The 2023 Draft Merger Guidelines: a Review

Herbert Hovenkamp*

Contents

* James G. Dinan University Professor, University of Pennsylvania, Penn Carey Law School and the Wharton School.

Preface

Thematic Changes: De-Emphasis of Price and Market Power

In 2023 the Antitrust Division of the Justice Department and Federal Trade Commission issued draft revised merger Guidelines.[1] At this writing these Guidelines have not yet been promulgated in final form and remain subject to comment and revision. They cover horizontal, vertical, and potential competition mergers, as well as some other nonhorizontal mergers that are more difficult to classify.

One declared purpose of the 2023 draft Guidelines was to state their requirements in "simple and straightforward language.[2] That is not the same thing, however, as stating concerns that resonate with the public. Overwhelmingly, opinion polls on economic issues show "prices" and "inflation" as top concerns, as well as related issues such as the price of health care or fuel.[3] "Concentration" does not even appear on these lists, assuming that the general public knows what it means.

The 2010 Horizontal Merger Guidelines state a "unifying theme" that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[4] The exercise of market power, well supported by merger precedent, is best evidenced by higher prices, although other metrics such as output reduction or diminished innovation can work as well. Speaking for a unanimous Supreme Court in 2013, Justice Sotomayor described merger law as challenging consolidation of market power.[5] That same year, then Judge Gorsuch cited the 2010 Horizontal Merger Guides as illustrating a methodology for proving market power from market share.[6] In 2008 then Judge Kavanaugh observed that "merger enforcement, like other areas of antitrust is directed at market power."[7] He was quoting from the *Heinz* ("baby food") merger decision, in which then judge Merrick Garland sat on the panel.[8] In the 1990 *Baker Hughes* decision, then Judge Thomas made merger law's structural presumption a contingent

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[1]U.S. Dept. of Justice and FTC, Merger Guidelines (hereinafter 2023dMG), https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

[2] See, e.g., The White House, Protecting Competition through Updated merger Guidelines" (July 19, 2023), https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/.

[3] E.g., Gallup, https://news.gallup.com/poll/1675/most-important-problem.aspx (lasts visited Sep. 6, 2023).

[4]U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines §1.0 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[5]FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 235 (2013) (for purposes of state action exemption, the state had not authorized hospitals "to consolidate market power through potentially anticompetitive acquisitions of existing hospitals").

[6]Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071 (10th Cir. 2013) (non-merger case).

[7]FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1052 (D.C.Cir. 2008) (Kavanaugh, j., dissenting, although not on this issue; see id. at 1040-1041; the majority focused on ability of small group of specialized firms to charge discriminatorily high prices).

[8]FTC v. Henz Co., 246 F.3d 708, 712 (D.C.Cir. 2001).

surrogate to measuring market power.[9] These statements are important, because the most important question these draft Guidelines face is whether the federal courts and perhaps the Supreme Court will defer to them as a legitimate interpretation of existing law rather than an attempt to make new law.

Judge Kavanaugh's statement that equated merger concerns with those in "other areas of antitrust" also reflect hundreds of federal decisions going back to 1890 declaring the purpose of the antitrust law to be combatting lower output or higher prices – the indicia of market power.[10]

In contrast to the 2010 Guidelines, the 2023 draft Merger Guidelines "assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation."[11] Their dominant metric is "concentration," although the harms that result from concentration are sometimes difficult to discern from this draft and only incidentally related to prices. Perhaps a consequence is also a reduced emphasis on economics. Both in 1950 when the Celler-Kefauver amendments to Clayton Act §7 were passed and also today, economics played an outsize role in merger analysis. The statute itself states its concerns in unambiguously economic terms that were generally understood by the time the statute was amended in 1950: "substantially lessen competition," and "tend to create a monopoly." The Supreme Court's *Philadelphia Bank* merger decision a year after *Brown Shoe* cited no fewer than seven industrial economists, more than any antitrust decision to that time.[12]

Antitrust economists in the 1950s and today use different but overlapping methodologies to evaluate competition. Those in the 1950s were heavily structuralist, focusing on the relationship between market structure and economic "performance." Today structuralism is less dominant. Price-cost margins and investment in innovation are more ascendant. The prevailing enforcement methodology employes a mixture of the two. One thing that has not changed, however, is underlying goals. Prominent structuralist economists from mid-century such as

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[9]United States v. Baker Hughes, Inc., 908 F.2d 981, 991-992 (D.C.Cir. 1990) ("Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence). See also id. at 985 n. 6 ("“Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.")

[10]See Herbert Hovenkamp, Antitrust's Goals in the Federal Courts (SSRN, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519993.

[11]2023dMG, p. 2.

[12]United States v. Philadelphia Nat. Ban, 374 U.S. 321 (1963) (citing Carl Kaysen and Donald F. Turner (4 times), George J. Stigler (twice), Jesse Markham (twice), Joe S. Bain, Edward S. Mason, & Fritz Machlup).

Edward S. Mason,[13] Joe Bain,[14] Leonard Weiss,[15] Carl Kaysen,[16] and Donald Turner, the AAG when the 1968 Merger Guidelines were released,[17] were uniformly concerned about the threats of oligopoly coordination and lack of price competition.[18] Today, the dominant economic literature, including that upon which the Agencies rely, uses different methodologies to state the same theme.[19] These draft Guidelines reflect a strong emphasis on structure, but bury the link

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[13]Edward S. Mason, Monopoly in Law and Economics, 47 Yale L.J. 34 (1937) ("the raising of the price of the product" or "the deterioration of its quality").

[14]Joe S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1956) (defining relevant entry barriers that factors that enable firms to charge supracompetitive prices while excluding entry).

[15] Leonard Weiss, The Structure-Conduct-Performance Paradigm and Antitrust, 127 Univ. Pa. L. Rev. 1104, 1105 (1979) (looking back at the S-C-P paradigm: "The rationale for this concern may be the effect that such elevated prices have either on efficiency or on the distribution of wealth").

[16]Carl Kaysen & Donald Turner: Antitrust Policy: A Legal and Economic Analysis (1959).

[17] Donald F. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962) (problem "of a few dominant sellers in an industry to maintain the same high noncompetitive price").

[18] George W. Stocking, *The Rule of Reason, Workable Competition, and Monopoly*, 64 YALE L.J. 1107 (1955) (advocating rule that linked concentration to performance, measured by price and output); Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953) (similar); Maurice A. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948) (noting irregular relationship between concentration and competitive performance). Later empirical studies often found the correlation between price/cost margins and concentration to be very robust. E.g. Norman R. Collins and Lee E. Preston, *Price-Cost margins and Industry Structure*, 51 REV. ECON. & STAT. 271 (1969)

[19]A few prominent examples include Jan De Loecker, Jan Eeckhout, & Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, 135 J. Pol. Econ. 561, 562 (2020) ("firms gain market power and command high prices"); Volker Nocke and Michael D. Whinston, Concentration Thresholds for Horizontal Mergers, 112 Am. Econ. Rev. 1915 (2022) (increases in concentration a good determinant of loss of consumer welfare, and current thresholds are too lax); Jonathan B. Baker, Market Power in the U.S. economy Today (Wash. Ctr. Equi. Growth, 2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today/ ("raising prices relative to what they would charge in a competitive market or by reducing quality or convenience…."); John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2014) (systematic underestimates of effect of mergers on prices), critiqued in Michael Vita & F. David Osinski, John Kwoka's MNergers, Merger Control, and Remedies: A Critical Review, 82 Antitr. L. J. 361 (2018); Justus Haucap, Alexander Rasch, & Joel Stiebale, How Mergers Affect Innovation: Theory and Evidence, 63 Int'l J. Indus. Org. 263 (2019) (mergers often lead to a decline in innovation); Michael L. Katz, Big Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors, 64 Information Econ. & Pol'y (2021) (similar). See also Filippo Lancieri, Eric A. Posner, and Luigi Zingales, The Political Economy of the Decline of Antitrust Enforcement in the United States (SSRN, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011335 (noting policy

between concentrated structure and higher prices, lower output, reduced innovation or similar indicia of market power.[20]

The draft Guidelines cite Supreme Court dicta expressing a "social preference" for internal growth rather than merger.[21] The source of these statements is unclear, but they must be regarded as stating issues of fact, subject to later empirical testing. For example, the *Brown Shoe* statement is that internal expansion is more likely to provide "increased investment in plants, more jobs, and greater output."[22] For each of those, answers could vary with the circumstances. Internal growth is surely preferable *if* a merger would lead to lower market output and higher prices. It is not necessarily preferable, however, when its prospects for success are worse or when construction of additional capacity leads to the displacement of existing firms.

A policy of targeting mergers that threaten price increases benefits both consumers and input suppliers, including labor, for reasons discussed below.[23] It may also harm higher cost competitors, who could profit from a post-merger rivals' higher prices. By contrast, internal expansion often displaces incumbent firms, particularly if they have higher costs. Further, this is most likely to occur in more highly concentrated markets where merger law tends to have its bite. Acquisition is also a common exit strategy for struggling small firms. Indeed, an important inducement to new entry by small firms is the potential profitability of later acquisition.[24] For these reasons §7 requires competitive harm, and its causation and "effects" test ("where the effect may be"), makes these issues of fact. Perhaps most importantly, as noted later, targeting price-increasing merger can and should lead to significantly greater merger enforcement.

Legislative History and Supreme Court Case Law

The legislative history of the 1950 Celler-Kefauver amendments to §7 is hardly a model of clarity, and the Supreme Court's *Brown Shoe* decision[25] compounded the problem by giving a very one-sided view of it. Congress on the whole was clearly concerned about market "concentration," and many members expressed the view that it had been increasing. Several members of Congress also expressed concerns that excessive mergers might result in higher

concerns with high prices over time); Steve C. Salop, Invigorating Vertical Merger Enforcement, 127 Yale L.J. 1962 (2018) (increased prices as concern).

[20]*See* Carl Shapiro, Why Dropping Market Power from the Merger Guidelines Matters (Promarket, Aug. 7, 2023), https://www.promarket.org/2023/08/07/carl-shapiro-why-dropping-market-power-from-the-merger-guidelines-matters/.

[21]See dMG, p. 11 n. 34; and see Brown Shoe v. United States, 370 U.S. 294, 345 n. 72 (1962); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 370 (1963); United States v. Falstaff Brewing Corp., 410 U.S. 526, 559 n. 13 (1973) (Marshall, J., concurring).

[22]*Brown Shoe*, 370 U.S. at 345 n. 72.

[23] See discussion of Guideline 11, infra.

[24] *See* Elizabeth Pollman, *Startup Failure*, DUKE L.J. (forthcoming, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4535089; Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 Boston Univ. L. Rev. 1 (2020).

[25]Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

prices.[26] No member of Congress spoke in opposition to that view or declared that a concern for higher prices was unimportant.

This legislative history was largely consistent with the then reigning "structure-conduct-performance" paradigm in antitrust economics, in which the principal evidence concerned structure, but on the assumption that anticompetitive conduct and poor performance would flow from noncompetitive structures. As structuralist economist Leonard Weiss put it:

> The main predictions of the structure-conduct-performance paradigm are: (1) that concentration will facilitate collusion, whether tacit or explicit, and (2) that as barriers to entry rise, the optimal price-cost margin of the leading firm or firms likewise will increase.[27]

In *Brown Shoe* the Supreme Court chose to ignore the legislative history's mentions of concerns about price and refer entirely to market concentration.

In any event, *Brown Shoe's* focus on concentration for its own sake was short-lived. The Court's *Philadelphia Bank* decision one year later cited no fewer than seven economists, more than any previous Supreme Court antitrust decision. All at the time were members of the reigning structuralist school (the "Harvard School.") For its conclusion that a merger should be presumptively unlawful if it created a firm with a market share of at least 30%, *Philadelphia Bank* cited four economists in a footnote. All would have applied a stricter standard than the one that the Supreme Court applied. These included Carl Kaysen and Donald F. Turner (recommending a 20% trigger for presumptive illegality), George Stigler (20%), and Jesse Markham (25%).[28] The Court concluded that it had "no view on the validity of such tests," but

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[26]See, e.g., House Debate, 81st Cong., 1st Sess. (Aug. 15, 1949), 95 Cong. Rec. 11484. (Statement of John A. Carroll, D. Colo, speaking in favor of the bill) ("we know that if there is free competition the public will be protect from unduly high prices…."); Sidney R. Yates (D. Ill., speaking in favor) ("When three or four producers take the places of 20 or 30, the chances are great the price competition will be crippled."); Joseph R. Bryson (D.S.C., speaking in favor) (speaking of a "trend toward more and more mergers, which suppress competition, increase the outside control of local enterprise, and cause higher prices and instability of employment…."); William T. Dyrne (D.N.Y., speaking neither for nor against) (citing FTC Report that "under competitive capitalism consumers are protected from high prices by the constant rivalry among numerous firms…."). *See also* Senate Debate, 81st Cong. 2d Sess. (Dec. w, 1950), 96 Cong. Rec. 16433: Sen. Forrest C. Donnell, R., Missouri (understanding bill to authorize injunctions against "any economic concentration, be it existing or incipient … which has power to raise prices or to exclude competition….").

[27] See, e.g. Leonard W. Weiss, The Structure-Conduct-Performance Paradigm and Antitrust, 127 UNIV. PA. L. REV. 1104, 1105 (1979).

[28]*See Philadelphia Nat. Bank*, 374 U.S. at 365 n. 41, citing Carl Kaysen and Donald F. Turner, Antitrust Policy (1959) (suggesting a 20% minimum); George J. Stigler, Mergers and Preventive Antitrust Policy, 104 Univ. Pa. L. Rev. 176, 182 (1955) (20%: "Every merger by a firm which possess one-fifth or more of an industry's output after the merger shall be presumed to violate the statute."); Jesse Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal,

noted that the actual case's 30% number exceeded all of them.[29] The Court also observed that one non-economist lawyer, Derek Bok, believed that the relevant number should be the increase in concentration rather than the absolute post-merger concentration level[30] – a conclusion to which some economists have returned.[31] The important point, however, is that the particular level or change in market concentration that should trigger enforcement was a fact question driven by changes in economic understanding of competitive effects.

From that point on Supreme Court case law on mergers was increasingly driven by concerns about price or other indicia of performance. One exception was the Court's 1966 decision in *Von's Grocery*, which the 2023 draft Guidelines do not cite.[32] *Brown Shoe* and *Von's Grocery* should be counted as severe outlier's from an antitrust tradition that with few exceptions targets higher prices, lower output, or restrained innovation. Merger policy was a part of it.

In its 1964 *El Paso Natural Gas* decision, two years after *Brown Shoe*, the Court focused exclusively on price.[33] El Paso, whose reserves lay to the south and east, was the dominant natural gas supplier to California. Pacific Northwest, with reserves to the north, had repeatedly bid against El Paso for supply contracts into California markets but had always lost the bids. In one case that Justice Douglas' opinion described, El Paso had to lower its bid price in order to meet a Pacific Northwest bid.[34] The Court conclude that "We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, although unsuccessful, had a powerful influence on El Paso's business attitudes."[35] With that, the Court treated the merger as horizonal ("Unsuccessful bidders are no less competitors than the successful ones") and condemned it entirely on price increasing grounds.[36]

In the *Continental Can* case that same year[37] the challenged merger was between a can maker and a bottle producer. At the time competition between the two had been driven mainly by

43 Va. L. Rev. 489, 521-522 (1957) (25%). Derek Bok, a lawyer, suggested that the key number was not the post-merger market share, but the increase in concentration resulting from the merger. a much lower number. Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 233 (1960) (5% increase). The opinion also cited Joe S. Bain, Barriers to New Competition (1956). Bain's principal concern was entry barriers that could build a protective wall around high prices. It also cited Edward S. Mason, Market Power and Business Conduct, 46 Am Econ. Rev. 471 (1956).

[29] *Philadelphia Bank*, 374 U.S. at 365.

[30] Derek Bok, *supra* 74 Harv. L. Rev. 226, 233 (1960).

[31] Volker Nocke and Michael D. Whinston, Concentration Thresholds for Horizontal Mergers, 112 Am. Econ. Rev. 1915 (2022).

[32] United States v. Von's Grocery, 384 U.S. 270 (1960). Justices Steward and Harlan dissented ("The large number of separate competitors and the frequent price battles between them belie any suggestion that price competition in the area is even remotely threatened…." Id. at 300.)

[33] United States v. El Paso Natural Gas, 376 U.S. 651 (1964).

[34] Id. at 655.

[35] Id. at 659.

[36] Ibid.

[37] United States v. Continental Can Co., 378 U.S. 441 (1964).

the markets for baby food and beverages. The concern was that the merger limited the ability of large customers to force the can and bottle makers to bid against each other for their trade with the threat of transferring their business. The Court concluded that:

> the possibility of such transfers over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level or engaging in other comparable practices….[38]

Then, in 1974 the Court issued a pair of decisions that severely pushed back against *Brown Shoe*, rejecting the government's challenges. The problem in the *General Dynamics* case was that the acquiring firm's depleted reserves made its current market share an exaggeration of its actual competitive weight.[39] As a result the Government could not rely exclusively on structural evidence.[40] The Court stated the fundamental concern that the defendant's "power *to affect the price of coal* was … severely limited and steadily diminishing."[41]

In *Marine Bancorp*.,[42] a potential competition merger case, the Court explained that the doctrine applied to concentrated markets in which current participants have "the capacity effectively to determine price and total output of goods or services."[43] If the target market were performing competitively, the incumbent firms would "have no occasion to fashion their behavior to take into account the presence of a potential entrant."[44] However, the merger precluded entry de novo which would have assisted in "deconcentrating that market over the long run."[45] The Court chastised the parties because they never "undertook any significant study of the performance, as compared to the structure of the commercial banking market…."[46]

The Supreme Court's next word on the issue was in the *Cargill* case in 1986.[47] In this private merger challenge the plaintiff claimed that after the merger Cargill, a very large beef processor, would reduce its prices, injuring the plaintiff competitor by forcing it to reduce its margins. The theory was very largely the same one that the Supreme Court had approved in *Brown Shoe*, which affirmed the district court's conclusion that small sellers were having an increasingly difficult time competing with larger firms because they had advantages that "result

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[38]Id. at 465-466.
[39] United States v. General Dynamics Corp., 415 U.S. 486 (1974).
[40] See Id. at 494, describing the government's evidence as showing:

> that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend toward concentration.

[41]*Ibid* (emphasis added).
[42] United States v Marine Bancorp., 418 U.S. 602 (1974).
[43] 418 U.S. at 630.
[44] Id. at 630.
[45] Id. at 615.
[46]*Id*. at 631.
[47]Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 119-120 (1986).

in lower prices or in higher quality for the same price."[48] In affirming, the *Brown Shoe* Supreme Court had suggested that Congress was aware that "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[49] The Court did not cite any legislative history supporting that proposition. In all events, *Cargill* effectively overruled *Brown Shoe* on this issue, concluding that condemning a merger because it would result in lower prices harming rivals was not only incorrect but that it would be "inimical to the antitrust laws."[50]

To be sure, *Cargill* is a private action. A private plaintiff must meet standing requirements that do not apply to the government. In this case, however, the Court expressly rejected a request from the Government as amicus that competitors be denied standing to challenge mergers.[51] Rather, it decided the case on the basis of substantive antitrust policy. It acknowledged that post-merger predatory pricing could be unlawful, but absent that it was not consistent with antitrust goals to condemn a merger simply because the plaintiff suffered lower margins.[52] That requirement is clearly a requirement of merger policy, not of private plaintiff standing to sue.

The *Phoebe Putney* hospital merger case concerned the extent to which antitrust's "state action" doctrine authorized an anticompetitive merger.[53] Justice Sotomayor wrote the unanimous Court opinion concluding that the state had not authorized hospitals "to consolidate market power through potentially anticompetitive acquisitions of existing hospitals." As a result, the FTC was free to proceed with its merger challenge.

Finally, any interpretation of §7 that uses a reduction in the number of firms rather than impact on performance as a metric entails that identical language in different sections of the Clayton Act mean different things. For example §3 of the Clayton Act reaches tying and exclusive dealing with the same "substantially lessen competition" or "tend to create a monopoly" language as §7, but tying does nothing to reduce the number of firms.[54] Early on, the Supreme Court interpreted §3 in tying cases to refer to the threat of higher prices in the tied market.[55]

Merger Guidelines must be faithful to this Supreme Court record.

The Structure and Substance of the Draft 2023 Merger Guidelines

The Structure of the draft Guidelines.

[48]*Brown Shoe*, 179 F.Supp. 721, 738 (E.D.Mo. 1959).
[49]*Brown Shoe*, 370 U.S. at 294, 344.
[50] Cargill, 479 U.S. at 109, 115
[51]Id. at 121 ("We decline that invitation").
[52] Id. at 108. Justice Stevens (with Justice White) dissented on this point. Id. at 123.
[53] FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216,235 (2013).
[54]15 U.S.C. §14.
[55]E.g., Int'l Bus. Mach. Corp. v. United States, 298 U.S. 131, 139 (1936).

The draft 2023 Merger Guidelines contain eight frameworks, also named "Guidelines," that state the concerns of antitrust merger law. Then, three additional Guidelines (9-12) "explain issues that often arise" when these Guidelines are applied, and Guideline 13 addresses some remaining competitive concerns.

A merger is challengeable under the 2023 Guidelines if it violates a single Guideline. They state that "the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction."[56] This makes the problem of pre-challenge counseling and litigation more complex. Those considering a merger can no longer ask simply whether the merger likely facilitates the exercise of market power, with its resulting lower output and higher prices. Indeed, the draft Guidelines appear to allow for the possibility of challenge to some mergers that are likely to increase output, improve products, or lower prices. Attacking such mergers on these grounds is inconsistent with Supreme Court precedent.

Another feature of the draft Guidelines is that it is difficult to distinguish issues of law from issues of fact. Issues of fact are subject to expert opinion under defined standards as well as continuous revisiting and updating.[57] For example, one of the Guidelines cites a "trend toward concentration" as an exacerbating factor. What provokes such a trend is an empirical question, whose answers are better understood today than they were in 1960. The "trend" language is not expressed in the statute, although the concern is stated in the legislative history as well as *Brown Shoe* and some other case law of that vintage. If the implications of a trend toward concentration are a matter of law, then it would be largely impervious to inconsistent fact findings. However, if its importance presents a question of fact, then it is subject to the *Daubert* standards that the Supreme Court has articulated for expert evidence and requires methodology that is accepted in the professional community and up to date.

Another feature of these draft Guidelines is that they do not give balanced guidance. They emphasize the anticompetitive potential of certain types of transactions but state little about when actions will be approved. Good guidance should instruct business managers about what they can as well as what they cannot do under the law. One example of this imbalance is Guideline 10 on two-sided platforms, where the competitive dangers are real but so are the benefits – more than in most old economy industries. However, Guidelines 10 speaks only of the dangers.

Guidelines 1 & 3: Mergers that Increase Concentration or the Risk of Coordination

The draft Guidelines first Guideline states that "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets." Concentration is then measured by the number and relative size of rivals. The draft Guidelinese continue use of the Herfindahl-

[56] 2023dMG, p. 3.
[57] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Hirschman Index (HHI) as a metric.[58] They offer alternative two-stage inquiries. First, is the post-merger HHI greater than 1800 or the market share of the post-merger firm greater than 30%? Second, satisfying either of these conditions "triggers a structural presumption" of the requisite lessening of competition if the increase in the HHI exceeds 100 points.[59]

This standard is not explicitly related to output or price in the market at hand. Indeed, the discussion in Guideline 1 never uses the word "price" and never speaks of market power. This is in sharp contrast to Guideline 11, which presents the mirror image of Guideline 1 as it pertains to supply markets, including labor. That Guideline emphasizes low wages as a central concern.[60]

Further, while the Guidelines appear to adopt the approach from *Brown Shoe* that emphasizes concentration aside from performance, they do not adopt the particular market share standards that *Brown Shoe* and other decisions of that era embraced.[61] Indeed, *Von's Grocery* condemned a merger on a combined market share of 7.5%, but it is not cited in the draft Guidelines. So slavish following of old cases goes only so far.

The HHI itself is strictly derived from oligopoly theory.[62] Supposing that its assumptions obtain, it serves as a predictor of pricing behavior insofar as that behavior is affected by the number and size distribution of firms in the market. Very likely the most useful tool it yields is a correlation between the *increase* in the HHI and predicted price effects.[63] That makes sense because assessing the effects of a merger is an estimate of change: how much does a change in market structure result in a change in performance?

The 2023 Guidelines reflect an amply supported belief that the 2010 Horizontal Guidelines were too conservative about their metrics, permitting many mergers likely to have adverse price effects. That tendency was then exacerbated by judicial decisions that tilted even more conservatively than the Guidelines indicated.[64] Indeed, one phenomenon that emerged after the 1992 Guidelines is that the Agencies themselves did not follow them, but generally limited enforcement to mergers that fell in the highest ranges of the articulated standards.[65] In

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[58]2023dMG, 7. The HHI consist of the sum of the squares of the market shares of every firm in the market. On its use, see 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶931 (4th ed. 2018).
[59]2023 dMG, 7-8.
[60] See discussion *infra*, discussing Guideline 11.
[61] E.g., United States v. Von's Grocery, 384 U.S. 270 (1960) (combined market share of 7.5%); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (vertical merger with foreclosure of 1.2%). See also United States v. Pabst Brewing, 384 U.S. 546 (1966) (premerger market shares of 10.7% & 13%; post-Merger HHI=849-1229). For a useful table see Donald I Baker & William Blumenthal, The 1982 Guidelines and Preexisting Law, 71 Cal. L. Rev. 311, 334 (1983).
[62]On the derivation, see George J. Stigler, A Theory of Oligopoly, 72 J. Pol. Econ. 44 (1964).
[63]See Volker Nocke and Michael D. Whinston, Concentration Thresholds for Horizontal Mergers, 112 Am. Econ. Rev. 1915 (2022).
[64]See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶919 (4th ed. 2017).
[65]See Carl Shapiro, The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 49, 57 (2010).

order to have teeth, the more aggressive standards articulated in the 2023 draft Merger Guidelines must be accompanied by more expansive enforcement activity to include mergers that are closer to the lower edge of the stated standards, and coupled of course with courts' willingness to follow them. This is one of the greatest improvements in enforcement that these Guidelines could make. Rather than the concern with concentration for its own sake, the draft should have take pains to explain why the articulated standards provide a reasonable prediction of post-merger performance.

Under the draft Guidelines, if a post-merger HHI exceeds 1800 and the change exceeds 100 then the Agencies will presume that the merger "may substantially lessen competition based on market structure alone."[66] They use the word "presume," as Supreme Court precedent requires. The *Philadelphia Bank* decision made structure at a certain level decisive except "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[67] In the Supreme Court's *Marine Bancorp*. Decision, involving a potential competition merger, the question was whether the market in question was highly concentrated and its competitive performance impaired as a result. The Court wrote:

> The record indicates that neither the Government nor the appellees undertook any significant study of the performance, as compared to the structure, of the commercial banking market in Spokane.
>
> We conclude that by introducing evidence of concentration ratios of the magnitude of those present here the Government established a prima facie case that the Spokane market was a candidate for the potential-competition doctrine. On this aspect of the case, the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the Spokane market. In our view, appellees did not carry this burden, and the District Court erred in holding to the contrary. Appellees introduced no significant evidence of the absence of parallel behavior in the pricing or providing of commercial bank services in Spokane.[68]

The Court did not state that an absence of parallel behavior would be the only kind of evidence that might defeat a structural presumption. New entry or shifts in market shares are also likely possibilities, as well as other indicia of actual competition among the firms. Other possibilities are product differentiation or doubts about market definition. Yet another, which the Supreme Court stated in its *Cargill* decision, was price effects: condemning a merger because it reduced prices would be inimical to antitrust goals.[69] That limitation is important because market concentration is in fact driven by multiple factors, including scale economies and network effects. Often the result is that higher concentration is accompanied by lower prices

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[66]2023dMG, p. 4.

[67]Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 Yale L.J. 1996 (2018).

[68]*United States v. Marine Bancorp. Inc*, 418 U.S. 602, 631 (1974), citing and quoting see *United States v. General Dynamics Corp*., 415 U.S. 486 (1974)..

[69]Cargill, Inc. v. Monfort, Inc., 479 U.S. 104 (1986),

rather than higher ones.[70] Making the structural presumption conclusive will yield excessive false positives.

Because Guideline 1 is addressed almost entirely to concentration itself, its selection of *levels* for scrutiny is not obviously related to any particular harm. Close scrutiny is triggered by an HHI exceeding 1800 and an increase in the HHI exceeding 100. Those numbers are similar to those applied in the 1992 Guidelines, but lower than the 2500 threshold stated in the 2010 Guidelines. In those Guidelines, however, the relevance of these numbers was attached to dangers of increased market power. As an empirical matter, the increase in the HHI was particularly significant.[71] One of the reasons that these numbers have changed over time is that empirical testing continues to progress.[72] The 2023 draft was correct to restore the 1800 number. Indeed, the evidence appears to justify an even lower one.

Guideline 1 also indicates that a challenge is proper when the post-merger firm's market share exceeds 30% and the HHI increase exceeds 100. The 30% number references the Supreme Court's *Philadelphia Bank* conclusion that a merger in that range triggered illegality.[73] Most mergers of that magnitude are very likely challengeable in any event. Further, if the resulting market share exceeds 30%, an acquisition of anything other than a very small firm will also increase the HHI by more than 100.[74] These conclusions are ones of fact, as is any conclusion about a particular concentration level that threatens to harm competition. The statute itself does not state any minimum concentration level. Further, the "effects" test in §7 ("where the effect may be") compels a factual conclusion of the type addressed by expert testimony. As noted previously, the *Philadelphia Bank* decision explicitly relied on several economists, who concluded on the basis of technique available at the time that a merger creating a firm with a market share in the 20% to 25% range should be challenged. Little has changed since then to suggest that this particular presumption is incorrect.

By contrast to Guideline 1, Guideline 3 does link concentration to performance by addressing mergers that "Increase the Risk of Coordination."[75] Further, this coordination can apply to all dimensions of competition, including price, product features, customers, wages, benefits, or geography. These dimensions of coordination have always been attached to merger

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[70] See the previous discussion; and Herbert Hovenkamp, Competitive Harm and the 2023 Draft Merger Guidelines (Stigler Center, Promarket, July 27, 2023), https://www.promarket.org/2023/07/27/herbert-hovenkamp-competitive-harm-and-the-2023-draft-merger-guidelines/.

[71]Volker Nocke & Michael D. Whinston, Concentration Thresholds for Horizontal Mergers, 112 Am. Econ. Rev. 1915 (2022).

[72] See, e.g., John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2014).

[73]United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963),

[74] E.g., a merger of two 15% firms increases the HHI by 450; of a 25% firm and a 5% firm would increase it by 250; of a 28% firm and a 2% firm would increase the HHI by 112. However, a merger of a 29% firm and a 1% firm would increase it by 58. The increase in the HHI is double the product of the market shares of the merging firms.

[75]2023 dMG, supra, at 4.

policy since its inception. Notably, the draft Guideline lowers the HHI level signaling danger to 1000, or the equivalent of ten equal size firms. This is a question of fact, and one for which the data and understanding can change.[76] In all events, given the historical record of post-merger pricing behavior, the Guidelines are correct to extend concerns about coordinated interaction down to less concentrated markets. Later on, in a discussion of rebuttal evidence, the draft Guidelines do briefly acknowledge that some industries may exhibit barriers to coordination requiring greater tolerance, but that these situations will be "exceedingly rare."[77]

One point, perhaps minor, is that Guideline 3 appears to state a narrower conception of oligopoly behavior than did the previous Guidelines. The 2010 HMG spoke of distinctive "coordinated" and "accommodating" behavior, The latter more clearly fell into the category of unilateral ("parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational…").[78] Further it was conduct 'not pursuant to a prior understanding."[79] By contrast the draft 2023 MG speak only of "risk of coordination," although they do observe that some of it might be difficult to prove under §1 of the Sherman Act. Indeed, the statement in the draft 2023 MG seems overly deferential to the agreement requirement of §1, but it should not be. Not only does §7 not impose an agreement (or "coordination") requirement, but the "may substantially less competition" prophylactic standard should enable it to reach further. Finally, the difference between "Highly Concentrated Market" as a "primary" factor under Guideline 3 and "Market Concentration" as a "secondary" factor is unclear and seems redundant.

Use of the HHI is also critically dependent on a correct market definition.[80] Further, in order to relate to the HHI, the market definition should be crafted so as to identify the threat of monopoly or collusion. That is, the hypothetical monopolist test (HMT), which seeks to identify the smallest grouping sales capable of being monopolized or cartelized, is the theoretically correct market definition for applying the HHI.[81] However, as observed later, the 2023 draft Guidelines embrace multiple approaches to market definition, some of which do a poor job of embracing concerns for competition.

Summary

To summarize, the way to make these Guidelines more effective but also to be consistent with existing law: 1) merge Guidelines #1 and #3 into a single discussion, with the material in current Guideline #1 shortened and made more transparent about the relationship between structure and performance, particularly price. Then, 2) structural indicators should be made more aggressive than they are, making HHI>1800 a presumptive "trigger" for situations when the Agencies are relying on structural evidence alone, but enabling them to reach much

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[76] For a good critique, see Nathan Miller, et al, One the Misue of Regressions of Price on the HHI in Merger Review, 10 J. Antitrust Enforcement 248 (2022).

[77] 2023 dMG, p. 34.

[78] 2010 Merger Guidelines, §7.

[79] Ibid.

[80] See Areeda & Hovenkamp, Antitrust Law, supra, ¶931d.

[81] On the hypothetical monopolist test, see Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129 (2007); Gregory J. Werden, The History of Antitrust Market Delineation, 76 Marq. L. Rev. 123 (1992).

further, even to HHI=1000, when exacerbating effects make oligopoly behavior more likely; finally, 3) at least presumptively follow the idea that increases in concentration will be given more weight than absolute post-merger concentration.

Then – the most difficult part – the Guidelines and Agency advocacy need to convince the courts to follow these stricter levels of scrutiny. Most actual antitrust enforcement continues to sit well above the highest concentrations levels stated in the 2010 Guidelines.[82] The Guidelines need to make a credible, focused case for why the relationship between higher concentration and the exercise of market power is important, and justifying these thresholds. That target is not well served by the mash of diverse factors presented in the current draft.

Because they are revisionist, an essential goal of these Guidelines should be to attain judicial acceptance. The way to do that is to tie stricter merger concentration standards to the standards for scientific evidence. The bulk of recent empirical literature is quite favorable to the proposition that merger efforts would be strengthened a great deal by stricter structural standards.[83] This depends on expert opinion and recent economic scholarship. Further, it shifts the focus away from substantive antitrust rules, which sadly carry a fair amount of ideological baggage, to evidentiary standards where the issues concern methodology rather than conclusions.[84] A federal judiciary that may be reluctant to embrace more aggressive antitrust generally, might be more receptive to arguments based on sound science. That science also places the focus where it should be: on post-merger prices and output, consistent with the goals of antitrust generally. That is, these Guidelines should acknowledge that economics can be their friend.

Guideline 2. Mergers that Eliminate Substantial Competition Between Firms

Original §7 as passed in 1914 addressed mergers that threatened to lessen competition substantially "between" the merging firms.[85] That language was widely interpreted to limit the provision's application to horizontal mergers, although the Supreme Court eventually disagreed.[86] Of course, every horizontal merger literally eliminates competition between the parties to the merger, for they are now a single firm. Section 7 as amended requires market injury and not merely a lessening of competition between the merging firms.

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[82] See Carl Shapiro, How Would These Draft Guidelines Work in Practice? (Promarket, Sep. 1, 2023), https://www.promarket.org/2023/09/01/carl-shapiro-how-would-these-draft-guidelines-work-in-practice/.

[83] See discussion *infra* on "procompetitive efficiencies and post-merger pricing"

[84] See Daubert v. Merrell Dow Pharma., 509 U.S. 579, 595 (1993) ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

[85] The original language of Clayton Act §7 was limited to mergers:

> …where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition….

Act of Oct. 15, 1914, Ch. 323, §7, 38 Stat. 731.

[86] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (applying original §7 to vertical acquisition, over dissent by Justices Burton and Frankfurter).

The 2010 Horizontal Merger Guidelines had spoken of mergers that have anticompetitive "unilateral effects." The logic of unilateral effects in most situations is that mergers of particularly close substitutes in a differentiated market can result in a price increase charged by the post-merger firm, while the price effects for most other firms are less. The recasting of "unilateral effects" analysis, as here, to refer to effects other than price increases complicates the analysis of such mergers, which now account for half or more of merger evaluations.

Unilateral effects theory has provided an extremely useful set of probabilistic metrics for predicting the consequences of mergers between firms selling close substitutes. It is formally unrelated to concentration, and indeed the formal methodologies need not even require a market definition. Its methodology is intended to predict the likelihood of merger-driven price increases.[87] As such, however, it is entirely price driven. For example, an "elasticity" measures a firm's price changes in response to a change in output, and does so through well-established methodologies. But how are economists going to model a potpourri of effects that includes prices, quality, "attractive features," wages, etc, as these draft Guidelines suggest? One likely outcome is that these effects will be reduced to their cash value. The economic analysis will ultimately be based on shadow prices in any event. A legitimate concern is that, far from increasing the effectiveness of merger enforcement in this area, the result will be greater complexity and fewer successful challenges.[88]

An Appendix in the draft Guidelines provide examples of the types of evidence that will be used in such cases, including such things as whether firms consider one another in strategic deliberations, the impact of new entry on other firms, customer substitution, impact of competitive decisions on rivals, or the impact of eliminating competition between the firms.[89] The Guidelines indicate that their search for competitive harm from such mergers will include higher prices but will not be limited to them. They observe that "The ratio of the value of diverted sales to the revenues lost by the first firm can be an indicator of the upward pricing pressure that would result from the loss of competition between the two firms." In addition, "Analogous concepts can be applied to analyze the impact on rivals of worsening terms other than price."[90] They also acknowledge use of such factors as diversion ratios, which measure the rate of substitution from one firm to another in response to a price change.[91]

These methodologies are consistent with those that are in common practice in the Agencies, although as currently used they measure price and output effects, which is better

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[87]See, e.g., Nathan H. Miller & Gloria Sheu, Quantitative Methods for Evaluating the Unilateral Effects of Mergers, 58 Rev. Indus. Org. 143 (2021); Malcolm B. Coate, Unilateral Effects Analysis and the Upward Pricing Pressure Model: Evidence from the Federal Trade Commission (SSRN, May, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837645;
[88]In a later observation on sources of evidence, the draft Guidelines state that the Agencies will "typically give more weight to analysis using high quality data and adhering to rigorous standards." 2023dMG, Appendix 1, p. 2.
[89]Id. at 30.
[90]Id., Appendix 2, at 5.
[91] Ibid., observing that "A measure of the impact on rivals of competitive actions is the value of diverted sales from a price increase."

behaved than the range of effects for which these draft Guidelines indicate concern. While the Agencies state that they will use "analogous concepts" to estimate "the impact on rivals of worsening terms other than price," they do not provide a metric for carrying this out. In all events a lessening of competition is not shown by simple premerger customer switching between two sellers. There must also be an inference that as a result of the merger output is lower, prices higher, or some other indicator that competition itself is lessened.

Guideline 4. Mergers Eliminating Potential Entrants in Concentrated Market

Prior to the 2023 draft Merger Guidelines, the most recent Guidelines to discuss potential competition mergers as a distinctive class were issued in 1982. They acknowledged two different theories for challenging mergers on potential competition grounds, stating:

> **"Harm to Perceived Potential Competition"**
> By eliminating a significant present competitive threat that constrains the behavior of the firms already in the market, the merger could result in an immediate deterioration in market performance. And
>
> **Harm to "Actual Potential Competition."**
> By eliminating the possibility of entry by the acquiring firm in a more procompetitive manner, the merger could result in a lost opportunity for improvement in market performance resulting from the addition of a significant competitor.[92]

The 1982 Guidelines add:

> Because of the close relationship between perceived potential competition and actual potential competition, the Department will evaluate mergers that raise either type of potential competition concern under a single structural analysis.[93]

By the time of those Guidelines the Supreme Court had already given its final word on potential competition cases with the *Marine Bancorp*. decision in 1974.[94] While it had applied the perceived potential entrant doctrine, it never approved the actual potential entrant doctrine, although it did not reject it either.[95]

One problem with the actual potential entrant theory is doubt about statutory coverage. That issue looms larger in this day of stricter textualism than it did in the 1970s. Section 7 prevents mergers that "may substantially *lessen* competition," not mergers that merely fail to increase competition. A firm's entry into a market by merger does not reduce the number of firms in that market, and there is no reason for thinking that competition would be otherwise lessened. That is why the *Falstaff* decision described the doctrine as involving mergers that "would have no

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[92]1982 Merger Guidelines §IV.A.1&2,
https://www.justice.gov/archives/atr/1982-merger-guidelines.
[93]*Id*. IV.A.3.
[94]United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).
[95]*Falstaff*, 410 U.S at 537 ("it is not necessary to reach the question…." accord *Marine Bancorp,* 418 U.S. at 625, 635-636).

influence whatsoever on the present state of competition in the market."[96] Indeed, the presence of an aggressive acquirer might even increase it. The merger is unlawful, if at all, because it fails to provide the additional competition that would have resulted had the firm entered de novo rather than by acquisition. In that case, of course, there would be one additional firm in the market. Nevertheless, the courts and the FTC have been divided on coverage.[97] In 2023 in FTC v. Meta Platforms, Inc., the FTC urged it and the district court assumed that the Ninth Circuit would follow it, but declined to find coverage on the particular facts.[98]

In its *Penn-Olin* decision in 1964 the Supreme Court took this doctrine to a perverse extreme.[99] The court condemned the formation of a joint venture to construct a new facility for production of sodium chlorate that significantly increased output in that market. The theory of the complaint was that if the two firms had moved separately rather than jointly the result might have been two plants and output would have increased even more. The Court did not explain why the joint venture transaction threatened to substantially "lessen" competition.

The draft Merger Guidelines discussion of the actual potential entrant doctrine is somewhat confusing. It states that the Agencies will examine:

> whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered "a substantial likelihood of ultimately producing deconcentration of [the] market or other significant procompetitive effects."[100]

However, the premise of the actual potential entrant doctrine, including the facts of the *Marine Bancorp.* decision that the draft cites, is that one of the firms is *already* in the market and the other lies outside. The facts that the draft Guidelines statement describes actually resemble the highly unusual ones of the previously mentioned *Penn-Olin* case, which involved a joint venture of two firms.

A useful potential competition theory sits between two extremes. One is the view that potential competition will always discipline monopoly, so there is nothing to worry about. If that is true, then we do not need a potential competition merger doctrine. At the other extreme is the view that potential competition is impotent and that the only competition that counts is that among actual current rivals. But if no one is a potential competitor, then the doctrine is useless as well.

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[96] *Ibid*.

[97] Decisions recognizing the doctrine include *Grand Union Co.*, 102 F.T.C. 812, 1050-1051 (1983), *Tenneco, Inc.*, 98 F.T.C. 464, 577 (1981); rev'd on other grounds, 689 F.2d 346 (2d Cir. 1982); *Heublein, Inc.*, 96 F.T.C. 385, 583 (1980); Yamaha Motor Co., Ltd. V. FTC, 657 F.2d 971, 977 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982). Decisions declining to decide include *Tenneco,* 689 F.2d at 355; *BOC Intl., Ltd. v. FTC,* 557 F.2d 24, 25 (2d Cir. 1977); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 293-294 (4th Cir. 1977).

[98] *FTC v. Meta Platforms, Inc*., ___ F.Supp.3d ___, 2023 WL 2346238 (N.D.Cal. Feb. 3, 2023) (noting that the Ninth Circuit had never addressed actual potential entrant doctrine but assuming in dicta that it was valid).

[99] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-71 (1964).

[100] Id. at 12, quoting *United States v. Marine Bancorp.*, 418 U.S. 602, 633 (1974).

So one element that the potential competition merger cases share is the idea that some firms but not all are potential competitors. Antitrust courts must be able to distinguish them. In the typical potential competition case, there is some firm sitting just outside the market, but who might come in if conditions are right. If there were a large number of such firms, then we would have nothing to worry about. As the Supreme Court observed in the *Procter & Gamble* decision, "the number of potential entrants was not so large that the elimination of one would be insignificant."[101]

Previously commenting on the issue, I have suggested a maximum number of three potential entrants, with the burden of proof on the defendant to show that the number of potential entrants is sufficiently large that competitive concerns are unwarranted.[102]

Not all firms are equally well placed to enter, and some may have entry advantages over others.[103] Even when the universe of potential entrants is large, it is quite plausible that one or a few are particularly responsive to price or structural changes in the target market. Whether and how many will enter depends on factors such as the size of the price increase. For example, only one or two firms might enter in response to a 3% price increase, while many more might enter in response to an increase of 10%. How many firms and how large a price increase we should tolerate are questions of fact and policy. The concern does serve as a warning, however, that when a significant number of equally plausible entrants exist, the elimination of one of them is unlikely to have much of a competitive effect.

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[101] *FTC v. Procter & Gamble Co*., 386 U.S. 568, 581 (1967). Accord 1984 Merger Guidelines, §4.132-3. *See also* Wilson Sporting Goods Co., 288 F. Supp. 543, 563 (N.D. Ill. 1968) (number of potential entrants must be small); British Oxygen Co., Ltd., 86 F.T.C. 1241, 1351 (1975), remanded on other grounds, 557 F.2d 24 (2d Cir. 1977) (similar). Numerous decisions have found that the availability of numerous potential entrants undermined the antitrust claim. *E.g*., United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980) (identifying at least six other entrants); FTC v. Atlantic Richfield Co., 549 F.2d 289, 300 (4th Cir. 1977) (86 firms too many); United States v. Hughes Tool Co., 415 F. Supp. 637, 646 (C.D. Cal. 1976) (many other potential entrants indicated by existing firms' response to court questionnaire); United States v. Connecticut Natl. Bank, 362 F. Supp. 240, 255-258 (D. Conn. 1973), vacated on other grounds, 418 U.S. 656 (1974) (many other banks equally likely entrants); United States v. Crowell Collier & Macmillan, Inc., 361 F. Supp. 983, 996, 1004-1005 (S.D.N.Y. 1973) (numerous garment makers could enter band uniform market; many domestic and foreign producers could enter band instrument market); United States v. Crocker-Anglo Natl. Bank, 277 F. Supp. 133, 182-183 (N.D. Cal. 1967) (ample number of new entrants, actual and potential); Beatrice Foods Co., 81 F.T.C. 481, 528, 530-533 (1972) (easy entry; many other firms equally likely); Sterling Drug Inc., 80 F.T.C. 477, 606 (1972) (a number of other actors on the fringe at time of acquisition who actually entered afterwards). *Cf*. FTC v. Meta Platforms, Inc., ___ F.Supp.3d ___, 2023 WL 2346238 (N.D.Cal. Feb. 3, 2023) (not considering alternate entrants or their number; apparently assuming that Facebook (Meta) was the only likely entrant). On the universe of potential entrants see 5 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1130 (4th ed. 2017).

[102] See Antitrust Law, ¶1130.

[103] On the relevance of differential placement or other comparative firm advantage to vertical foreclosure, *see* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶570 (5th ed. 2021).

The discussion of the acceptable universe of potential entrant in the draft 2023 Merger Guidelines is very brief, mentioning in a footnote that "Where there are few equivalent potential entrants including one or both of the merging firms, that indicates that the future market, once commercialized, will be concentrated. The Agencies will consider other potential entrants' capabilities and incentives in comparison to the merging potential entrant to assess equivalence.[104]

The draft Merger Guidelines also state that in identifying potential entrants they will rely mainly or perhaps even exclusively on objective evidence. During the era of Supreme Court potential competition merger cases this was a contentious issue, leading then Associate Justice Rehnquist to protest the majority's reliance on objective evidence.[105] The FTC itself took the position that the "best evidence concerning the incentives of the acquiring firm to enter independently… is likely to be subjective."[106]

While we presume that a firm wishes to maximize its profit, we would hardly expect a firm to enter all or even a small portion of the markets into which an expert observer concluded that entry would be profitable. New entry is an investment, often a costly and risky one, and every firm is faced with a large number of investment possibilities.

Justice Rehnquist's position would have reduced the range of potential competition merger decisions by limiting them to situations in which the acquired firm had actually contemplated or "intended" to enter a market de novo as an alternative. The distinction is relevant to the probabilistic standard incorporated into the Clayton Act – "where the effect may be." Considered purely objectively, the range of potential competitors is very large. For example, weighed objectively Ford, an automobile manufacturer, might seem like a plausible entrant into the markets for auto repair, bicycles, roller skates, gasoline, roadside motels, or digital maps. It may have technical or business capabilities giving it an entry advantage in those markets. Does that mean that it should be regarded as a potential entrant based on those considerations alone? If the answer is yes, then GM, Chysler, Toytota, Subaru, and several others would very likely also be potential entrants. But if the query is limited to markets where Ford has seriously contemplated entry the range could be much narrower.

To summarize, using purely objective evidence makes it easier to "show," or at least speculate, that an outside firm is a potential entrant based on capabilities and predictions of profitability. In the process, however, it also tends to make the universe of potential entrants larger.

How much can be inferred from the acquisition itself? Suppose that Ford acquires a bicycle manufacturer and that acquisition is challenged under potential competition doctrine. The acquisition itself manifests intent to enter, but not to enter independently, which involves added capacity in the target market, a new product, new manufacturing and distribution experience and typically lower prices subsequent to the merger. There could be additional evidence, such as actual

[104]2023dMG, p. 12 n. 36, https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.
[105]United States v. Falstaff Brewing Corp., 410 U.S. 526, 575-576 (1973) (Rehquist, j., dissenting).
[106]*B.A.T. Indus., Ltd*., 104 FTC 852, 927-928 (1984).

but failed entry attempts.[107] That requires consideration of the types of factors that ordinarily go into analysis of entry barriers: the nonrecoverable cost of entry, risk of failure, and a prediction of post-entry prices.[108]

Both the 2010 Guidelines and the 2023 draft Guidelines discuss the impact of entry into concentrated markets on post-entry prices, although in their treatment of entry barriers rather than potential competition mergers.[109] Entry at minimum profitable scale into a concentrated market will drive prices down, as the entrant's output is added to that of the incumbents. The amount they go down depends on the new entrant's minimum viable scale of entry and the market elasticity of demand.

To illustrate, if the minimum viable scale of entry into a concentrated market is 15% and the price elasticity of demand is 1, then entry increasing the market's output by 15% will reduce the post-entry price by 15%, assuming that the elasticity remains constant. To the extent elasticity declines at lower prices, as it usually does, the price decrease would be less; to the extent that rivals reduce their own prices in response to new entry, it might be more. That is, predicting the post-

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[107]*See* Yamaha Motor Co., Ltd. V. FTC, 657 F.2d 971, 978 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (prior to its acquisition Yamaha, which had not made boat motors in the United States, made two unsuccessful attempts to enter the American market; but if so, why was it a potential de novo entrant). *Cf*. Tenneco, Inc. v. FTC, 689 F.2d 346, 353 (2d Cir. 1982) (dismissing complaint, citing lack of evidence that Tenneco would have entered the market de novo, although there was "abundant evidence" that it had an interest and incentive to enter but that viable smaller firms were not available); BOC Intern., Ltd. V. FTC, 557 F.2d 24, 28 (2d Cir. 1977) (geographic market extension merger; FTC's fact finding that firm might "eventually" enter a market de novo was in adequate because the law mandates that §7 requires more than "ephemeral possibilities"); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972) (few firms other than Kennecott had the experience and assets necessary to enter the coal market, thus making it a likely entrant); FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) (evidence indicated very high entry barriers into target market, copper mining, and new entry would take between 10 and 19 years; so acquirer could not have been an actual potential entrant); United States v. Phillips Petro Co., 367 F.Supp. 1226 (C.D. Cal. 1973) (no evidence that Phillips had ever attempted to enter target market, but objective evidence indicated that it had the ability to enter; sufficient to make it a likely entrant); ASARCO v. Pennzoil United, Inc, 295 F.Supp. 146, 155 (D. Del. 1969) (acquiring firm had been studying alternative methods of entering prior to acquisition; sufficient to warrant injunction).

[108]On the alternative definitions of entry barriers under antitrust law, *see* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶420-422 (5th ed. 2021).

[109]The draft Guidelines acknowledge that the market will be more competitive because of de novo entry, but not that an anticipated post-entry price reduction reduces the incentive to enter de novo:

> If the merging firm had a reasonable probability of entering the concentrated relevant market, the Agencies will usually presume that the resulting deconcentration and other benefits that would have resulted from its entry would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*.

2023 dMG, 12.

entry price decline involves some behavioral assumptions as well as arithmetic, but we can assume that it will occur in most markets where potential competition doctrine has relevance.

That price decrease is unlikely to occur, however, in response to a simple change of ownership of a firm in the target market – that is, when the outside firm proceeds by merger with an insider. Indeed, an important point of a policy encouraging independent entry is to lower target market prices. Nonetheless, the fact remains that the same lowered prices that make entry de novo desirable as a matter of policy, also tend to make it unprofitable to the entering firm.[110] Before it will enter, the potential entrant must anticipate profitability at post-entry prices.[111]

The better rule should be that the acquisition itself manifests an intent to enter, but not necessarily an intent to enter de novo. As a result, some additional evidence about the plausibility and effects of de novo entry should be required. In *Meta Platforms* the district court did not reject an objective approach, although it did find the evidence in that case to be insufficient.[112]

The 2023 draft merger Guidelines rely strongly on objective evidence, although they do not rule out subjective evidence altogether. The draft Guidelines begin by querying whether there is a "reasonable probability of alternative entry," which is based on objective evidence concerning a firm's "capabilities and incentives,"[113] including evidence "of any advantages that would make the firm well-situated to enter," and including evidence of past entry. The 2023 Draft Guidelines elaborate:

> Objective evidence is highly probative and includes evidence of feasible means of entry or communications by the company indicating plans to expand or reallocate resources in a

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[110] *See* Timothy F. Bresnahan and Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991) (finding significant effects from new entry when the target market has three or fewer firms, but substantially less with larger numbers); Richard J. Gilbert, *The Role of Potential Competition in Industrial Organization*, 3 J. ECON. PERSP. 108 (1989) (anticipated price cutting in response to new entry serves as a significant entry barrier).

[111] On this point, see *See* Louis Kaplow, *Entry and Merger Analysis*, 85 ANTITRUST L.J. 1083 (2023) (noting the complex array of assumptions going into calculus of price responses to new entry); Sean P. Sullivan & Henry C. Su, *Antitrust Time Travel: Entry and Potential Competition*, 85 ANTITRUST L.J. 147 (2023) (similar).

[112] FTC v. Meta Platforms, Inc., ___ F.Supp.3d ___, 2023 WL 2346238 (N. D. Cal. Feb. 3, 2023):

> the Court is not persuaded that this evidence establishes that it was "reasonably probable" Meta would enter the relevant market. Meta's undisputed financial resources and engineering manpower are counterbalanced by its necessary reliance on external fitness companies or experts to provide the actual workout content and a production studio for filming and post-production. Furthermore, the record is inconclusive as to Meta's incentives to enter the relevant market. There are certainly some incentives for Meta to enter the market *de novo*, such as a deeper integration between the VR fitness hardware and software. However, it is not clear that Meta's readily apparent excitement about fitness as a core VR use case would necessarily translate to an intent to build its own dedicated fitness app market if it could enter by acquisition.

[113] 2023dMG at 11.

> way that could increase competition in the relevant market. Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants' internal perceptions or direct evidence of strategic reactions to the potential entrant. If such evidence is available, it can weigh in favor of finding that a current market participant could reasonably consider the firm to be a potential entrant.[114]

That statement mixes the concerns of the actual and perceived potential entrant doctrines. For both, one question is whether the firm likely would have entered de novo had it not taken the merger route. For the perceived potential entrant doctrine, however, and additional query is whether firms inside the market *perceived*, or feared, that the outside firm would enter in response to higher prices. Those perceptions might exist even though the outside firm was not in fact likely to enter de novo.

Referring to perceived potential entry, the draft Guidelines also say:

> Subjective evidence indicating that current market participants, including for example customers, suppliers, or distributors, internally perceive the merging firm to be a potential entrant can also establish a likely influence. Direct evidence that the firm's presence or behavior has affected or is affecting current market participants' strategic decisions can also establish a likely influence. Circumstantial evidence that the firm's presence or behavior had a direct effect on the competitive reactions of firms in the market may also show likely influence.[115]

The draft Guidelines' description of incumbent firm's exclusion strategies under a perceived potential entrant doctrine is not limited to pricing. It mentions other strategic decisions, although without specifying what they are. Descriptively, that may be a better way to describe strategic entry deterrence, for it need not always be about price. But it also complicates the query. What exactly is it that the incumbent firms do in order to stave off a perceived entry threat? Further, is there some reason that it cannot be translated into price as a metric? For example, a firm might offer free delivery, longer warranties, or design changes in order to make entry less attractive to an outsider, but in order to assess the impact we would likely have to reduce them to a cost metric.

[114] 2023dMG at 13.
[115] *Ibid*.

In all events, the choice between entry de novo and by merger is a complicated one. The failure rate for mergers is high,[116] but for new entry it is very likely even higher.[117] Successful new entry involves the displacement of existing firms and their possible bankruptcy, so it can harm smaller rivals more and produce more waste in the form of prematurely retired productive assets. One well known story is Walmart, which enters new markets mainly de novo, and in the process harms competing grocers both large and small.[118] This is particularly likely to be true in more concentrated markets where scale economies are significant. As noted earlier, one advantage of new entry over acquisition is that new entry often results in lower post-entry prices,[119] but for that reason it can also be less attractive to outside firms.

Potential Entry and Market Definition

On thing that the 2023 draft Merger Guidelines do not address is whether changes in the methodology for defining markets affects the scope or even the continuing need for potential competition doctrines. The hypothetical monopolist test for a relevant market considers not only who is in a market at this instant but also who would be in the market in response to a small but significant increase in price. The test is inherently dynamic in that it predicts firm (or sometime consumer) movement in response to price changes. But that is also what the potential competition doctrines do. A viable potential competition doctrine would require a firm qualifying as a potential entrant but who was nevertheless not "in the market" in response to a small but significant price increase. If such a firm were in the market, then it should be treated as a competitor and the merger considered to be horizontal. That was the route that the Supreme Court took in the *El Paso* case,[120] where the acquired firm had previously bid to come into the market but had not ever made any sales. The Court responded that "[u]nsuccessful bidders are no less competitors than the successful one,"[121] and treated the merger as horizontal. The interesting but unanswered policy question that leaves is this: Are there firms who would not be considered as "in the market" under a hypothetical monopolist market definition, but who nevertheless should be considered as potential entrants?

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[116] See Graham Kenny Don't Make This Common M&A Mistake, Harv. Bus. Rev. Today (March 16, 2020) (estimating that between 70% and 90% of mergers fail), https://hbr.org/2020/03/dont-make-this-common-ma-mistake#:~:text=According%20to%20most%20studies%2C%20between,integrating%20the%20two%20parties%20involved..

[117]Luisa Zhou, The Percentage of Businesses that Fail (Statistics and Failure Rates) (July 28, 2023) (estimating 90% overall, and 75% within 15 years), https://www.luisazhou.com/blog/businesses-that-fail/

[118]See Richard Volpe & Michael A. Boland, The Economic Impacts of Walmart Supercenters, 14 Ann. Rev. Res. Econ. 43 (2022).

[119] As it does in the case of Walmart. *See ibid*.

[120]United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[121]*Id*. at 661. *Cf*. Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012), cert. denied 570 U.S. 917 (2014) (where firm need only retool its production line in order to compete with the acquiring firm and had already contemplated doing so the merger should be treated as horizontal).

Guidelines 5 & 6. Foreclosure Concerns: Mergers Creating Firms that Control Products or Services that Rivals Use to Compete; Vertical Mergers

Guidelines 5, 6 & 7 all deal with various categories of mergers of firms producing complementary products. To an extent, so does Guideline 10 dealing with two-sided platforms. As a general matter, mergers involving complements pose fewer threats of competitive harm and more opportunities for cost savings. Vertical mergers aside, mergers of complements have never been treated as a separate category in any edition of the Guidelines, and they are woefully undertheorized. The three categories listed as Guidelines 5, 6 & 7 provoke similar concerns; namely, that a firm that operates in one market can profit by using a merger to exclude competition in a secondary market.

Guidelines 5 states that a "merger involving products, services, or customers that rivals use to compete may substantially lessen competition when it results in a firm with both the ability and incentive to make it harder for its rivals to compete in the relevant market, or to eliminate them or deter the entry of new firms into the relevant market."[122] This states a "foreclosure" concern such as has traditionally been applied to vertical mergers, but extended to other than vertically related complements.

Guideline 6 addresses vertical mergers, which have been recognized in previous Guidelines as a distinct category. Vertical mergers are simply a special case of mergers of complements. A producing firm, its inputs, and its distribution are all complements in the delivery of a final good to its consumer.

The distinction between vertical and complementary pre-merger alignments is often arbitrary, depending on the organization of a firm's production system. For example, if automobiles are sold with GPS systems installed, an auto maker's purchase of a GPS maker for its own manufacturing process would be regarded as "vertical." But if customers buy the car without a GPS system and procure it elsewhere, then the two products are complements and would fall outside any of the classification systems under which mergers are evaluated (assuming that one of them is not a potential entrant). Problematically, some products such as the GPS in the illustration may be sold via both arrangements, even by the same vendor and at the same time. This was true, for example, when car radios were treated as "options." The manufacturer might supply one, which the manufacturer or dealer would install, or a customer might purchase the car without a radio and procure it elsewhere or not at all.

This approach may usefully extend merger coverage to complementary products, an area not generally covered in previous Guidelines. For example, if the hypothetical automaker's acquisition of a GPS maker denied access to that product to other automakers, the merger could be anticompetitive under either a vertical theory or a theory of a merger of complements. From that point, one would expect that foreclosure would be measured by similar percentages.

[122] Id. at 15.

By analogy, the law of tying arrangements is often applied to complements but also to vertical arrangements such as franchises. For example, in the *Kodak* case the plaintiffs claimed that servicing and parts for photocopiers could be obtained from other sources, but by tying Kodak insisted on selling these elements to all purchasers of Kodak photocopiers.[123] Many so-called "tech ties" occur when a firm incorporates a tied product directly into its own product.[124]

One contribution of Guideline 6 is its suggestion that a vertical merger should be challengeable if it forecloses at least 50% of a relevant market.[125] While that number is more aggressive than existing law, it serves to bring vertical merger doctrine more closely into alignment with the law of vertical contractual restraints on competition. For tying and exclusive dealing the presumptive standard for illegality is in the range of 30%-40%, and there is no strong reason for thinking that the standard for acquisitions should be different. If there are significant differences, they should be pursued on a case-by-case basis. The draft will also permit pursuing mergers for which foreclosure is less than 50%, provided that there is also evidence that the acquisition would "restrict options along the supply chain, depriving rivals of a fair opportunity to compete." They do not require a showing of reduced output or higher prices as a result.

The 50% foreclosure threshold is not stated to be presumptive, but rather "subject to … rebuttal evidence…" as outlined in Section IV. That sounds like a distinction without a difference, but I suspect that it was driven in part by the D.C. Circuit's conclusion in *AT&T/Time Warner* that "statistics about the change in market concentration" cannot be used to establish a presumption.[126] The court's statement itself is peculiar, because a vertical merger does not typically result in a change in concentration. Be that as it may, the way it is stated in this Guideline seems appropriate in light of that statement.

The Guideline also cites a "trend toward vertical integration" as an exacerbating factor. Problematically, such a trend is just as likely to be procompetitive as anticompetitive. If vertical integration or unions of complements reduce firms' costs, unintegrated firms may be compelled to integrate vertically in order to compete. The Guidelines speak of a vertical merger under these circumstances as "motivated by a desire to secure supply or distribution" when other firms are integrated as well. They also acknowledge the possibility that a vertical merger might injure unintegrated rivals by raising their costs.

One omission in the Guidelines is discussion of double marginalization. Double marginalization occurs when two makers of complements or vertically related firms each have a degree of market power but are unable to coordinate their output. If each one sets its profit-maximizing price individually, the result will be output that is lower and prices that are higher

[123]Eastman Kodak Co. v. Image Tech. Svces, 504 U.S. 451 (1992).
[124]See Dennis W. Carlton & Michael Waldman, The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 Rand J. Econ. 194 (2002); John M. Newman, Anticompetitive Product Design in the New Economy, 39 Fla. St. U.L. Rev. 681 (2012).
[125] Guidelines 6, p. 17.
[126] United States v. AT&T, Inc., 916 F.3d 1029 (D.C.Cir. 2019).

than if only one firm with market power were present.[127] The concept has been overused in the past and there may be non-merger alternatives for addressing it, including contracts stipulating such things as volume requirements or maximum resale price maintenance.[128] Nevertheless, it is hardly irrelevant and can sometimes explain why a firm is motivated to integrate into a concentrated market, such as when it suspects collusion at a vertically related or in some cases other complementary level.

The theory of double marginalization applies to any two firms whose products are ordinarily used together, including both vertically related firms and producers of complements. One difference, however, is that vertically related firms deal with each other all the time, so it may not be particularly difficult for them to coordinate their output, as in the maximum RPM situation. By contrast, firms that sell complements are not in the same position, and coordination may be more difficult for them. As a result, double marginalization should be relevant in all of the Guidelines' situations involving complements. That would include Guidelines 5, 6, 7, & 10 at a minimum.

In sharp contrast to the 2020 Vertical Merger Guidelines, previously withdrawn by the FTC and in any event superseded by these Guidelines, changes in the terms of bargaining are not mentioned as a factor for assessing vertical mergers.[129] While that concept may have been overused in the 2020 VGM, it is hardly irrelevant and should at least be mentioned.

Finally, while the draft Merger Guidelines cite the Supreme Court's *Brown Shoe* decision extensively, they do not cite the portion of it indicating that a vertical merger might be unlawful because it results in lower costs, making it more difficult for rivals to compete.[130] Whether that

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[127] See, e.g., United States v. AT&T, Inc., 916 F.3d 1029, 1036 (D.D.C. 2018). One member of the previous administration expressed a strong belief that elimination of double marginalization was a prominent procompetitive rationale for vertical mergers. See Makan Delrahim, "Harder, Better, Faster, Stronger": Evaluating EDM as a Defense in Vertical Mergers, 26 Geo. Mason L. Rev. 1427 (2019).

[128]Maximum RPM can address double marginalization by enabling an upstream firm to limit dealer markups directly. E.g., a manufacturer might charge a dealer $10 for a product but establishe a maximum resale price of $12. In that case the manufacturer has decided that the dealer is entitled to a $2 markup, just as if the dealer were owned by the manufacturer.

[129]See U.S. Dept. of Justice & FTC, Vertical Merger Guidelines (June 30, 2020), https://www.justice.gov/atr/page/file/1290686/download.

[130]*Brown Shoe*, 370 U.S. at 344 (in the horizontal section of the opinion, but referring to the effects of integrating retailing and manufacturing):

> A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to

omission operates as an assurance that the Guidelines will not be used to condemn mergers that result in lower prices is not clear. In any event, we noted above that in *Cargill* the Supreme Court concluded that condemning a merger for this reason would be "inimical to the goals of the antitrust laws."

Guideline 7. Mergers Entrenching or Extending a Dominant Position.

Guideline 7 provides that "Mergers Should Not Entrench or Extend A Dominant Position." This Guideline could apply to a merger of firms in any premerger competitive relationship, including horizontal, vertical, potential competition, or some other relationship. A few of the decisions raising entrenchment as an issue are also analyzed either as vertical mergers or as potential competition mergers.[131] The concern was also stated in the 1968 Merger Guidelines,[132] but omitted in the 1982 and 1992 Guidelines. The term appears a single time in the 2010 Horizontal Merger Guidelines, which state that the "unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or *entrench* market power…."[133] That is an appropriate use of the term, specifically linking it to the durability of market power. The 2010 Guidelines do nothing further with "entrenchment" as a distinct concern.

"Entrenchment" is concerned with exclusion of competition. Original §2 of the Clayton Act (predatory pricing) as well as §3 (exclusive dealing and tying) use identical "substantially lessen competition or tend to create a monopoly" language to address exclusionary practices. Previous Guidelines have largely ignored or at least underemphasized exclusionary conduct. Adding exclusion as a concern is wise, but the question is how to go about it?

The Supreme Court discussed entrenchment as a merger concern in several decisions in the 1960s and 1970s. In the *Citizens and Southern* case, Justice Brennan mentioned it in a dissent.[134] In *Marine Bancorporation* the Court acknowledged the idea but concluded that anticompetitive entrenchment was not likely to occur.[135] A dissent by Justice White disagreed.[136] A third decision, *P&G*, condemned a merger on potential competition grounds, observing that

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> recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

[131] E.g., United States v. E.I. du Pont de Nemours & Co., 3661 U.S. 316 (1961) ("Dupont/GM," vertical merger), Ford Motor Co. v. United States, 405 U.S. 562 (1972) (Ford/Autolite, vertical merger), FTC v. Procter & Gamble, 386 U.S. 568 (1967) ("Clorox," potential competition merger).

[132] USDOJ, Merger Guidelines II., 20. (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines.

[133] USDOJ and FTC, Merger Guidelines (2010), §1, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (emphasis added).

[134] United States v. Citizens and Southern Nat. Bank, 422 U.S. 86 (1975).

[135] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 641 (1974).

[136] Id. at 649 (J. White, dissenting).

Clorox, the acquired firm, was "solidly entrenched" in its market.[137] Finally, the *Pabst* beer decision condemned a concentration-increasing merger.[138] Justice Harlan concurred, believing that the post-merger brewer might become entrenched.[139] Other decisions, like *Ford*, indicated that a vertical merger of an automobile manufacture and a spark plug maker could increase entry barriers, although it did not speak of entrenchment.[140]

Numerous lower court decisions relied on entrenchment. Many suffered from the same anti-consumer bias that pervades 1960s and 1970s merger cases: treating cost savings or product improvements as the enemy. Most of the decisions involved mergers of parties that produced complements, whether in use or in production. *Allis-Chalmers*, which the draft Guidelines cite twice, condemned a merger between a company that made steel rolling mills and another that made their electrical hookups.[141] A functioning mill needed both, which had required dealing with two different companies for the components. The court condemned the merger because it made the post-merger firm the "only company capable of designing, producing and installing a complete metal rolling mill," leading to "potential entrenchment" of its market power.[142] The 1963 *Ingersoll-Rand* decision condemned a merger of two manufacturers of complementary, noncompeting lines of mining equipment.[143] The government's theory was that the merger entrenched the firm by making it the only one offering one-stop shopping.[144] Similarly, the 1968 *Wilson* decision condemned a merger between a firm that made gymnastics equipment and another that made baseball and basketball equipment.[145] The theory was that the firm's ability to offer a broader line gave it an advantage in bidding for the business of schools, who preferred to deal with a single firm.

"Entrenchment" occurred in these cases because the merger enabled the firm to reduce its production or distribution costs, make a more attractive product, or distribute it more effectively. A merger of two components would not entrench if combining them offered no benefit. The draft Guidelines do acknowledge that the theory will not be used to challenge "simple improvements in efficiency," citing a decision rejecting a merger challenge on the ground that it would "strengthen the capital position, the resources, [and] the scientific knowhow…" of the post-merger firm.[146] That limitation is not particularly reassuring. For example, as a matter of production the Allis-Chalmers case noted above involved a simple improvement in efficiency, but it also created the only firm that had taken advantage of that improvement. So would the Agencies challenge that merger or not? Neither citation to that case in the draft suggests that it would not.

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[137] FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).
[138] United States v. Pabst Brewing Co., 384 U.S. 546 (1966).
[139] Id. at 561 (J. Harlan, concurring).
[140] Ford Motor Co. v. United States, 405 U.S. 562 (1972).
[141] Allis-Chalmers Mfg. v. White Consol. Indus., 414 F.2d 506 (3d Cir. 1969).
[142] Id. at 518.
[143] United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963).
[144] Id. at 521 ("A broad line of products possessed by some companies in the coal mining machinery industry is an advantage to them in their sales efforts….").
[145] United States v. Wilson Sporting Goods, 288 F. Supp. 543 (N.D.Ill. 1968).
[146] Emhart Corp. v. USM Corp., 527 F.2d 177 (1st Cir. 1978).

The draft Guidelines also cite as entrenchment concerns that a merger might increase entry barriers or switching costs, interfere with others' use of competitive alternatives, deprive rivals of scale economies or network effects, or eliminate a nascent competitive threat. Any one of these is plausible under the right circumstances. The Guidelines would be greatly improved if they provided examples linking these situations to higher prices or other exercises of market power – that is, to actual competitive harm rather than product or distribution improvements.

For example, "increasing switching costs" reduces the post-merger firm's elasticity of demand, enabling a price increase. Depriving rivals of scale economies or network effects is simply a way of reducing the competitive pressure a firm faces, enabling it to increase its own prices. Problematically, offering products in a way that consumers prefer can also increase switching costs and deprive rivals of scale economies. Not every instance of these practices is harmful, but only those that plausibly lead to higher prices or reduced quality. By relating the concerns to prices, output, or product quality, the Guidelines could also provide a metric for evaluating them. A pervasive problem with the draft Guidelines is that because they are so indifferent to consumer harms resulting from market power, particularly higher prices, they are unable to provide useful metrics for evaluation.

Guideline 8. Mergers Furthering a Trend Toward Concentration

Guideline 8 states that "Mergers Should not Further a Trend Toward Concentration." The *Brown Shoe* decision emphasized that concern, and it was repeated in some other decisions from that era.[147] It also appeared in the 1968 Guidelines, which would apply a stricter market share standard to mergers in markets exhibiting such a trend.[148] Those Guidelines as well as the 2023 draft Guidelines also indicate that the government would apply a stricter standard to vertical mergers if there was a significant trend toward vertical integration.[149] The concern was dropped in the 1982 Guidelines and did not reappear until 2023.

Why do markets exhibit a "trend" toward concentration? One historically important reason is changes in technology, which often involves investment in larger plants with greater fixed costs, thus leaving room for fewer firms. For example, the migration of transportation from horse drawn to gasoline vehicles led to many fewer manufacturers. Many of the early "trust" cases, such as cans and wire nails, arose out of a movement from hand-made products made by very small producers to machine made-ones that required much larger firms.[150] In a smaller number of cases the trend has worked in reverse. For example, the digital computer moved from the large mainframes that dominated the 1960s and 1970s to the era of smaller digital units, permitting many more firms to make them. Closely related is improved modes of transportation or transmittal which can make markets bigger and typically less concentrated. For

[147] E.g., United States v. Phillipsburg Nat. Bank & Trust co., 399 U.S. 350, 366 (1970).
[148] 1968 MG, *supra*, I.7.
[149] Id. II.14.
[150] E.g., United States v. American Can Co., 230 F. 859 (d. Md. 1916) (can monopoly); United States v. U.S. Steel Corp., 223 F. 55 (D. N.J. 1915) (noting United States steel's ownership of production of machine made wire nails).

example, Amazon.com and other internet sellers have undoubtedly been a significant factor in *reducing* market concentration to the extent that they provide online availability for products in addition to local offline suppliers. A town with two hardware stores comes to have at least three when Amazon and other firms are able to deliver hardware items efficiently to that location.

Another thing that increases concentration is differential rates of growth. Some firms have lower costs or are more innovative than others.[151] For example, imagine a market that starts out with 10 equal size firms, each with 10% of the market and thus an HHI of 1000. Suppose that subsequently two firms grow because they have lower costs or superior technology. Others decline. So later the array of firm sizes is 25, 25, 10,10,5,5,5,5,5,5. This new market has an HHI of 1600 (25^2, 25^2, 10^2, 10^2, 5^2, 5^2, 5^2, 5^2, 5^2, 5^2). In this case the lagging firms lost market share but did not go out of business. If some had shut down, the resulting HHI would be even higher. Further, none of the increase in concentration resulted from a merger. Relatedly, product differentiation, branding and advertising strategies tend to favor more concentrated markets, although without diminishing the amount of competition and often increasing it.[152] Further, these large firms also tend to be both more productive and more innovative.[153]

The empirical evidence indicates that markets experience increasing concentration for a variety of reasons, most of them competitively benign. As a result, there is no reason to apply differential scrutiny toward mergers exhibiting such a trend. The 2023 Guidelines seek to apply this "trend" toward concentration factor without a stated consideration of effects on output or price.[154] Rather, they consider first whether the "merger would occur in a market or industry sector where there is a significant tendency toward concentration," and second whether the increase in concentration in this particular case would be significant. They suggest that significance could be established by a change in HHI greater than 200. That would be the equivalent of a merger of two firms whose pre-merger market shares were 10% each.[155] There are good reasons for subjecting most mergers that increase the HHI by 200 or more to a close

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[151] Harold Demsetz, Industry Structure, Market Rivalry, and Public Policy 16 JLE 1 (1973).
[152] John Sutton, Sunk Costs and Market Structure: Price Competition, Advertising, and the Evolution of Concentration (1991). See Timothy F. Bresnahan, Sutton's Sunk Costs and Market Structure, 23 Rand J. Econ. 137 (1992); Daniel R. Shiman, The Intuition Behind Sutton's Theory of Endogenous Sunk Costs (SSRN, May 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018804.
[153] See David Autor, et al, The Fall of the Labor Share and the Rise of Superstar Firms, 135 Q.J. Econ. 545 (2020).
[154] The draft quoted *General Dynamics* for the proposition that

> "The Supreme Court has therefore 'adopt[ed] an approach to a determination of a 'substantial' lessening of competition [that] allow[s] the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing.'"

Quoting *Gen. Dynamics*, 415 U.S. at 497-498 nn. 7-8 (1974). Of course, in this case the Court in fact rejected pure concentration evidence as misleading.
[155] The increase in HHI resulting from a two-firm merger is double the product of the firms' individual premerger market shares.

look and even presumptive illegality even if post-merger concentration levels are relatively low.[156] There is no good reason that a trend toward concentration should be a factor.

Guideline 9. "Roll-ups": Series of Multiple Acquisitions

This particular Guideline has greatest relevance when the individual market shares of one of the two merging participants is small. One lacuna in previous Guidelines is that they address each acquisition in isolation, typically involving a single pair of firms. A merger that increased the HHI by less than 100 would be treated as presumptively lawful under both the 2010 Horizontal Merger Guidelines and the 2023 draft Guidelines.

To illustrate, if a 20% firm should acquire a 2% firm the increase in the HHI (ΔHHI) would be 20X2X2, or 80.[157] Suppose that this firm acquired three different 2% firms with the acquisitions spaced four months apart. Examining each merger in this series individually, they would look like this:

#1: 20 X 2 X 2: ΔHHI = 80
#2: 22 X 2 X 2: ΔHHI = 88
#3: 24 X 2 X 2: ΔHHI = 96.

For each successive acquisition the size of the acquiring firm has grown by the amount of the previous acquisition, but even the final one falls under the 100 ΔHHI threshold.

Alternatively, however, suppose that the firm acquired all three of the firms, with an aggregate 6% market share, in a single transaction. In that case:

20 X 6 X 2: ΔHHI = 240, a presumptively challengeable merger, certainly if the post-merger HHI exceeded 1800.

The arithmetic is simple, and certainly overly simplistic. The policy question is both important and more complex: should this series of acquisitions be treated as three discrete events or as an aggregated acquisition of the 6% firm? In both cases the firm has gone from a 20% share to a 26% share. The difference is that in the first circumstance this growth by acquisition was spaced out over a year, while in the second it occurred in a single transaction.

The Guidelines' statement on serial acquisitions observes that aggregated harm might occur "even if no single acquisition on its own would risk substantially lessening

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[156]See Vivek Bhattacharya, Gaston Illanes & David Stillerman, Merger Effects and Antitrust Enforcement: Evidence from U.S. Retail 33, Fig. 7(a) (NBER, 2023), https://www.nber.org/papers/w31123; and see discussion infra on "procompetitive efficiencies and postmerger pricing." The data set that the authors used would place even mergers in unconcentrated markets into an enforcement ("red") zone.
[157] The increase in the HHI, or ΔHHI, equals double the product of the acquiring and acquired firms.

competition…."[158] The Guideline quotes the House *Report* on the Celler-Kefauver amendment as expressing concern about "a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[159]

The point would have been clearer had it also quoted the previous sentence, which stated that competitive harm "may be achieved not in a single acquisition but as the result of a series of acquisitions…."[160] The Guidelines statement then refers to discovering "a pattern or strategy of growth through acquisition by examining both the firm's history and current of future strategic incentives."[161] That statement seems unnecessary and calculated to produce unnecessary investigative expense.

Section 7 provides that a merger is to be evaluated by its probabilistic *effects* ("where the effect may be"), not by its purpose. The only real question about such a series of transactions is whether its impact on price, output, innovation, wages, or some other indicator of competitive effects is similar to that of an aggregated single transaction. Merely as a working presumption, I suggest that the occurrence of multiple acquisitions within a two-year period should presumptively entitle the Agency to aggregate them. The two-year period is presumptive in both directions; either side should be permitted to make a case for a longer (government) or shorter (defendant) period. It is also arbitrary, and further study might suggest a longer or shorter presumptive period.

In addition, aggregation is generally appropriate only when the firms that are consecutively acquired operate in the same market. For example, suppose that a large retailer with stores scattered across the country should acquire individual stores or small chains located in Montana, Texas, and Delaware. At least at the retail level these stores do not compete with one another. The upstream level may be another story, depending on the facts.

One common observation is that very large firms such as Alphabet (Google) or Amazon have acquired numerous smaller companies, many of them extremely small.[162] However, the acquired firms operate each in its own market, which is often different from the market of other firms acquired in that same year. Should these be aggregated? To illustrate, in 2017 Amazon acquired Whole Foods, a high-end grocery chain; Graphiq, which operates as an input into Amazon Echo digital sound systems; and Body Labs, a software producer with artificial intelligence capabilities for analyzing human body shape and motion. There does not seem to be a compelling case for "aggregating" the output of these firms. Even on the upstream side, it is

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[158] 2023dMG at 22.
[159] Quoting H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[160] Ibid.
[161] 2023dMG at 22.
[162] Wikipedia maintains lists of these under the title "List of Mergers and Acquisitions by __." For example, this list of Amazon's mergers includes five firms acquired in 1998 and nine acquired in 2015. See https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Amazon.

not clear that they operate in the aggregate to increase Amazon's market share in any product beyond the forbidden limits. This situation is much different from the owner of a five-store chain in Chicago who buys a 6th, 7th, and 8th store, with the acquisitions staged over one or two years. Then a stronger case can be made that the acquisitions be aggregated, assuming that the acquired stores compete with one another.

Guideline 10. Mergers and Multi-Sided Platforms

Guideline 10 states that "When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform." They note that digital multi-side platforms "have characteristics that can exacerbate or accelerate competition problems."[163]

The guidelines observe that network effects can create a "tendency toward concentration in platform industries," and also that a "conflict of interest' may result when a platform operator is also a platform participant.[164] They state:

> When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against other competitors participating on the platform, harming competition in the product market for that product or service ….[165]

The Guidelines are not using the term "conflict of interest" in the traditional legal sense where it is applied to fiduciaries. Rather, it means something more akin to the "conflict" that might occur when Walmart sells both the active wear of third parties such as Nike and its own "Athletic Works" house brand. Then it might be tempted to favor its own brand in terms of display, pricing, or other customer convenience. Such preferencing is common among multibrand stores that have their own house brands, both on- and offline, and is rarely an antitrust violation. In any event it should not be except for a dominant firm, and then only if it leads to higher prices or reduced output. To the best of my knowledge it has never been theorized to do that as a general matter, although there may be exceptions.

Here, the Guidelines do not state a dominance requirement, but they do state that when a platform owner is dominant the Agencies will 'seek to prevent even relatively small accretions of power from inhibiting the prospects for displacing the platform or for decreasing dependency on the platform." That sentence suggests that the dominance requirement applies to the platform, rather than the particular product or service in which the self-preferencing is threatened. For example, Amazon is a dominant online platform retailer, but it has less than 3% of grocery sales, facing intense competition from offline stores. So would the Amazon/Whole Foods acquisition be challenged on the theory that it would encourage Amazon to display its own Whole Foods

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[163] 2023 dMG, p. 23.
[164] Ibid.
[165] Id. at 25.

items over competing items offered by third party sellers? The proposition that this is merely an "interpretation" of §7 rather than an attempt to make new law is more than dubious.

The important requirement of dominance in the particular product that is subject to self-preferencing is lacking. Suppose that Amazon sells multiple brands of toasters of various designs and price points. Suppose now that it acquires Toastrite, a hypothetical toaster manufacturer. It may wish to arrange its display or search results in such a way as to favor Toastrite over other brands that it carries, such as Cuisinart or Hamilton-Beach. Indeed, it may even terminate its relationship with other brands and sell Toastrite exclusively. It is difficult to see any impact at all, incipient or otherwise, on the price or quantity of toaster sales. Nor does it increase concentration in any market. In order to be consistent with merger law as a part of competition policy, however, such an effect must either be proven or shown to be likely.

The same can happen in a traditional offline market when the owner of a large multiproduct store acquires a producer of one of the products that it sells. Why the digital platform should merit adverse treatment is not spelled out, and there are good reasons to doubt the wisdom of that approach.[166]

The issues in these cases are similar to those in a vertical merger case, where the concern would be foreclosure of rivals and the draft Guidelines recommend a 50% foreclosure trigger. However, merely preferential treatment, such as a higher position in a search result or a default, would have to be counted as less severe than outright termination.[167] In the ongoing *Google* monopolization case the court measured foreclosure by looking at the percentage of sales covered by Google's default search engine contracts.[168] That's a good place to start on a motion for summary judgment, but a default is not the same thing as an exclusive deal. Pointing the other way is the fact that the §7 "where the effect may be standard" is more aggressive than the Sherman Act standard being applied in *Google*. At a minimum there must be some evidence that the default is effectively inducing a significant number of people to stay with the default choice. It is also worth noting that in such cases a narrower remedy, such as approval conditioned on an obligation not to engage in the feared the self-preferencing, is likely to be sufficient.

Also important would be proper market definition. For example, in the Amazon toaster example above, toasters are retailed competitively across a wide variety of sellers. Both Amazon and Walmart have significant shares (very likely in the low 20% range), but other large retailers sell them as well. Online and traditional brick-and-mortar sales are presumptively competitive with one another, or else one of them would have to be proven to be sufficiently insulated from the other so as to justify supracompetitive prices. That question is very market specific. For example, video streaming is a technology largely unavailable in offline stores, so that market would be limited to internet sellers. Groceries and try-on clothing are entirely different, and

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[166]See Herbert Hovenkamp, Antitrust and Self-Preferencing, Antitrust (2023, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4526022.
[167]Ibid.
[168]United States v. Google, LLC, 2023 WL 4999901 (D.D.C. Aug. 4, 2023), *19, citing 3B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶768b4 (5th ed. 2022).

online sellers face intense competition from traditional sellers and very likely operate at a competitive disadvantage.

Speaking of mergers between platforms, this particular Guideline also does not mention offsetting competitive benefits, which can be very substantial, stronger than in the general run of merger cases. One strong network effect is that value can increase dramatically as the network expands. Consider the hypothetical merger of two imaginary dating sites, *loveme.com* and *intoyou.com*. On the one hand, the merger would eliminate competition between them. That claim would have to be evaluated against evidence about the number and competitiveness of numerous other sites. If the post-merger owner blended the two sites into one, the result could be a significant product improvement, with both a larger number of seekers and a larger number of sought. Clearly the benefits of a larger network could be strong. In sum, positive network effects can operate as a significant efficiency defense in merger cases in which the combining of networks is at issue.

Although this observation may apply to some of the other Guidelines as well, one particular problem is that this one does not provide very much in the way of guidance. It has far too little discussion of the applicable markets, whether upstream or downstream, minimum market shares, offsetting effects, or how harm is to be assessed. As such it is calculated to invite additional litigation and produce poor results. To be sure, this is largely new territory and the economic literature has not been all that clarifying, but the Guidelines could be clearer about how a market power requirement should be applied, what are the minimum standards for competitive harm, and other particulars.

Guideline 11. Mergers Harming Suppliers, Including Labor

Guideline 11 of the Draft Guidelines provide that "When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers." The concerns stated in this Guideline mirror somewhat those stated in earlier Guidelines for seller-side harms, just as monopsony is the economic mirror image of monopoly.

One visible imbalance is that draft Guideline 11 expresses significantly more concern about low worker wages than Guideline 1 does about high output prices. That imbalance must either be righted or justified. Presumptively, it seems, they should be treated symmetrically, as discussed below. Further, the amount of labor and other inputs in the economy is very largely driven by customer purchasing. They buy, and in response suppliers (including labor) provide.

The draft Guidelines generally take the position that labor markets are less competitive than product markets, exhibiting higher switching costs or sunk investments. That is more likely to be true of end use retail customers than it is of small business and other commercial buyers. They also suggest that labor markets may often be smaller than product markets. Particularly at lower skill levels. While that may be true, a distinction exists between geographic and product markets.

For example, while the *geographic* market for low skill workers may be small, limited to a commuting area, to the extent these workers are less specialized and can be used across multiple output lines the *product* market could be larger. To illustrate, the market for minimum wage window washers may be geographically limited to reasonable commuting distances, but business firms in many markets need their windows washed, as well as some residences. Nurses are a different matter, for their skills are much more specialized to specific employers. The same thing is largely true for non-labor input suppliers. Some are highly specialized, perhaps even for a single customer.[169] Others, such as providers of cleaning supplies or common building components, can provide a wide range of product producers. So here it is critical that concentration be measured correctly. For example, the nurses employed by a hospital almost certainly work in a much more concentrated market than the firms supplying it with cafeteria food or cleaning agents.

In a monopsony market a firm exercises its market power by purchasing less, with the effect that its purchase prices (or wages) are suppressed. Thus one important difference is that the concern in buying markets is with lower prices, not higher ones. Whether this occurs depends on the extent of market power held by the actor(s). This typically requires a market definition. The theory of "unilateral effects" could possibly also be applied to close substitutes on buy side markets, but at this writing it is relatively undeveloped in the literature.[170] Presumptively, *increases* in buy side concentration should provide a useful metric for assessing the competitive effects of a merger in supply markets.

The Guidelines appreciate that not every merger that reduces demand for a certain input, including labor, is anticompetitive. Consolidation often leads to reduced demand, including a lower demand for workers.[171] This is presumably a reference to the elimination of duplication or various other cost savings that can accrue from a merger. For example, if two stores merge they may require only one sales manager rather than two, or they may require the services of only one accountant. While these consolidations eliminate suppliers or jobs, the reductions are not a consequence of monopsony output suppression but rather through resource savings. The antitrust laws do not incorporate a preference for featherbedding. Evaluation of market shares will address many of these problems, but even firms operating in concentrated markets can save resources by eliminating duplication. Analyzing that would be the same as any other efficiency defense. In any event, acknowledgement should be made more explicit.

The Guidelines do note that competitive harm in labor markets cannot be offset by purported benefits in product markets. That follows from the "single market" rule embraced by the *Philadelphia Bank* decision, interpreting the "any line of commerce" and "any section of the country" language of §7 of the Clayton Act. Harm in one market cannot generally be offset by

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[169]Such as Fisher Body's supply to General Motors in a well-known case. See Benjamin Klein, Fisher-General Motors and the Nature of the Firm, 43 J.L. & Econ. 105 (2000).
[170]For an attempt in labor markets, see Suresh Naidu, Eric A. Posner, and Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536, 577-580 (2018).
[171]See 2023 dMG, p. 25:

> Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces frictions for suppliers.

claimed benefits in another, no matter which side is the source of harm. On the other hand, as the 2010 Horizontal Merger Guidelines note, the exercise of prosecutorial discretion might incline the Agency not to challenge a particular merger for which offsetting benefits in a different market are significant.[172] That is a wise policy that should be continued.

Labor Harms and Product Markets

The Guidelines do not mention the important relationship between the health of labor markets and the robustness of product markets. Here, economists Jan De Loecker, Jan Eeckhout, & Gabriel Unger make an important observation:

> An increase in markups implies a decrease in aggregate output produced, whenever demand is not perfectly inelastic. Lower output produced then implies lower demand for labor. This results in both lower labor force participation and lower wages. Even if supply is perfectly elastic, real wages decrease with market power because the price of the output good has increased…."[173]

This often overlooked principle is critical to any antitrust policy that must simultaneously manage input and output markets. Labor is largely a variable cost, particular in the lower income ranges. As a result the number of jobs available is critically dependent on output in the corresponding product market. This can create an antimony if product market antitrust rules are designed in such a way as to protect higher cost businesses, resulting in higher product prices and lower output. As noted earlier, the Supreme Court would very likely not permit condemnation of a merger on the grounds that it reduced prices. But aside from that, enforcement that is excessive in the sense that it perpetuates higher costs and lower output could harm labor, depending on the amount of market power held in labor markets. On this issue Guideline #1 is troublesome. Its suggestion of condemnation based on concentration without regard to performance suggests at least the possibilities that the Agencies will challenge some output increasing mergers. If that happens, consumers and labor will *both* suffer.

One implication of this is that true efficiencies that tend toward higher output in product markets should be taken seriously. They should be difficult to prove, and the efficiencies concept has been overused. But that is no reason to impose a policy of using merger law as an output limitation device. For example, a recent empirical paper relates active antitrust enforcement to higher output and lower prices in product markets, with corresponding improvement in the availability of jobs, increased wages, and higher worker participation rates.[174] It is plausible that a policy of producing robust competitive levels of output in product

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[172] See 2010 HMG, §10 n.14.

[173] Jan de Loecker, Jan Eeckhout, and Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, 135 Q. J. Econ. 561, 611 (2020).

[174] Tania Babina, Simcha Barkai, Jessica Jeffers, Ezra Karger & Ekaterina Volkova, Antitrust Enforcement Increases Economic Activity (NBER, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4539741 (SSRN, 2023) (finding strong correlation between antitrust enforcement that leads to increased product output and lower prices, and long term gains in employment, wages, and labor participation).

markets would benefit labor more than a more aggressive policy toward a practice such as noncompete agreements. These cover perhaps 20% of the workforce while all workers can benefit from healthy product output. It is not unreasonable to assume that a 15% reduction in product output – whether caused by a cartel or by a defective antitrust policy -- will be followed by a comparable decline in jobs. This decline would show up rather quickly for lower wage hourly workers, whose job are typically the most sensitive to changes in product demand.

Guideline 12: Partial acquisitions

Partial acquisitions have been reasonably well understood in merger law since the early years of the Clayton Act.[175] Guideline 12 notes the well-established concern that an acquisition need not be of a "controlling" interest in order to have a significant impact on competition. What they add is a concern that a partial acquisition may give a firm "access to non-public, competitively sensitive information from the target firm." As they observe, this could facilitate collusion-like behavior.

Guideline 13. Other Merger Harms

Finally, Guideline 13 lists a few potential merger harms that are harder to classify, like regulation avoidance, procurement biases, dampening of a firm's incentives to compete in a concentrated market. It should go without saying that the "effect … may be substantially to lessen competition" language of §7 does not state any a priori limits to the range and types of competitive harms, but only that it be a harm to "competition." That is, the conduct must support the reasonable probability that the acquisition will lead to lower output, higher prices, reduced innovation, or similar other indicia of noncompetitive performance.

Market Definition

The draft Guidelines statement on market definition begins with boilerplate, largely taken from the *Brown Shoe* case, that a relevant market is measured by "reasonable interchangeability or use or the cross-elasticity of demand between the product itself and substitutes for it." They also note that markets may include narrower groupings of sales that are fully encompassed in broader markets.

Interchangeability at any price is rarely sufficient to establish a market. There must also be some warrant for thinking that each of the goods in a market is able to force the price of others' goods to cost. More discerning methodologies such as the hypothetical monopolist test (HMT) have been developed in order to address such questions. Under that methodology the fact finder usually tries to identify the smallest grouping of sales that could yield relatively durable monopoly prices if the sellers of that grouping were united as either a single firm (a "hypothetical monopolist") or a cartel. The draft Guidelines give a good accounting of the HMT, but indicate that it is no more than an alternative among others.

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[175] See 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1202 (partial asset acquisitions), ¶1203 (partial stock acquisitions) (4th ed. 2017).

These Guidelines list an additional potpourri of factors, some of which are relevant to determination of a smallest grouping of sales capable of being monopolied, and others that seem to reflect no more than casual observation of substitution at any price. To illustrate, consider the fact that movie goers are observed to attend theaters, purchase DVDs, or stream them from a website such as Netflix. This would seem to show the "substantial competition between the merging parties" that the Guidelines call for, but does it really show that these three diverse technologies belong in the same relevant market for antitrust purposes? This is very likely a version of the "Cellophane fallacy," named after a Supreme Court decision that reasoned too quickly from observed substitution among diverse wrapping materials that all belonged in the same market.[176] As the *Cellophane* decision also reveals, casual market definitions that ignore the relationship of market definition to economic monopoly can sometimes make markets smaller, but they are just as likely to make them larger, as in that case. Once the Supreme Court decided that wax paper, wrapping paper, and cellophane were all in the same market it dismissed the complaint. More problematically, the present draft suggests that an Agency may simply pick a methodology depending on likelihood of success.

Another problem with such an eclectic approach to market definition is that it lines up very poorly with the Guidelines' overall structuralism. These Guidelines are heavily focused on market structure rather than performance as a device for assessing the competitive consequences of a merger. But making that approach coherent depends on meaningful market definitions that are designed to capture the relevant structural concerns. Simply lumping theaters, DVD production, and video streaming into the same relevant market from observations about consumer behavior also drives conclusions about the concentration level that market experiences, but combining highly diverse technologies into the same market is not helpful and almost certain to mislead.

An Appendix 3 to the draft Guidelines provides some additional helpful details. A more detailed discussion of the hypothetical monopolist test modifies previous approaches by adding non-price terms. The traditional test queries whether a firm or cartel could exact a "small but significant and nontransitory increase in price," or SSNIP, without losing so many sales that the price increase is unprofitable. That test led to significant advances in market definition. To this the draft Guidelines would add nonprice terms to the test, renaming it the "SSNIPT" to address that it is referring to an increase in price or worsening terms.

Descriptively that modification is undoubtedly accurate in the sense that firms usually compete with each other along both price and nonprice avenues. That is particularly true in zero price markets, where sellers may exercise market power not by raising the price but rather by employing less attractive terms. As a methodological matter, however, this can greatly complicate the query. SSNIP problems present issues concerning elasticities, or rates of substitution in response to price changes. There are not comparable methodologies for assessing such substitution in response to changes in terms or conditions other than prices. One suspects that the principal way of modeling such changes will be to reduce changes in terms to cash value, and the SSNIPT will become the functional equivalent of the SSNIP, except somewhat harder to

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[176]United States v. Du Pont & Co., 351 U.S. 377 (1956). On the *Cellophane* fallacy, see 2B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶539 (5th ed. 2021).

apply. For example, in applying its SSNIPT to wages, the Guidelines appendix notes that it would refer not only to a decrease in the wage offered, but to a "worsening of … working conditions or benefits." The nonpayment of a measurable cash benefit might be easy to compute; the "worsening" of a working condition very likely much more difficult. The Appendix acknowledges this conversion to cash value by saying that the measure of a SSNIP is often five percent of the price or else five percent of the 'products or services to which the merging firms contribute value."[177]

In addition, the Appendix has a discussion of narrow markets for "targeted trading partners," which appears to be equivalent to discussions of "price discrimination markets" in previous Guidelines. Third degree price discrimination requires a firm to segregate various groups of customers who have differential willingness to pay. To the extent a group can be segregated in this way it is proper to speak of a relevant market encompassing this disfavored group who, after all, is defined by the seller's ability to extract a higher price/cost ratio from them. The Guidelines discussion adds to this that the discrimination could exist not only in the nominal price, but also in other terms. The draft Guidelines then apply similar analysis to suppliers or customers who are differentiated in space, and how that may call for narrower geographic markets.[178]

The Guidelines Appendix also has a brief discussion of "cluster markets," which are markets of non-substitute goods or services (typically complements). The rationale for clusters requires two conditions to be satisfied. First, there must be cost or provision advantages in either production or consumption that make the grouping attractive. Second, the grouping must be difficult to duplicate. As an example, a grocery store might sell both corn flakes and milk. This would meet the first condition in that there might be both economies in provision or customer convenience in having the two sold in one place. It would very likely not meet the second condition however, because pretty much anyone who wanted to sell groceries could group the two together without impediment.[179] The Guidelines Appendix states the first condition, but not the second.[180] The Guidelines then have a separate discussion of "Bundled Product Markets" where similar constraints apply. For some reason that is not altogether clear, the draft also distinguishes "One-Stop Shops" as possible markets, although once again these seem to be the same as cluster markets.

In a very brief discussion of innovation markets the draft notes the possibility of defining markets for the products that the innovation would produce, even if the products have not yet been marketed or even invented. They also note the possibility of a distinct market for the innovation itself. They provide few details.

Finally, the Guidelines offer a more lengthy discussion of input markets, and labor markets in particular. For these, the Guidelines apply distinctive tools focusing on such things as

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[177] Draft Guidelnes, Appendix 3, p. 9.
[178] Draft Guidelines, Appendix 3, p. 12.
[179]See Herbert Hovenkamp, Digital Cluster Markets, 2022 Col. Bus. L. Rev. 246, which also reviews the general literature.
[180] Draft Guidelines, Appendix 3, p. 12-13.

commuting distances and vacancy rates, switching willingness, and the like. See the discussion of Guideline 11, supra.

In a separate Appendix 4, the draft Guidelines discuss the calculation of market shares and measurement of concentration. They follow the 2010 HMG in counting as "in the market" all firms who could enter rapidly without incurring significant sunk costs. They also observe as a factual matter that a firm already making or delivering a product in one geographic area might be a rapid entrant into a different geographic area. They also notice the importance of excess capacity that may make a firm a rapid entrant into another area.

For calculating shares the draft conventionally uses actual output but will also consider reasonably foreseeable changes in market conditions that may serve either to overstate or understate current output as a measure. They do observe that excess capacity or reserves may be used in markets for homogeneous goods if a firm's competitive significance derives "principally from its ability and incentive to rapidly expand production… in response to a price increase or output reduction by others…."[181] All of this seems quite conventional and appropriate.

"Rebuttal Evidence": Failing Firms, Entry Barriers, and Efficiencies

Failing Firms

The draft Guidelines offer a fairly conventional "failing firm" defense.[182] They do state resistance to any idea that the defense should be weakened to accommodate situations where a firm is in a weakened condition but cannot meet these elements. In a footnote they appear to reject the "failing division" variation indicated in some previous Guidelines.[183]

Entry and Repositioning

The draft Guidelines speak not simply of barriers to entry but of "entry and repositioning. That good addition reflects the fact that "entry" concerns are not limited to firms that do not exist but also to firms that may operate in adjacent markets and that can redirect or develop their production into a new market as well. That reflects a distinction made in the 2010 Horizontal Merger Guidelines between "rapid" entrants, who are counted as in the market, and established firms for whom nonrecoverable expansion costs are greater. These latter firms are treated under the rubric of entry barriers. Unlike more rapid entrants, they may have to incur significant nonrecoverable, or "sunk," costs in the entry process.[184] From that point on the approach is largely neoclassical, which means that they assume a profit-maximizing firm and consider whether entry would be "timely," "likely," and "sufficient" under that assumption.

[181] Draft Guidelines, Appendix 4, p. 17.
[182] Draft Merger Guidelines, pp. 31-32.
[183] Draft Guidelines, p. 32. N. 100. Cf. 1992 Horizontal Merger Guidelines §5.2 ("failing division"), https://www.justice.gov/archives/atr/1992-merger-guidelines.
[184] Ibid, p. 32.

In assessing timeliness, the draft does not state a particular time period, but only that it must be "rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur." As the draft itself concedes, this requirement is harsh: serious entry that involves a significant investment is likely to take some time, and the situations in which it can be expected to occur before a merger's effects on price or other factors materializes is likely to be rare.

As to Likelihood, the draft Guidelines observe that firms "make entry decisions based on the market conditions they expect once they participate in the market." This is a variation from previous Guidelines' discussion of entry prospects at post-entry prices, noted in the discussion above of potential competition mergers. They also observe that the merger itself may facilitate "unilateral or coordinated exclusionary strategies" designed to make entry less promising.

Finally, on sufficiency, they conclude that "Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient." That appears to be saying that the entry must be sufficient to restore competitive conditions that are no worse than the status quo ante.

The draft Guidelines state that "[t]he Agencies typically do not credit entry that depends on lessening competition in other markets." While this reference is not entirely clear it is likely to entry that involves shifting of durable plant or equipment from one market to another. The most obvious example is the airlines, who may enter a market by shifting planes from another market, thus possibly reducing competition in the market from which they were moved. Assuming that such transfers are not predatory, they generally reflect an assumption that durable returns will be greater in the market into which the aircraft are moved.

Procompetitive Efficiencies and Post-Merger Pricing

Efficiencies are often claimed but much less often proven. These Guidelines reflect a tradition in merger enforcement of being skeptical and requiring strict proof of efficiencies. They note that firms can often use "contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger."[185] They also adhere to the well-accepted "single market" rule, refusing to "credit benefits outside the relevant market."[186] The draft also generally adheres to a practice of assuming ordinary efficiencies without specific proof, but requiring that large claimed efficiencies be verified. The draft does not explicitly assign the burden of proof. Critically, previous Guidelines such as those issued in 2010 require passing on of cost savings sufficient to hold consumers harmless.[187]

Notwithstanding the dominance of efficiencies in discussions of merger policy since the 1970s, the fact is that empirical evidence on the subject is underdeveloped. Several recent studies on post-merger pricing are helpful. They are largely limited to examining post-merger *prices* rather than costs. Some mergers may create substantial efficiencies but have market

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[185] 2023dMG, p. 33.
[186] Id., p. 33.
[187] 2010 HMG, §10.

power effects that offset any cost reduction. Mergers in competitive, undifferentiated markets may reduce costs without having any measurable impact on prices. Beyond that, equilibrium lower prices following a merger are most likely explained by some (although not necessarily specified) cost savings. The difficulty of specification and proof justifies both the selection of prima facie concentration levels and the question whether there should be a built-in "efficiency credit" provided without specific proof.

Another thing we are lacking (except in litigation records prepared for the purpose) is "engineering" studies that consider how mergers affect firms' operational costs, including procurement, innovation, production, and distribution. Yet another question is the comparative cost of transitions: a merger typically reassigns ownership of production facilities to a different firm, which continues to produce. By contrast, internal expansion may displace existing production facilities, often harming incumbent firms, particularly those that are smaller or have higher costs. That cost may be considered an externality in economic models and thus go unrecognized, but in fact they are real costs that public policy needs to consider. Finally, vertical mergers and mergers of complements are more likely to yield substantial efficiencies than are horizontal mergers.

In any event, the empirical evidence from pricing suggests that a significant minority of approved mergers even in more highly concentrated markets result in lower prices.[188] Most such studies are skewed in the overall universe of mergers because they focus on mergers that are reported and reviewed. The majority of mergers fall below reporting thresholds and, unless the screening problem is worthless, these are more likely to yield cost savings and lower prices.[189] The reported mergers in one recent study show somewhat more price-increasing than price-reducing mergers, but most of the mergers in that study had post-merger HHIs in the 2000-4000 range with an average of 3157. Some reached as high as 6000.[190] That is, a majority of these mergers are likely challengeable under the 2023 draft Guidelines, and most even under the 2010 HMG. Even with this group, however, 25% of mergers lowered prices by over 5.2%.[191] Overall, 28% of the evaluated mergers led to lower prices while 40% led to increases.[192] The study also found that price increases were correlated, although not perfectly, with quantity decreases.[193]

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[188]See Vivek Bhattacharya, Gaston Illanes & David Stillerman, Merger Effects and Antitrust Enforcement: Evidence from U.S. Retail (NBER, 2023), https://www.nber.org/papers/w31123.

[189] For example, in 2021 there were 24,899 transactions, of which 3250, or roughly 13%, were reported. Of these, 65 received second requests. See https://www.dwt.com/insights/2023/02/hart-scott-rodino-antitrust-mergers-acquisitions#:~:text=Together%2C%20the%20agencies%20issued%2065,1.2%25%20in%20Fiscal%20Year%202020.

[190]See Bhattacharya, supra, p. 8. In fact, only a small handful had post-merger HHI's below 1800. See id., 9 (table), showing out 3 out of 40 with HHIs under 1800.

[191] Id. at 16.

[192] Id., p. 17, also noting some complexities when the pricing of non-merging parties is considered.

[193] Id. at 23.

The literature also indicates that the HHI is a useful tool for analysis but that the current (2010 HMG) standards are underdeterrent.[194] HHI increases above 200 were correlated with price increases in nearly all cases, even in less concentrated markets.[195] Further, while lowering the thresholds would envelope many more mergers, enforcement costs would also rise considerably. This provides ammunition for adjustments in the thresholds, provided that (1) the Agencies actually enforce to the full extent of the stated threshold and (2) the courts go along.[196]

The 2023 draft Guidelines require a particularized showing of "merger specificity," meaning that the claimed efficiency could not be attained otherwise then by a merger.[197] That is consistent with the treatment in previous Guidelines. In making this assessment the Agencies may look at the potential for "organic growth," or contractual alternatives such as maximum resale price maintenance that are less anticompetitive than mergers, or a partial merger involving only some assets that give rise to the claimed efficiencies. While the Guidelines are quite strict about proof that claimed efficiencies must be verifiable, they do not indicate that they will apply the same strictness in assessing these alternatives, many of which are likely to be hypothetical.

Finally, the Guidelines require the proponents of the merger to show that as a consequence of the claimed efficiencies there will likely be no "anticompetitive worsening of terms for the merged firm's trading partners."[198] That operates as equivalent to the statement in the 2010 Guidelines that claimed efficiencies must be sufficient to hold the post-merger price to pre-merger levels. Once again, the broadening of consideration to include nonprice elements is factually descriptive but likely to make the query more complex.

A problem that remains in the background is the willingness of at least some courts to recognize efficiency claims that may not meet the Guidelines requirements.[199] It is not obvious that the presentation in these Guidelines will improve that situation. As noted previously, more discussion of the methodology and its robustness would be helpful.

Conclusion

The 2023 draft Merger Guidelines are a commendable effort, containing several worthwhile improvements over previous Guidelines. In other areas, however, they are poorly designed to address competition problems resulting from mergers, fail to articulate the source of the harm or the metrics by which harms should be evaluated. The discussions of market

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[194] Id. at 29-32 ("…we find over a broad range of specifications that mergers with higher average DHHI lead to larger price increases, consistent with the presumption that these mergers are more likely to enhance market power.").
[195] Id. at 33 & Figure 7(a).
[196] Id. at 43 ("We find that the current levels of antitrust enforcement are such that the probability of blocking a pro-competitive merger is very low, while the probability of allowing anti-competitive mergers is substantial. However, tightening standards would lead to a drastically higher burden on the agencies.").
[197] 2023 dMG, p. 33.
[198] Id. at 34.
[199] E.g., New York v. Deutsche Telekom AG, 439 F.Supp.3d 179 (S.D.N.Y. 2020).

structure in particular lack a clear conception of the harms that high concentration might impose. In a few other areas they go beyond existing law, making the courts unlikely to enforce them. All of these problems are fixable.