lessons learned from *Deutsche Telekom* are a perfect vehicle to drive these changes. There has been a renewed focus on antitrust law in the last few years, most notably in the form of bi-partisan congressional hearings examining potential antitrust violations by large technology companies.²³⁴ In a rare move, the DOJ recently filed an antitrust suit against Google, a dominant market player in the dynamic search engine market.²³⁵ Further, the FTC and multiple state attorneys general recently brought separate antitrust suits against social media giant Facebook, claiming that the company "illegally squash[ed]

230. *Id.* at 210.

231. Sidak & Teece, *supra* note 2, at 885.

232. *Id.*

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

234. See Shannon Bond, *Congress Holds Big Tech Antitrust Hearing*, NPR (July 29, 2020, 4:05 PM ET), <https://www.npr.org/2020/07/29/896840093/congress-holds-big-tech-antitrust-hearing> [<https://perma.cc/EDG8-H7TW>].

235. Cecilia Kang, David McCabe & Daisuke Wakabayashi., *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/technology/google-antitrust.html> [<https://perma.cc/T7BT-DVPD>].

competition” by “buying up its rivals.”²³⁶ They allege that Facebook’s motivation for purchasing rivals was to “eliminate[] competition that could have one day challenged the company’s dominance”²³⁷ and that their actions “leave[] consumers with few choices for personal social networking.”²³⁸ Notably, these regulators have recognized that integrated and dynamic markets and platforms such as Facebook can “deny consumers the benefits of competition” and that regulators must step in to preserve innovation in the market.²³⁹

Antitrust regulators have started to make the incremental changes needed to properly protect individuals in dynamic markets, but these changes must be solidified uniformly through statutes, guidelines, and judicial opinions. The recent focus on antitrust can usher in a broader, more accurate view of the law that is built for the dynamic markets of the twenty-first century.

V. CONCLUSION

Modern technology markets are increasingly dynamic and integrated into society. Scholars and litigators must update the analytical framework of antitrust law to reflect these changes if they hope to effectively protect competition and consumers. Updates to antitrust may also incentivize different third parties, not just the federal government, to bring antitrust suits, as the state of New York did in *Deutsche Telekom*. While the act of predicting future market behavior will never reach perfection, this Note suggests that courts and regulatory agencies can better protect markets by studying long-term efficiencies and overall economic effects. This expands both the goals of antitrust and the means of achieving those goals.

236. Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html> [<https://perma.cc/2WTB-F3LX>].

237. *Id.*

238. Press Release, Fed. Trade Comm’n, *FTC Sues Facebook For Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> [<https://perma.cc/WJZ5-VMUT>].

239. *See id.*