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Merger Guidelines

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The U.S. Justice Department first published merger guidelines in 1968, with the goal of providing transparency to the standards applied in reviewing mergers. Since then, the agencies have updated the guidelines numerous times.

In early 2022, the FTC and the antitrust division of the DOJ launched a new review into the guidelines, with a view to taking into account "developments in the modern economy and new evidence of mergers' effects on competition." As this might suggest, the revised guidelines (when adopted) may signal a more interventionist stance from the agencies. Indeed, recent statements by the agency heads suggest that new merger guidelines may replace the tried-and-tested consumer welfare standard with a series of alternate goals, reflecting the so-called "neo-Brandeisian" school of antitrust.

The pieces in this volume address the potential revisions to the merger guidelines, with each author taking a distinctive stance on the issues – some cautious and others more welcoming of change.

Maureen K. Ohlhausen & Taylor Owings open with the blunt assessment that such neo-Brandeisian policies would chill acquisitions and potentially remove from the competitive race the companies that often have the best prospects for de-consolidating many markets, including digital markets that are prone to tipping.

Mark Israel, Jonathan Orszag & Jeremy Sandford also comment on this possible policy shity. Proponents of the shift see a need to promote goals other than consumer welfare and believe the consumer welfare standard is inadequate to enforce against mergers resulting in certain types of harms. The authors, however, disagree: in their view, shifting away from the consumer welfare standard would necessarily harm consumers and replace a clear standard with a series of vague standards, undermining the agencies' credibility, which would also harm consumers.

Daniel Francis poses the question in magical terms: What should we do with a magic wand? The revision of the merger guidelines offers an opportunity to update and improve the foundational texts of U.S. merger control, but it also poses dangers. The author posits that is not at all clear that the text of the 2010 guidelines is really holding back federal merger enforcement: all seem to be much more significant constraints on the agencies. That said, including brief discussions of future (including potential and nascent) competition, platform markets, data, and the relationship between merger review and conduct would help the public, courts, policy-makers, and merging parties understand the stakes.

Keith Klovers, Alexandra Keck & Allison Simkins underline the need for new guidelines that are consistent both internally and with binding precedent. Indeed, because the "essence of the rule of law is that like cases are treated alike," it is doubtful that inconsistent guidelines could win judicial adoption. But there is a risk that the new guidelines will adopt inconsistent positions on several topics. For example, recent discussions of "nascent competition" suggest the agencies might formally adopt a lenient test for assessing the competitive significance of entrants deemed "nascent competitors," but a more stringent test for assessing the competitive significance of any other potential entrants.

Mark A. Jamison has a focused point: he argues that merger analysis should move away from observations based on past markets towards focusing on industry features that do or that will create market power – i.e. protect firms from competitive pressure – and then adopt policies that challenge mergers that would extend the reach of such monopoly-inducing features.

Abbott B. Lipsky, Jr. focuses on vertical mergers. In a major policy switch, the agencies recently announced increased hostility to vertical mergers. Stated reasons include skepticism of their benefits and of remedies traditionally used to control their competitive risks. Based on the long enforcement history involving vertical mergers, the agencies' concerns are materially overstated. Since February 2022, agency litigation threats led to voluntary termination of several deals, but the agencies lost both of the other cases that were tried. The author suggests that the agencies should consider the lessons of their recent defeats.

Margaret C. Levenstein & Valerie Y. Suslow similarly focus on vertical relationships, specifically vertical relationships that can have coordinated effects. These relationships can have important implications for planned revisions of the U.S. Department of Justice merger guidelines. Vertical mergers can expand the scope for monitoring, coordination, punishment, and exclusion on the part of horizontally colluding firms. The very high horizontal concentration levels observed in markets with explicit collusion also suggests that the merger guidelines should address such patterns of market dominance.

Malcolm B. Coate focuses on one potential change, the elimination or marginalization of price modeling in merger analysis. Recognized as useful in the 2010 Guidelines, these models have been applied, with mixed results in a number of recent litigations. The author analyzes the foundational models of price modeling in order to bring important insights. In his view, returning unilateral effects analysis to its historical focus on the totality of the evidence is a good idea.

Whatever the outcome of the agencies' current consultation, it seems that U.S. merger policy is at something of a crossroads (as is antitrust more broadly). The pieces in this volume draw together the threads of the various possible reforms in order to develop a roadmap of how merger review in the U.S. will look beyond 2022. No matter what path the agencies choose to take, the route ahead will prove interesting.

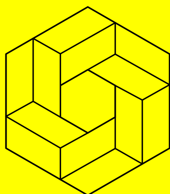
As always, many thanks to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks ITIF for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

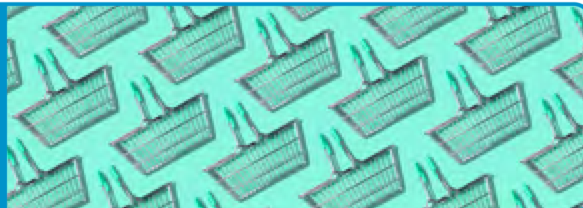
SUMMARIES

8 

HOW THE NEW ANTI-MERGER POLICY MAY BE THE NEW ANTITRUST PARADOX

By Maureen K. Ohlhausen & Taylor Owings

Neo-Brandeisian policies that would chill acquisitions by highly capitalized companies, or companies with 30%+ market share in some related market, would remove from the competitive race the companies that often have the best prospects for de-consolidating many markets, including digital markets that are prone to tipping.

16 

NEW MERGER GUIDELINES SHOULD KEEP THE CONSUMER WELFARE STANDARD

By Mark Israel, Jonathan Orszag & Jeremy Sandford

Recent statements by the heads of the Federal Trade Commission and Department of Justice suggest that new merger guidelines may replace the tried-and-tested consumer welfare standard with a series of alternate goals. Proponents of such a shift see a need to promote goals other than consumer welfare and believe the consumer welfare standard is inadequate to enforce against mergers resulting in certain types of harms. We disagree. Shifting away from the consumer welfare standard will necessarily harm consumers, resulting in higher prices and lower output. In contrast, sticking with the consumer welfare standard is not biased toward or against enforcement, is consistent with enforcement against a variety of types of harm (as reflected in the agencies' recent enforcement decisions), and provides ample room for greater enforcement if that is what the agencies desire. Shifting away from the consumer welfare standard would also replace a clear standard with a series of vague standards, undermining the agencies' credibility, which would also harm consumers.

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REVISITING THE MERGER GUIDELINES: PROTECTING AN ENFORCEMENT ASSET

By Daniel Francis

What should we do with a magic wand? The revision of the merger guidelines offers an opportunity to update and improve the foundational texts of U.S. merger control, as well dangers. The guidelines' status as a critical enforcement asset is a function of judicial confidence that the guidelines reflect the teachings of experience and a consensus that will endure across Administrations. Moreover, it is not at all clear that the text of the 2010 guidelines is really holding back federal merger enforcement: other frontiers — including agency resources, judicial skepticism, and the HSR timeline — all seem to be much more significant constraints on the agencies. Accordingly, too free a hand in revising the guidelines risks undermining a key asset of the merger-control system, without offering much prospect of an offsetting benefit. The deep puzzles and gaps in merger law, including causation and the treatment of efficiencies and upfront remedies, likely cannot be solved by guidelines. But there are a number of ways in which the guidelines could usefully be filled out or adjusted. Among other things, brief discussions of future (including potential and nascent) competition, platform markets, data, and the relationship between merger review and conduct would help the public, courts, policy-makers, and merging parties understand how the agency thinks about some high-profile puzzles that have been the subject of extensive enforcement experience. By adding some explanation of these topics, while relying on litigation and legislation to develop the substance of merger law, the agencies can ensure the guidelines remain a reliable, trusted, and up-to-date guide to the execution of one of their most important functions.

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TREATING LIKE CASES ALIKE: THE NEED FOR CONSISTENCY IN THE FORTHCOMING MERGER GUIDELINES

By Keith Klovers, Alexandra Keck & Allison Simkins

The U.S. Department of Justice and Federal Trade Commission are expected to release new merger guidelines soon. Among other requirements, the Agencies should strive to develop new guidelines that are consistent both internally and with binding precedent. Indeed, because the "essence of the rule of law is that like cases are treated alike," it is doubtful that inconsistent guidelines could win judicial adoption. Based on recent statements and enforcement actions, there is a risk that the New Guidelines will adopt inconsistent positions on several topics. For example, recent discussions of "nascent competition" suggest the Agencies might formally adopt a lenient test for assessing the competitive significance of entrants deemed "nascent competitors," but a different, more stringent test for assessing the competitive significance of any other potential entrants. Public statements also suggest the Agencies could take inconsistent positions with respect to market definition and out-of-market effects.

SUMMARIES

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ADAPTING MERGER GUIDELINES TO A DIGITAL ENVIRONMENT

By Mark A. Jamison

Contemporary merger guidelines are heavily dependent on empirical observations of past and present markets. This feature makes the guidelines inadequate for addressing market power in the dynamic high-tech industries. Competition regulators should redirect merger policies towards focusing on industry features that do or that will create market power – i.e. protect firms from competitive pressure – and then adopt policies that challenge mergers that would extend the reach of such monopoly-inducing features. Antitrust strategies for diminishing the presence of such features to the extent practicable would also be in order.

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THE NEO-BRANDEISIAN APPROACH TO VERTICAL MERGERS – A ZIPLINE TO OBLIVION?

By Abbott B. Lipsky, Jr.

In a major policy switch, federal antitrust agencies recently announced increased hostility to vertical mergers. Stated reasons include skepticism of their benefits and of remedies traditionally used to control their competitive risks. Based on the long enforcement history involving vertical mergers, the agencies' concerns are materially overstated. Since February 2022, agency litigation threats led to voluntary termination of several deals, but the agencies lost both of the other cases that were tried. While subject to further appeal, the meticulous reasoning of each seems persuasive. When mergers do not involve competitors and the parties offer plausible business justifications, it takes sophisticated analysis, strong factual support and effective advocacy to explain to an objective decision maker why they pose antitrust concerns sufficient to justify prohibition. The agencies should consider the lessons of their recent defeats. Any new vertical merger policy should be based on a balanced, thorough and realistic assessment of the key relevant considerations: the competitive risks of vertical transactions, their potential competitive benefits, and the availability of limited conduct remedies to address the second-order competitive issues present in some transactions.

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VERTICAL MERGERS AND COORDINATED EFFECTS: IMPLICATIONS FOR MERGER POLICY

By Margaret C. Levenstein & Valerie Y. Suslow

Vertical relationships can have coordinated effects with important implications for planned revisions of the U.S. Department of Justice merger guidelines. Despite increased efforts to prosecute explicit collusion, increased fines, and the use of creative detection and enforcement techniques, firms continue to engage in explicit collusion, harming consumers, competitors, and economic dynamism. Firms engage in a wide variety of behaviors to prevent cheating or entry from disrupting collusion. In some cases, those behaviors include mergers. Vertical mergers can expand the scope for monitoring, coordination, punishment, and exclusion on the part of horizontally colluding firms. The very high horizontal concentration levels observed in markets with explicit collusion also suggests that the merger guidelines address such patterns of market dominance.

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SHOULD PRICE MODELING REMAIN IN THE MERGER GUIDELINES?

By Malcolm B. Coate

The 2022 revision of the Merger Guidelines is likely to introduce a number of controversial changes; this paper focuses on one potential change, the elimination or marginalization of price modeling in merger analysis. Recognized as useful in the 2010 Guidelines, these models have been applied, with mixed results in a number of recent litigations. However, the analytical disconnect, between using these static models to predict price and innovation being the driving force of product differentiation, raises concerns. In some situations, the product design is the core aspect of competition, while in other situations price and non-price conditions of sale interact such that the idea of firms dictating prices for differentiated goods is an illusion. By exploring the foundational models of price modeling, it is possible to offer some insights. In conclusion, returning unilateral effects analysis to its historical focus on the totality of the evidence is a good idea.

WHAT'S NEXT?

For December 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Privacy & Competition**; and (2) **Digital Markets Act**.

ANNOUNCEMENTS

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CPI ANTITRUST CHRONICLES January 2022

For January 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Robinson-Patman Act**; and (2) **Defining Platform Markets**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

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The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

HOW THE NEW ANTI-MERGER POLICY MAY BE THE NEW ANTITRUST PARADOX

BY MAUREEN K. OHLHAUSEN & TAYLOR OWINGS[1]

1 Maureen K. Ohlhausen, Partner and Chair Global Antitrust and Competition Practice, Baker Botts LLP; Taylor M. Owings, Partner, Baker Botts LLP. These views are our own, not necessarily the views of Baker Botts LLP or its clients.

I. INTRODUCTION

Neo-Brandeisians are in control at the White House, the Federal Trade Commission ("FTC"), and the Department of Justice Antitrust Division ("DOJ"). Raising barriers to mergers is in; concern about the impact of overenforcement is out. The classic Borkian antitrust "paradox" (that certain misguided forms of antitrust enforcement can be counterproductive to the goal of increasing competition) is out of vogue and maligned in public discourse. A little over a year since the Biden Executive Order on competition,[2] it's helpful to take stock of the Administration's policy on mergers and whether it risks falling into the original paradox of counterproductive overenforcement.

II. THE POLICY

Public statements from President Biden, FTC Chair Lina Khan, and Assistant Attorney General for Antitrust Jonathan Kanter have all sounded the call that antitrust enforcers should be discouraging or blocking more mergers.[3] The Biden Executive Order on competition prompted a joint FTC/DOJ statement expressing skepticism that the merger guidelines accurately reflect current economic realities and calling for a "hard look to determine whether they are overly permissive."[4] Tim Wu, advisor to President Biden for competition policy, has advocated for the agencies to dispense with merger review in favor of bright line rules,[5] and Chair Khan has made moves to "deter" companies from "proposing anticompetitive transactions in the first place."[6] Some legislators have proposed presuming that mergers are anticompetitive until the merging companies show otherwise.[7]

An important part of the deterrence policy, it seems, is to broadcast that the agencies are not amenable to merger remedies. In the summer of 2021, Chair Khan engaged in several public letter exchanges that announced her skepticism that agencies could identify and address isolated anticompetitive aspects of a merger: "While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright."[8] Chair Khan also embraced the scholarship of Professor John Kwoka, who has asserted

2 Executive Order on Promoting Competition in the American Economy (July 9, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 See *id.* (calling on the DOJ and FTC to "enforce the antitrust laws vigorously" and "challenge prior bad mergers that past Administrations did not previously challenge" amidst a Biden Administration policy of "greater scrutiny of mergers"); Remarks of Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms (Sept. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/remarks-chair-lina-m-khan-regarding-non-hsr-reported-acquisitions-select-technology-platforms (highlighting the number of technology firms with non-HSR reportable acquisitions as a basis for re-working the merger review process); Remarks of Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-request-information-merger-enforcement ("This inquiry comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy. Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate; our markets further yet."); Jonathan Kanter, Remarks of Jonathan Kanter for 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements).

4 Lina M. Khan & Richard A. Powers, Remarks of Lina M. Khan & Richard A. Powers on Competition Executive Order (July 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers.

5 See Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018) (recommending a "simple but *per se* ban on mergers that reduce the number of major firms to less than four").

6 Lina M. Khan Letter to Deese, Letter Exchange Between Lina M. Khan and Brian Deese, Director, National Economic Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

7 Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. ("[U]nder our new standards, the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal").

8 Lina M. Khan, Letter from Lina M. Khan to Senator Elizabeth Warren on Merger Remedies (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf; Elizabeth Warren, Letter from Senator Elizabeth Warren Responding to Lina M. Khan (July 16, 2021), https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20(Warren).pdf; See also Lina M. Khan Letter to Deese, Letter Exchange Between Lina M. Khan and Brian Deese, Director, National Economic Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

that merger remedies are frequently ineffective.[9] More recently, Professor Kwoka advocated for a "fix it or forget it" policy — where agencies should not consider remedies fashioned as part of a response to the merger review investigation.[10] After this article came out, Chair Khan hired Professor Kwoka as an economic advisor to the Chair.[11] Subsequently, the agencies issued their Request for Information on Merger Enforcement, which explicitly asked whether the merger guidelines should "adopt a formal process and deadlines for remedy proposals."[12]

AAG Kanter has expressed similar sentiments, and the Antitrust Division has broadcast skepticism of merger remedies in recent public speaking appearances.[13] Deputy Assistant Attorney General Andrew Forman recently warned "[i]t will be a high bar to convince us we should be comfortable enough to make a filing in federal court that [a] settlement is in the public interest."[14] This posture matches the refrain that the DOJ would prefer to litigate to block mergers outright, rather than settle cases where they have concerns.[15]

The Neo-Brandeisian policy goes beyond just speeches and signals, however. The agencies are also erecting administrative hurdles to mergers. At the FTC, Chair Khan and the majority have:

- Suspended, indefinitely, the practice of early termination, by which parties can close their transactions without delay if the agency's inquiry reveals there is no competitive concern.[16]
- Kept open some merger investigations despite the HSR waiting period expiring and issued "close at your own risk letters" so as to free the agencies from any review timeline, and to clarify that the parties should remain uncertain about the antitrust risk from closing the deal.[17]
- Consolidated investigatory powers in the Chair, including for mergers of all kinds.[18] According to Congressional testimony by then-Commissioner Noah Phillips, the resolution means less oversight by the bipartisan Commission and will result in "more real red tape on American business, large and small."[19]
- Withdrawn from the Vertical Merger Guidelines in order to clearly indicate that the FTC does not recognize efficiencies from a merger as

9 See John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (1st Ed. 2014) (analyzing "retrospective" academic studies of consummated mergers to argue federal enforcement policies are ineffective insofar as they accept remedies); Lina M. Khan, Letter from Lina M. Khan to Senator Elizabeth Warren on Merger Remedies (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf. For a summary of the criticisms of Professor Kwoka's retrospective merger study, see Pallavi Guniganti and Charles McConnell, FTC economist criticizes Kwoka merger study, *Global Competition Review*, (July 18, 2017), https://globalcompetitionreview.com/gcr-usa/article/ftc-economist-criticises-kwoka-merger-study.

10 John Kwoka & Spencer Weber Waller, Fix it or Forget It: A "No Remedies" Policy for Merger Enforcement, *Competition Policy International* (Aug. 17, 2021), https://www.competitionpolicyinternational.com/fix-it-or-forget-it-a-no-remedies-policy-for-merger-enforcement/.

11 See Lina M. Khan, Announcement by Chair Lina M. Khan on New Agency Appointments (Nov. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-chair-lina-m-khan-announces-new-appointments-agency-leadership-positions (appointing John Kwoka to Chief Economist to the Chair).

12 Fed. Trade Comm'n, Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

13 See Remarks of Jonathan Kanter for Georgetown Antitrust Law Symposium (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust (advocating for a structural presumption for coordinated effects and for a presumption against mergers where there is direct evidence of "head to head competition");

14 Andrew Forman, Remarks of Deputy Assistant Attorney General Andrew Forman to the ABA M&A Committee (Sept. 17, 2021), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-antitrust-division-delivers-remarks-aba.

15 See Jonathan Kanter, Remarks of Jonathan Kanter for 2022 Spring Enforcers Summit (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements); see also Bryan Koenig, DOJ Willing to Challenge Mergers Before Investigations End, *Law360* (Apr. 6, 2022), https://www.law360.com/articles/1481559/doj-willing-to-challenge-mergers-before-investigations-end.

16 Fed. Trade Comm'n, Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

17 Fed. Trade Comm'n, Press Release, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021) https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger-filings, see also Christine Wilson, Statement of Commissioner Christine Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

18 Fed. Trade Comm'n, Press Release, Federal Trade Commission Authorizes Three New Compulsory Process Resolutions for Investigations (Aug. 26, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-authorizes-three-new-compulsory-process-resolutions-investigations#:~:text=The%20Federal%20Trade%20Commission%20has%20approved%20three%20omnibus,to%20seek%20compulsory%20process%20in%20each%20related%20case.

19 See Noah Joshua Phillips, Oral Statement of Commissioner Noah Phillips Before House Committee on Energy and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592981/prepared_statement_0728_house_ec_hearing_72821_for_posting.pdf/.

relevant to the legal question whether the merger will substantially lessen competition.[20]

- Required, going forward, "all merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged," and extended significant similar prior approval requirements on divestiture buyers as well.[21]

All these administrative hurdles undergird a policy of chilling merger activity generally. These moves may be a prelude to a major substantive overhaul of the merger guidelines, if that is the result of the agencies' Request for Information on Merger Enforcement.[22]

The text of the RFI, along with the statements of Chair Khan and AAG Kanter accompanying the release of the RFI, suggest that the agencies are looking for ways to classify more mergers as illegal, on theories that have not been relied upon since the 1970s. Indeed, Neo-Brandeisian groups have expressly argued that the agencies should follow the approach set out in the 1968 Merger Guidelines.[23] They argue that the strict market-share-based thresholds for horizontal and vertical mergers in that set of guidelines "reflect the Clayton Act's purpose 'to preserve and promote market structures conducive to competition.'"[24] Chair Khan and the FTC majority reflected those same goals when they pulled the FTC out of the 2020 Vertical Merger Guidelines. The plan for a new set of guidelines, the FTC majority explained, is to dispense with the need "to predict which specific mechanism will lead to [the] lessening on competition in a specific case" in favor of relying on "evidence that a particular market structure tends to lessen competition."[25] The goal is to identify more mergers that are "presumptively anticompetitive."[26]

Likewise, AAG Kanter's remarks demonstrated an interest in classifying additional mergers as unlawful under the little-used, "tends to create a monopoly" prong of Section 7.[27] Shortly after announcing the merger guidelines RFI, AAG Kanter explained that he is worried about acquisitions even if the deal rationale is to compete more vigorously on the merits. He explained, "As enforcers, if we focus only on acquisitions of firms already set to enter a market, we miss acquisitions that allow digital platforms to strengthen their moats through innovation."[28]

These comments show that both Chair Khan and AAG Kanter are especially concerned by the M&A activity of what they call "dominant" firms. Under this theory, already-large companies should be barred from acquiring additional resources for growth, because the primary concern is not facilitating or protecting competition on the merits, but rather preserving "structural" outcomes. The Neo-Brandeisians point to a Senate

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20 Fed. Trade Comm'n, Press Release, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

21 Fed. Trade Comm'n, Commission Statement, Use of Prior Approval Provision in Merger Orders (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

22 U.S. Dept. of Just. & Fed. Trade Comm'n, *Request for Information on Merger Enforcement* (Jan. 18, 2022) [hereinafter "RFI"], https://www.regulations.gov/document/FTC-2022-0003-0001.

23 Open Markets Institute and American Economic Liberties Project, Comment to the FTC & DOJ Vertical Merger Guidelines, *The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines* 21 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf. See also Open Markets Institute, Press Release (Apr. 21, 2022), "Open Markets Institute Files Comment to FTC & DOJ on Merger Enforcement, et al., https://www.openmarketsinstitute.org/publications/response-by-the-open-markets-institute-to-the-request-by-the-federal-trade-commission-and-the-antitrust-division-of-the-department-of-justice-for-information-on-merger-enforcement.

24 Open Markets Institute, Press Release (Apr. 21, 2022), "Open Markets Institute Files Comment to FTC & DOJ on Merger Enforcement, et al., at 22 (quoting U.S. Dep't of Justice, 1968 Merger Guidelines §2) (emphasis supplied); Open Markets Institute, *The Failure and Potential Redemption of Federal Merger Policy*, FTC Comment 2 (Aug. 20, 2018) ("The FTC, along with the DOJ, must develop new guidelines on horizontal and vertical mergers. The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal."), available at https://www.openmarketsinstitute.org/publications/open-markets-submits-comments-federal-trade-commission-upcoming-hearings-competition-consumer-protection-21st-century; Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HLS Antitrust Association (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/ ("1960s merger policy, as embodied in the 1968 Guidelines, should be treated as a template. Strong rules, tied to market share and firm size, against all types of mergers are critical for controlling corporate power."); *id.* (praising 1968 guidelines, though taking issue that they did not do more on conglomerate effects).

25 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, & Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission at 6–7, File No. P810034 (Sep. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter.

26 *Id.*

27 Jonathan Kanter, AAG, Modern Competition Challenges Require Modern Merger Guidelines, DOJ (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download.

28 AAG Jonathan Kanter Delivers Keynote at CRA Conference, Keynote (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

report that the aim of Section 7 "is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects."[29] The main target for these concerns are companies that are highly capitalized and have a large number of users.

The U.S House of Representatives conducted an investigation[30] into Amazon, Apple, Google/Alphabet, and Facebook/Meta, culminating in a 2020 report that was co-authored by Chair Khan, and cited by her now that she is at the FTC.[31] The legislative proposals coming out of this report, including one banning mergers, targeted companies based on their market capitalization and number of online users.[32] The implication is that acquisitions by the very large companies are always, or almost always, competitively harmful. But this policy of chilling mergers in general, and acquisitions by large companies in particular, should be more closely examined before it is adopted in the merger guidelines, where, if wrong, it will take years of litigation to undo.

III. THE PARADOX

There is no agreement on a single, optimal structure for a competitive and innovative market,[33] and chilling mergers across the board on the presumption that maintaining a less concentrated market is always superior could hamper one of the economy's engines for innovation and competition. The paradox of the Neo-Brandeisian policy is that its targets — highly capitalized companies and companies with a strong reputation, or large number of users, in an adjacent product market — may often be the very best candidates to reposition into consolidated markets, where innovation and competition are most needed. Restricting the best-qualified companies in particular from acquiring the resources that would facilitate successful entry in concentrated markets is a policy that itself may substantially lessen competition.

Business and antitrust scholars alike agree that some consolidated markets are most likely to see entry and real competition only from other highly capitalized competitors. Digital markets experts frequently observe that the most powerful competitive forces are coming from large platforms competing against each other.[34] This makes sense where there are huge benefits to operating at scale. A company that already benefits from network effects or other size advantages may in many instances only be threatened by the prospect that another company could get to a similarly large, efficient operating size.

For many companies, including innovative start-ups, entry at that sort of size is out of reach. But two realistic methods of successful entry could be accomplished by large companies not currently in the market: they could cross-sell a large number of already-existing customers in an adjacent market, or they could invest large amounts of capital to "buy" new customers through introductory offers and other methods of attracting customers on the merits. Maintaining the threat of potential competition thus depends in part on creating a regulatory environment where highly capitalized companies, or companies with a lot of customers in an adjacent market, have all the available tools for entry at their disposal.

This phenomenon is on display in the so-called "streaming wars."[35] Though the "N" in Netflix sometimes made an appearance in the acronym referring to the supposedly moat-protected tech companies — "FAANG" — highly capitalized companies have launched streaming services in direct competition with it, betting that they can finance growth with low-priced introductory subscription offers and massive invest-

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29 *Id*. (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950)).

30 The House's investigation included a review of documents, testimony, submissions, and interviews. U.S. House of Representatives, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations at 8 (Oct. 2, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

31 See Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission 8, n.42, File No. P810034 (Sept. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter (citing Majority Staff Rep. and Recommendations of the Subcomm. on Antitrust, Commercial, and Admin. Law of the Comm. On the Judiciary, 116th Cong., Investigation of Competition in Digital Markets, at 406-31(2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

32 See, e.g. H.R. 3826 – Platform Competition and Opportunity Act of 2021 – 117th Cong. (introduced June 11, 2021 by Rep. Jeffries), available at https://www.congress.gov/bill/117th-congress/house-bill/3826?q=%7B%22search%22%3A%5B%22jeffries%22%5D%7D&s=1&r=8.

33 See, e.g. Carl Shapiro, Competition and Innovation Did Arrow Hit the Bull's Eye? (describing the continuing Arrow-Schumpeter debate on the relationship between market structure and innovation), available at https://faculty.haas.berkeley.edu/shapiro/arrow.pdf.

34 *The New Rules of Competition in the Technology Industry*, The Economist (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/the-new-rules-of-competition-in-the-technology-industry; Ben Thompson, *First, Do No Harm*, Stratechery (Feb. 12, 2020), https://stratechery.com/2020/first-do-no-harm/ (for instance, preventing Snap from acquiring technologies that enable new features would stunt one of the most effective competitive forces in Meta's market).

35 See Ramon Lobato & Amanda Lotz, *Beyond Streaming Wars: Rethinking Competition in Video Services*, Media Industries 8(1) (2021), available at https://doi.org/10.3998/mij.1338 (describing the history of the "streaming wars" cultural narrative and the metrics along on which video content services compete). See also Joe Flint, *The War for Talent in the Age of Netflix*, The Wall Street Journal (Sept. 21, 2019), https://www.wsj.com/articles/the-war-for-talent-in-the-age-of-netflix-11569038435.

ments in unique "tentpole" content. These highly capitalized companies — Apple, Amazon, Disney (the 1st, 5th, and 42nd largest companies by market cap in the world, at the time of this writing) — are investing heavily to grow their streaming platforms.[36] They may also get a jump by cross-selling to their existing customers: Amazon to its Prime subscribers, and Apple to its hardware-owning installed base. The hope is that this will result in the same sort of economies of scale that Netflix enjoys, which economies are critical for any competitor that provides high-fixed cost content at low marginal cost to digital subscribers. The strategy is working to create competition so fierce that it is regularly denominated a "war."

Other digital markets commentators have observed a similar dynamic in the fierce rivalry between Apple and Meta, where Apple is moving into advertising while Meta is moving into hardware, making them each a dangerous rival for the other.[37] This type of competition has also played out in the Chinese digital economy in the past ten years: Alibaba's e-commerce dominance peaked at 62 percent in 2013, and has receded to about 50 percent since. Its fiercest competition has been from digital rival Tencent — which made important investments in e-commerce and, more recently, in another core Alibaba market: cloud computing.[38] These investments have challenged Alibaba in its core areas of market leadership, even though they are adjacent to Tencent's core competencies in social media and gaming. The Economist magazine summarized this economy-wide trend among the largest U.S. tech companies: the share of total revenue that substantively overlaps with the revenue earned by other big tech firms grew by nearly 20 percentage points from 2015 to 2020.[39]

The U.S. antitrust agencies, too, have previously acknowledged that not all firms can be viable potential entrants in consolidated markets and there is a special type of firm that "could use its pre-existing operations to facilitate entry" into a market.[40] In the 2020 Vertical Merger Guidelines, the agencies explained the conditions for entry into a special type of consolidated market: one where a vertically integrated company controls an input that other firms need to compete downstream. In this scenario, the vertically integrated firm will face competitive pressure only if there is a credible threat that a rival firm can enter at both levels of the market. As the agencies explained, "This two-level entry may be more costly and riskier than entering the relevant market alone, and thus may deter [potential competitors] from entering." Highly capitalized companies are in a much better position to make these sorts of costly and risky investments to establish a new source of the upstream input. Additionally, firms with a large presence in an adjacent market may be able to utilize aspects of that existing business model to re-create the needed upstream input.

As an example, let's return for a moment to the head-to-head competition in China: Alibaba, as an e-commerce company first, had a natural advantage in creating a third-party mobile payment market because it already had access to users' wallets when they paid for Alibaba transactions.[41] But Tencent was able to leverage an adjacent market to re-create this critical input: Tencent introduced a peer-to-peer payment function as part of its chat service. Its existing competency in connecting people was closely enough related to third-party payments that it was able to establish access to consumers' wallets in order to build the downstream payments business. The two companies are now fierce competitors in this downstream market, despite Alibaba's early lead.[42]

So, granting that some large firms may be the best potential entrants into consolidated markets, the question remains: why allow them to enter by acquisition? Is there any reason to suspect that they will be more successful as entrants if they are allowed to buy, rather than being forced to build, the operational capabilities they need in the consolidated market? There are several reasons the answer is yes.

The first reason is the relative length of time it takes to build rather than buy. In the very markets that Neo-Brandeisians are most worried about — digital markets prone to network effects and tipping — time to market is of the essence. The sooner a rival can enter, the sooner it can

36 Lauren Forristal, *Report: Top Streaming Companies Will Spend $140.5 Billion on Content in 2022*, The Streamable (Jan. 18, 2022), https://thestreamable.com/news/new-data-shows-top-9-media-and-tech-companies-will-spend-140-5-billion-on-content-in-2022; Sergei Klebnikov, *Streaming Wars Continue: Here's How Much Netflix, Amazon, Disney+ And Their Rivals Are Spending On New Content*, Forbes (May 22, 2020), https://www.forbes.com/sites/sergeiklebnikov/2020/05/22/streaming-wars-continue-heres-how-much-netflix-amazon-disney-and-their-rivals-are-spending-on-new-content/?sh=7be68657623b.

37 Brett Ryder, *Apple's Duel with Facebook is a New Form of Big-Tech Rivalry*, The Economist (Feb. 27, 2021); Mark Gurman, *Apple Finds Its Next Big Business: Showing Ads on Your iPhone*, Bloomberg (Aug. 14, 2022), https://www.bloomberg.com/news/newsletters/2022-08-14/apple-aapl-set-to-expand-advertising-bringing-ads-to-maps-tv-and-books-apps-l6tdqqmg.

38 *The New Rules of Competition in the Technology Industry*, The Economist (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/the-new-rules-of-competition-in-the-technology-industry.

39 *Id.*

40 Fed. Trade Comm'n and U.S. Dept. of Justice, Vertical Merger Guidelines (June 30, 2020) at 1, https://www.justice.gov/atr/page/file/1290686/download.

41 Liyan Chen, *Red Envelope War: How Alibaba and Tencent Fight Over Chinese New Year*, Forbes (Feb. 19, 2015), https://www.forbes.com/sites/liyanchen/2015/02/19/red-envelope-war-how-alibaba-and-tencent-fight-over-chinese-new-year/?sh=3ecbea8bcddd.

42 Eva Xiao, *How WeChat Pay became Alipay's Largest Rival*, TechinAsia (Apr. 20, 2017), https://www.techinasia.com/wechat-pay-vs-alipay.

compete for contested users and get to a minimum efficient scale. If the incumbent goes unchallenged for long enough, it may absorb so much of the addressable market that there would not be enough users left over for the challenger to reach minimum efficient scale.

The second reason to allow an acquisition that would facilitate entry is because, when the antitrust agencies are reviewing such a transaction, the directors and officers of the company have already assessed the relative costs and benefits of the build-versus-buy question and decided that it would be strategically advantageous to buy rather than build.[43] Business management scholarship suggests a couple reasons why this might be the case:[44]

1) The acquired firm has resources that the purchasing firm needs to achieve an operational efficiency (e.g. matching a product to a distribution network, or a unique combination of engineering resources that can solve a design problem); or
2) The acquired firm's business model is transformative, and the purchasing firm sees the need to adapt.

We see examples from the digital revolution that both of these strategies are utilized by highly capitalized companies and support entry into markets where the incumbent players are already large. For instance, Apple purchased chip designer P.A. Semi in 2008, whose engineering resources allowed Apple to solve the specific design problem of optimizing power consumption for mobile devices.[45] This resource play allowed Apple to enter and compete against entrenched incumbents like Nokia, Motorola, and Samsung in the mobile device market.

Another highly capitalized company, Walmart Inc., bought Jet.com in 2016 to acquire its unique business model: Jet.com had e-commerce strengths in a niche, urban market.[46] E-commerce was a disruptive threat to Walmart's traditional brick-and-mortar business, and, with the rise of Amazon.com, Walmart recognized that it would need to adapt in order to stay competitive. As business theorists instruct, it was critical that Walmart buy rather than attempt to build every aspect of the disruptive business model on its own Walmart.com site.

Clayton M. Christensen, the Harvard Business School professor who coined the term "disruptive innovation," recommends to acquirers that they not force too much integration between old and new business models and instead allow disruptors to innovate and transform the industry without being forced into the metrics and methods of the incumbent.[47] That's how Walmart, with Jet.com, could enter and really compete directly against Amazon.com with features like two-day and next-day delivery, in an e-commerce business that was unlike its traditional business model.[48]

Walmart and Apple are success stories of entry through acquisition, providing new competition and spurring transformative innovations that benefitted consumers. Surely antitrust enforcers should not want to chill acquisitions of these kinds, where buying resources or transforming a business model through acquisition provides the best chance of successful entry. And yet that is exactly what the Neo-Brandesian merger policy risks doing. They often justify the policy by suggesting that overenforcement is preferrable to underenforcement. Perhaps they'll erroneously block an Apple/P.A. Semi or Walmart/Jet.com here and there, but they believe on balance the negative effect is justified by preventing "killer acquisitions" and other problematic mergers through a general policy of chilling mergers by highly capitalized, or highly popular companies.

But where is the evidence of a great number of "killer acquisitions" or other problematic mergers that need chilling? The FTC recently conducted a 6(b) study looking back at ten years of non-reportable acquisitions by Google/Alphabet, Apple, Facebook/Meta, Amazon, and Microsoft.[49] However, the 2021 staff report summarizing those acquisitions points out no evidence that the antitrust agencies missed any problematic

43 Indeed, the FTC's model Second Request includes a question designed to elicit the build-versus-buy comparative analysis performed as part of the decision to do the deal under review. See Question 21, FTC Model Second Request (Oct. 2021) at https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf ("Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including . . . an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction . . . .").

44 See Clayton M. Christensen et al., "The Big Idea: The New M&A Playbook," *Harvard Business Review* (Mar. 2011). There is also the influence of opportunity costs, where internal resources that would be used to build a capability might be directed to an even more productive use.

45 *Id.*

46 Dennis Green, *Walmart's $3.3 billion Acquisition of Jet.com is Still the Foundation on Which all of its E-Commerce Dreams are Built*, Business Insider (June 13, 2019), https://www.businessinsider.com/walmart-acquisition-of-jet-gave-ecommerce-boost-2019-6.

47 Clayton M. Christensen et al., "The Big Idea: The New M&A Playbook," *Harvard Business Review* (Mar. 2011).

48 Dennis Green, *Walmart's $3.3 billion Acquisition of Jet.com is Still the Foundation on Which all of its E-Commerce Dreams are Built*, Business Insider (June 13, 2019), https://www.businessinsider.com/walmart-acquisition-of-jet-gave-ecommerce-boost-2019-6.

49 Fed. Trade Comm'n, Press Release, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies#:~:text=FTC%20Staff%20Presents%20Report%20on%20Nearly%20a%20Decade,Amazon%2C%20Apple%2C%20Facebook%2C%20and%20Microsoft%20September%2015%2C%202021.

mergers, and it suggests no industry- or market-wide practices over the longitudinal period that could reasonably suggest systemic underenforcement.

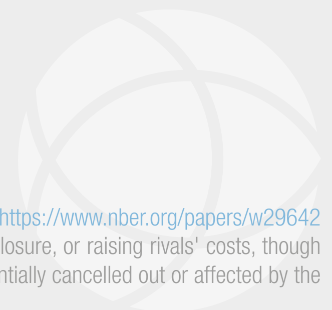
In fact, when researchers took an independent look at the same S&P 500 data that the FTC used in its 6(b) study, they found that the tech company acquisitions were rarely in the same market and tended to be correlated with a future increase in other companies acquiring in that same market.[50] Far from supporting a "killer acquisition" or "kill zone" hypothesis, the data was instead consistent with the hypothesis that tech companies are investing in and trying to forge new business offerings in the same "greenfield" space where lots of firms see room to grow.

Moreover, the fact that tech companies do not go back to the same area to buy additional companies tends to support the two deal rationales found in the business management literature discussed above: the data look more consistent with the thesis that the companies were buying rather than building when they wanted to sponsor competitive entry and needed some new resource or wanted to bet on a new, niche (and perhaps disruptive) business model to see whether it would transform the industry. If entry was the rationale, it would make sense to make one capability-enhancing acquisition in a particular area, and then move along to build other capabilities or place other bets.

Regardless of whether the past ten years of large tech company acquisitions can be explained by any single strategy, there is certainly no indication that the retrospective proved the Neo-Brandeisians' thesis of systematic underenforcement. Without this evidentiary underpinning, their policy will not create the desired results. At best, they will waste resources challenging individual mergers that are procompetitive or competitively neutral. At worst, they will undermine their own goal of deconcentrating markets by systematically chilling mergers that would have been important sources of entry.

IV. CONCLUSION

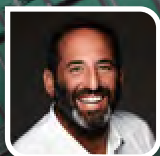
If the Neo-Brandeisians are serious about increasing market competition, they should consider where they need to recalibrate their policy: they should take a case-by-case approach in understanding deal rationales and avoid using administrative burdens to raise costs for acquisitions by large companies. The merger guidelines review will be an important test of which path the DOJ and FTC will take and whether they will be the authors either of a measured policy refinement or, perhaps, of the next antitrust paradox.



50 Ginger Zhe Jin et al., How Do Top Acquirers Compare in Technology Mergers? New Evidence From an S&P Taxonomy at 9 (Jan. 2022), https://www.nber.org/papers/w29642 ("In net, as far as our dataset and analyses indicate, the results seem inconsistent with competition concerns regarding kill zones, foreclosure, or raising rivals' costs, though of course, we cannot rule out the possibility that these concerns do exist but may be associated by non-majority transactions or are potentially cancelled out or affected by the potential positive signal that GAFAM acquisitions may convey about the profitability of the target category.")

NEW MERGER GUIDELINES SHOULD KEEP THE CONSUMER WELFARE STANDARD

BY MARK ISRAEL, JONATHAN ORSZAG & JEREMY SANDFORD[1]



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I. INTRODUCTION

The Federal Trade Commission ("FTC") and Department of Justice ("DOJ") are preparing to revise the 2010 Horizontal Merger Guidelines ("HMG") and the 2020 Vertical Merger Guidelines ("VMG"). To the extent the revisions incorporate new scholarship and accumulated enforcement experience, we applaud efforts to update the public on such matters. However, we are concerned about some of the directions suggested in the agencies' Request for Information ("RFI") and about recent statements of the heads of both agencies. In particular, it appears that new guidelines may explicitly or implicitly move away from the consumer welfare standard ("CWS"). From an economic perspective, such a policy step would be a significant mistake.

The apparent hostility toward the CWS from some appears to derive from two premises: first, that the CWS ignores broad classes of harm, and second, that the CWS has directly led to systematic underenforcement. As we will explain in more detail, both of these premises are false.

The CWS defines the goal of merger enforcement as preventing mergers that harm consumers through a reduction in competition. We argue that this definition is consistent with the agencies' actual enforcement records, including cases alleging nonprice harms, long-run harms, and harms to sellers. Critically, from an economic perspective, the CWS makes merger enforcement credible: It separates efficient mergers, which create benefits for consumers (even if they harm rivals and sellers), from mergers that do not benefit consumers. A CWS replacement would (necessarily) lack this feature, to the detriment of the very people that the Neo-Brandeisians seek to help.

Moreover, the CWS is not biased for or against enforcement. If the agencies desire to bring more merger challenges, they have ample tools to do so within the CWS. Replacing the CWS may appear to offer a shortcut to greater enforcement, but such a shortcut would trade credibility for expediency. In the long run, this tradeoff would damage the agencies' ability to block harmful mergers. More immediately, shifting to an alternative standard would necessarily lower consumer welfare through higher prices and lower output. Such an outcome is an inevitable consequence of shifting focus away from consumer welfare and towards other goals.

II. NEO-BRANDEISIAN VIEWS OF THE CWS

The leadership of the FTC and DOJ, as well as other Neo-Brandeisians, have made clear their views on the CWS. For example, FTC Chair Khan's academic scholarship defines the consumer welfare standard as encompassing merely "short-term price effects."[2] She also argues that the CWS "fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition."[3] She endorses, in the place of any single goal, a "general vision" of "keeping markets open and keeping them free from industrial monarchs" and avoiding "concentration of economic power."[4] To avoid such concentration, she endorses a greater focus on market structure.

For his part, DOJ Assistant Attorney General ("AAG") Kanter refers to the CWS in a recent speech as a "catch phrase, not a standard," because he believes that the CWS is not well-defined.[5] He derides the CWS as a "central planning standard" given what he sees as the standard's focus on "econometric quantification of price or output effects, with a "blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."[6] In place of the CWS, he advocates refocusing antitrust enforcement on a series of goals, including "corporate power," "choice and opportunity for individuals and small businesses," "the liberty of our nation," and "all the benefits of competition, not just the ones we think we can measure or calculate." He argues that ignoring these alternate goals systematically biases antitrust toward underenforcement. We disagree for reasons we will make clear below.

Neo-Brandeisian commentators view the CWS as powerless against a variety of perceived societal ills. For instance, the 2020 House Antitrust Subcommittee's Report — led by a team including Chair Khan — complains about the undue influence of a "narrow construction of 'consumer welfare' as the sole goal of the antitrust laws," and recommends prohibiting *all* acquisitions of "potential rivals and nascent com-

2 Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 710 (2017).

3 *Id.* at 737.

4 *Id.* at 740.

5 Jonathan Kanter, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

6 *Id.*

petitors."[7] To consider another example, Chair Khan blames sees the CWS as inadequate to address "concentrated control over data" and any accompanying effects.[8] Finally, both Chair Khan[9] and AAG Kanter[10] argue that the CWS inadequately considers harm to sellers. Again, we disagree, and we explain why abandoning the CWS would actually lead to many of the harms that Chair Kahn, AAG Kanter, and neo-Brandeisians more generally say they wish to prevent.

The agencies' recent actions are — unsurprisingly — consistent with the views of their leaders. For instance, upon the FTC's withdrawal from the 2020 VMG, a majority of the FTC endorsed replacing that document's focus on the merged firm's incentives to affect consumer welfare with market concentration screens, citing the "fundamental difficulty" of analyzing the competitive effects of a vertical transaction.[11] The statement additionally questions the relevance of the Elimination of Double Marginalization ("EDM"), which incentivizes the merged firm to have a single margin, instead of both independent firms having the their own (double) margins. EDM is a direct benefit to consumers of many vertical mergers, producing *lower* prices and *greater* output, yet the statement calls into question its importance.

Further, the agencies' RFI foreshadows a shift away from what it characterizes as "unduly narrow" focus on price effects and "too broad economic investigation[s]."[12] While new merger guidelines have not been released at the time of writing, Chair Khan has previewed that they will shift focus to concentration screens and will view skeptically benefits to consumers from merger efficiencies.[13] All of this points to standards that will end up harming consumers in the name of ill-defined alternative goals.

III. THE CWS DOES NOT INAPPROPRIATELY RESTRICT MERGER ENFORCEMENT

The attacks on the CWS outlined in the previous section do not comport with our experiences working both for and against the agencies. In the early days of an investigation, FTC and DOJ staff interview dozens of market participants, examine the parties' merger-related documents, request additional documents and data from the parties, examine structural factors, and model potential harms. Should a matter proceed to a Second Request, ten or more lawyers and economists will look for evidence of a merger's potential anticompetitive effects, often across several theories of harm. The idea that the CWS inappropriately circumscribes this process, by restricting staff to look only at a narrow class of harms, simply does not match reality. In reality, the CWS *strengthens* enforcement, by freeing staff to ignore a merger's effects on competitors and instead focus on a merger's effects on competition, but with a consistent metric to assess those effects.

Below, we first explain why Neo-Brandeisian criticisms of the CWS does not match the agencies' actual enforcement records under the standard. We then explain that the CWS is not biased for or against enforcement, and we discuss ways in which enforcement could be expanded under the CWS, if that is what the agencies desire.

A. Harms to Innovation and Quality; Mergers of Nascent and Potential Competitors; Mergers involving Data

The CWS does not rule out nonprice effects as theories of merger harm, including harms to innovation or quality. This is because such effects can harm consumers. The CWS's approach to such harms is reflected in the 2010 HMG, which explicitly states that "enhanced market power can also be manifested in non-price terms and conditions […] including reduced product quality, reduced product variety, reduced service, or diminished innovation." It is also reflected in the numerous agency enforcement actions against perceived harms to innovation or quality; such recent cases include: *Whole Foods/Wild Oats* (FTC, 2007); *Steris/Synergy* (FTC, 2015); *Methodist/Tenet* (FTC, 2020); *Hackensack/Englewood*

7 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, 2020, at 391 and 394.

8 Khan, *supra*, note 2, at 783.

9 Khan, *supra*, note 2, at 737 ("the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends – including our interests as workers").

10 Kanter, *supra*, note 2 (arguing that "the consumer welfare standard has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."

11 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

12 U.S. Department of Justice and Federal Trade Commission, Request for Information on Merger Enforcement (January 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

13 Khan, Lina, Remarks of Chair Lina M. Khan As Prepared for Delivery, (September 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

(FTC, 2020), and *CoStar/Rentpath* (FTC, 2020). Indeed, Chair Khan seems to acknowledge this point, stating in her academic work that "by some measures the FTC has alleged potential harm to innovation in roughly one-third of merger enforcement actions" between 2004-2014.[14]

The economic literature offers useful tools the agencies use to help assess nonprice harms, rather than relying solely on structural factors. To take just a small sample, Willig (2011) describes a framework for assessing merger quality effects,[15] while Gaynor (2021) summarizes empirical results on hospital merger quality.[16] Thinking of innovation effects, Federico, et al. (2017) develop a model in which mergers generically reduce the incentive for innovation,[17] while An & Zhao (2019) retrospectively analyze investment effects of the 1997 Boeing/McDonnell Douglas merger.[18]

Similarly, the Neo-Brandeisian rhetoric on mergers of nascent and potential competitors does not match reality. The agencies have condemned recent acquisitions of potential or nascent competitors, including *Inverness/Acon* (FTC, 2008), *Thoratec/HeartWare* (FTC, 2009), Steris/Synergy (FTC, 2015), *Mallinckrodt/Synacthen Depot* (FTC, 2017), and *Illumina/PacBio* (FTC, 2019). While potential competition cases may present unique issues for merger enforcers, these challenges stem from the need to predict a "but-for world" based on historical information and the inherent uncertainty about the future, not the CWS. Once again, the potential for mergers of nascent competitors to harm consumers is much studied in the economics literature, with a representative paper being Cunningham et al. (2021).[19]

As another example, notwithstanding Neo-Brandeisian anxiety about "concentrated control of data" in the hands of merging parties, the CWS provides a consistent framework for assessing harms that may result from mergers involving data. Once again, the agencies' actual record suggests that mergers involving data were challenged if they were though likely to harm consumers. Recent examples include: *Thompson/Reuters* (DOJ, 2008, involving financial data); *Reed Elsevier NC/ChoicePoint* (FTC, 2009, the provision of electronic public records data to law enforcement); *CCC/Mitchell* (FTC, 2009, automobile damage estimating software and underlying parts and labor data); *Dun & Bradstreet/QED* (FTC, 2010, K-12 educational marketing databases); *Nielsen/Arbitron* (FTC, 2014, national syndicated cross-platform audience measurement services); *CoreLogic/DataQuick* (FTC, 2018, national assessor and recorder bulk data); and *United/Change* (DOJ, 2022, insurance software and associated data).

B. Mergers Involving Upstream and Labor Market Harms

The Neo-Brandeisian view that the CWS is impotent against harms to sellers does not stand up to examination. Instead, as we demonstrate, the CWS makes enforcement against mergers that harm sellers more credible, by distinguishing different mechanisms for harm to sellers, only some of which are potentially anticompetitive.

As the 2010 HMG recognize, some mergers that leave sellers worse off are not anticompetitive and should not be condemned. For example, suppose a merger made the merging firms more efficient by allowing them to produce the same output with fewer inputs. This would benefit consumers to the extent that lower costs are passed through to lower prices. It would leave sellers worse off, because they would sell fewer units to the combined firm, but that is a product of economic efficiency, not of harm to competition. In contrast, a merger that increased the buyer power of the combined firm, and thereby lowered an input price and quantity would, *ceteris paribus*, reduce output, and thus harm consumers. The CWS appropriately distinguishes the two cases.

In some matters, it may be difficult to determine accurately whether or through what path seller harm results in harm to consumers. We do not think this difficulty precludes agency enforcement under the CWS. As the 2010 HMG explain, harm to sellers not linked to merger efficiencies may be actionable, even without a showing of harm to consumers. For instance, in a non-merger matter, Weyerhaeuser was found to have obtained a monopsony in an upstream market, but likely lacked market power in any downstream market.[20] Absent downstream effects, the Court treated harm to sellers symmetrically with harm to buyers, essentially interpreting Weyerhaeuser's suppliers as "consumers."

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14 Khan, supra note 2, at 721.

15 Robert Willig, *Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions*, 39 REV. IND. ORD., Article 19 (2011).

16 Martin Gaynor, *Antitrust Applied: Hospital Consolidation Concerns and Solutions*, Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, (May 19, 2021).

17 Giulio Federico et al., *Horizontal mergers and product innovation*, 59 INT. J. IND. ORD. 1 (2018).

18 Yonghong An & Wei Zhao, *Dynamic efficiencies of the 1997 Boeing-McDonnell Douglas merger*, 50 RAND J. ECON. 666 (2019).

19 Colleen Cunningham, et al., *Killer Acquisitions*, J. POL. ECON. (2021).

20 549 U.S. 312 (2007), at 321 ("[T]his case does not present […] a risk of significantly increasing concentration in […] the market for finished lumber.").

Seller harms resulting from a reduction in competition often occur in concert with product market harms, and there may be limited upside to allocating resources to additionally investigate seller harms. As a result, product market harms appear more prominently in the agencies' complaints, as noted by Nancy Rose, a former Deputy AAG for Economics.[21] Nonetheless, the agencies can and do investigate seller harms under the CWS. One recent example is Breakthru/RNDC, a merger that was abandoned in 2019 while under FTC investigation on theories that included harms to suppliers.[22]

The economic literature offers analytical tools that can aid the agencies in their evaluation of such mergers. To take one representative paper, Prager & Schmitt (2021) empirically identify conditions under which there is evidence for harms to workers resulting from hospital mergers.[23]

C. The CWS is not Biased Towards or Against Enforcement

Much of the Neo-Brandeisians' antipathy towards the CWS appears to stem from a belief that it is inherently anti-enforcement. This belief is without merit. In fact, the CWS does not bias decisions in favor of or against enforcement; instead, it provides a tool to aid in separating beneficial from harmful mergers. In our experiences, the binding constraints on the agencies' enforcement decisions are case law and resources. Neither constraint can be lessened by shifting away from the CWS. While the agencies' RFI at times appears to imagine greatly streamlined antitrust in which enforcement decisions involve nothing more than counting the number of firms, such a simplistic approach will quickly run into the same two constraints. First, mergers that do not harm consumers are unlikely to be condemned by courts. Second, figuring out which firms to count and which not to count requires the agencies to do the work of an investigation so they can assess the contours of competition faced by the merging firms.

We believe there is ample room for additional merger enforcement within the CWS, if this is what the agencies desire. If so, we agree that it would be useful for the agencies to clarify how their approaches will shift. To take just one example, Carl Shapiro, who was then serving as the Deputy AAG for Economics and was one of the principal architects of the 2010 HMG, stated in 2010 that current Division practice was to treat expected unilateral price effects of less than 5 percent (as proxied by GUPPI) as falling within a safe harbor.[24] If such a safe harbor no longer reflects the agencies' approach, this could usefully be clarified.

To take another example, if the agencies revise how structural criteria are applied, they could draw on a rich body of academic work studying the likelihood of harm from mergers across different market structures. To consider just three examples, Farrell and Shapiro (1990) show that as a theoretical matter HHI can give a misleading picture of merger price effects. Hosken et al. (2011) find no consistent empirical relationship between HHI and merger price effects. Nocke & Whinston (AER, 2022) argue for greater reliance on delta HHI, and less reliance on the level of HHI, as predictors of merger price effects.[25] Again, if these approaches will be used by the agencies, the guidelines could usefully clarify this.

As a final example, we explained above in Section 3.B that the CWS is consistent with more enforcement against anticompetitive mergers thought to harm sellers. If the agencies plan to more closely scrutinize such harms, they could usefully clarify the criteria they will apply in distinguishing anticompetitive and procompetitive mergers (both of which can leave sellers worse off).

IV. ABANDONING THE CWS WOULD RESULT IN VAGUE OR CONCLUSORY STANDARDS, UNDERMINING THE AGENCIES' CREDIBILITY

To be useful, guidelines must identify characteristics not only of mergers that the agencies are likely to condemn, but also of mergers that the agencies would not typically view as illegal (while recognizing that, under any standard, a fuzzy middle ground will remain). As Assistant Attorney

21 Federal Trade Commission, Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18_1.pdf (at 56, saying "we probably haven't missed anything in the hospital setting because a delta HHI of 3,000 is going to get the FTC's attention on the product market side. And we don't need to allege labor market harm if we're blocking a merger because of product market harm").

22 Statement of the FTC's Bureau of Competition (April 8, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/04/statement-ftcs-bureau-competition-regarding-announcement-republic-national-distributing-company.

23 Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021).

24 Carl Shapiro, Update from the Antitrust Division (November 18, 2010), https://www.justice.gov/atr/file/518246/download, (at 24, "Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of lost revenues").

25 Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107 (1990); Daniel Hosken, et al., *Does Concentration Matter? Measurement of Petroleum Merger Price Effects*, 101 AM. ECON. REV. 45 (2011); Volker Nocke & Michael Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915 (2022).

General Donald Turner — who was responsible for the 1968 Merger Guidelines — said, "People wishing to comply with what the Government thinks the law is can only do so if the Government's views are made known." The consumer welfare standard establishes such a benchmark: Agencies gauge a merger's legality by its effect on consumers.

Neo-Brandeisians complain about what they perceive to be a high standard of proof for merger enforcement and imagine a future in which "clear" structural criteria can replace the CWS. However, in actual practice, any replacement is likely to result in inconsistent and unpredictable enforcement. For instance, courts commonly cite the current HMG. If a replacement document reflects vague criteria — or current politics — more than sound economics, this will undermine judicial acceptance and make enforcement more difficult. Unfortunately, the agencies' RFI foreshadows new merger guidelines that discard the CWS in favor of a series of vague and conclusory (rather than evidence-based) standards, which are likely to undermine the reliance of the guidelines by courts. We select four such standards for further discussion below.

First, the RFI mentions a "trend toward concentration in the industry" as a relevant factor in merger analysis. While such a standard may have some rhetorical appeal, it does not have substantive support in the economics literature as a standard to distinguish beneficial mergers from harmful ones. In particular, levels of concentration do not determine the welfare effects of a merger on anyone, and thus are not a useful standard on their own.[26] The current HMG recognize this fact, stating (accurately, in our experience) that agencies rely more on measures of consumer harm than concentration thresholds.

Second, the agencies' RFI mentions "the danger of [permitting] a too-broad economic investigation." But pre-limiting the scope of economic analysis would seem to cut *against* the goal of considering harder-to-measure harms and benefits from mergers, which require more care, not less. For instance, the economics literature recognizes that a firm's incentive to engage in investment is nuanced, and does not clearly or monotonically track market concentration measures. Even measuring merger price effects is more difficult than it first appears, and it requires all of the tools in an enforcer's arsenal (and perhaps particularly economic tools).

Third, the RFI appears to endorse eliminating distinctions between vertical and horizontal mergers, despite quite different mechanisms for potential harms and benefits. Failure to recognize these distinctions is likely to lead to less clarity in decisions, whether in favor of or against enforcement. Indeed, the RFI discusses structural presumptions for vertical mergers — which the agencies tested in the draft VMG and ultimately rejected — despite there being no evidence-based rationale for such thresholds.[27]

Fourth, the RFI appears to simultaneously endorse both structural criteria (e.g. "number of significant competitors") and doing away with rigorous market definition tests (e.g. "evidence of substantial competition between the merging parties is one way to define a market," questioning whether it is "necessary to precisely define the market in every case"). Taken together, these criteria suggest a standard in which there is simultaneously both more focus on market structure and less focus on carefully defining markets. Such an approach will inevitably lead to misguided enforcement decisions since one cannot reliably determine the "number of significant competitors" without defining the scope of the relevant market, and market definition, for all its imperfections, as least provides courts with some guardrails when assessing the relevant set of competitors.

V. A CWS REPLACEMENT IS LIKELY TO HARM CONSUMERS THROUGH LOWER OUTPUT AND HIGHER PRICES

If the CWS is replaced, then, by definition, the agencies would condemn some mergers that make consumers better off, while failing to act against some mergers that harm consumers; if not, a new standard would simply be the CWS under a different name. Proponents of a change in standard may argue that a new standard can consider *both* the welfare of consumers *and* other groups, such as workers, farmers, or other parties. But once again, if a new standard condemned mergers that harmed workers only if consumers were also harmed, it would be equivalent to the CWS. Instead, the unambiguous statements of Chair Khan and AAG Kanter describe a preference for considering other factors *instead* of consumer welfare. Regardless of the merits of these alternative factors, such a move would shift enforcement to disfavor consumers.

The consequences of such a move are predictable: lower output, higher prices, and lower consumer welfare. Indeed, some Neo-Brandeisians appear to view these consequences as a feature, and not a bug. We strongly disagree; for all the rhetoric of the Neo-Brandesians, they fail to explain how lower output — which means that willing buyer and sellers have failed to make mutually beneficial trades — can be a good thing.

26 See *e.g.* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L. J. 49, 63 (noting "There is no good link between the level of the HHI and unilateral price effects with differentiated products.").

27 See e.g. Gloria Sheu & Charles Taragin, *Simulating mergers in a vertical supply chain with bargaining*, 52 RAND J. ECON. 596, 616-617 (finding no clear relationship between the number of upstream or downstream firms and harm resulting from a vertical merger).

By way of example, in her scholarship, Chair Khan appears to express hostility towards benign forms of vertical integration, regardless of the integration's effect on consumers.[28] But while vertical integration can cause consumer harm in some circumstances, it often results in procompetitive consumer benefits through its realization of EDM and efficiencies (e.g. increased investment incentives) that result from the aligning of incentives or the lowering of transaction costs. However, Chair Khan and allies question the relevance of such procompetitive effects, referring to EDM as a "non-statutory defense" and stating that "we should be highly skeptical that EDM will ever be realized — let alone passed on to end-users."[29] They claim (incorrectly) that EDM is limited to very specific factual circumstances, and that it is "simply not relevant to the legality of a merger" unless it results "in the preservation of competition in the post-merger market, with the assessment of competition not limited to price."[30] In a recent statement, Chair Khan appears to go further still, dismissing the weighing of *any* benefit of vertical or horizontal mergers as "directly contravening Congress."[31]

Vertical mergers are tricky to analyze precisely *because* they can often result in both procompetitive and anticompetitive effects, as the government's case in AT&T/Time Warner recognized. By scrutinizing only harms, and ignoring benefits of such mergers, the agencies could indeed simplify enforcement decisions. But such simplification comes at the cost of condemning procompetitive mergers, intentionally depriving consumers of their benefits.

In another example, Chair Khan and allies express a willingness to enforce against *low* prices, and mergers that may facilitate lower price. In her scholarship, Chair Khan advocates "abandoning the recoupment requirement in cases of below-cost pricing by dominant platforms" and decries low prices on e-books set by Amazon.[32] In a recent speech, Commissioner Bedoya describes what he sees as the negative effects of low wholesale prices available to large grocers and pharmacies, but not their "independent" counterparts.[33] Bedoya explicitly favors "fairness" as a goal of enforcement, and speaks skeptically of "efficiency."[34] But whatever the merits of such "fairness," it will come at a cost of harm to consumers since it will deprive them of the "low price" option. Low-prices may be difficult for competitors to match, but this is a reflection of the fact that competition is hard; one cannot seriously claim to support the competitive process without recognizing that the process will inherently result in winners and losers.

To consider one final example, neo-Brandeisians appear to favor small enterprises over large enterprises, regardless (or even because) of their higher cost structure and prices. For instance, Chair Khan's academic work decries Amazon's size and network effects for reasons including the "concentration of data," the potential negative consequences of a potential hack of a large platform, and "undue economic and political power" that may result from Amazon's scale.[35] Once again, antitrust hostility towards large firms, regardless of their prices, can only lower consumer welfare.

VI. CONCLUSION

Abandoning the CWS will, by definition, harm consumers, increase prices, and lower output. Such a lowering of output will tend to harm workers and other sellers of inputs. Harm will result from anticompetitive mergers that are waived through while enforcers focus on priorities other than consumer welfare. Harm will additionally result from procompetitive mergers that are enjoined for failing to pass the new, impressionistic standards. This second class of harm is very difficult to measure, as it involves a comparison to a counterfactual reality in which a procompetitive merger is allowed to be consummated. Because of this, such harms will occur largely without the affected parties — especially consumers — being aware that they are harmed. These harms to the very people Neo-Brandeisians claim to be protecting should be weighed seriously before the CWS is abandoned.

28 Khan, *supra*, note 2 at 797 suggests "Limiting Amazon's reach through prophylactic bans on vertical Integration."

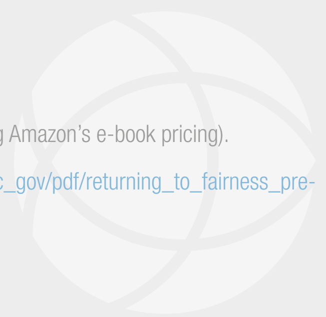
29 *Supra*, note 11.

30 *Id.*

31 Khan, *supra* note 9.

32 Khan, *supra*, note 2, at 791 (recommending abandoning the recoupment requirement for predatory pricing cases); at 756 (describing Amazon's e-book pricing).

33 Bedoya, Alvaro, Returning to Fairness, Midwest Forum on Fair Markets (September 22, 2202), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.



34 *Id.*

35 Khan, *supra*, note 2, at 796-796.

REVISITING THE MERGER GUIDELINES: PROTECTING AN ENFORCEMENT ASSET

BY DANIEL FRANCIS[1]

1 Assistant Professor of Law, NYU School of Law; formerly Deputy Director, Associate Director, and Senior Counsel, FTC Bureau of Competition. I am grateful to a number of kind folks for reactions to an earlier draft, including Ian Conner, Mark Meador, Nancy Rose, Doug Ross, and Steve Salop. All views, and all errors are, of course, my own responsibility.

For a long time, I've had a favorite question for interviews and fireside-chat-type settings in which I get to ask the questions rather than answer them. It goes: "If you had a magic wand and could change *just one thing* about the antitrust system — its laws, precedents, enforcement practices, institutional arrangements, anything at all — what would it be and why?" I've found that, every time I hear someone answer it, I always learn something interesting, and my sense of antitrust possibility is broadened. So, when I was generously invited to contribute a short essay to this collection on the merger guidelines, I thought I might take a shot at answering my own question. What would I do to the merger guidelines with a magic wand?

The answer, it turns out, is underwhelming. I would make a handful of modest tweaks: mainly to say something brief regarding a handful of topics on which the guidelines are currently silent, or a bit thin. The modesty of my proposals is a function of three fundamental beliefs about the merger guidelines and the state of merger enforcement today. First: I believe that one of the greatest assets of the federal merger enforcement program is the fact that the merger guidelines — including but not limited to the quantification of the structural presumption — are accepted as strongly persuasive by courts, even in cases where courts disagree with an agency about the merits of an individual merger challenge. And I believe that that judicial confidence in the guidelines, in turn, is a function of the widespread belief among judges that the guidelines reflect existing law, economic consensus, and a continuity of experience across Administrations of both parties, not a partisan or transitory project, or an effort to change established principles of merger law. This judicial faith is an immensely valuable, but fragile, component of our enforcement system. As such, I would be reluctant to make changes — *even substantive improvements* — to the extent that they risked undermining the status of the guidelines as a trusted, bipartisan centerpiece of the merger enforcement project. That status is too valuable to the antitrust enforcement system to be lightly imperiled.

Second: I don't think the text of the merger guidelines is a particularly important constraint on merger enforcement in the United States today. Certainly, there are some things that I would tweak, clarify, and improve. Like any important document, the guidelines can benefit from some re-evaluation after more than a decade of experience. But I really don't think that what the merger guidelines (horizontal or vertical) do or don't say is on the list of, say, the five or ten most significant limitations on merger enforcement today.[2] At the top of that list is resources: the agencies need more funding and more dollars, and without both of those it's hard to see how the agencies can adequately cover their beat. When you have your hands full covering the more striking two-to-one and three-to-two cases, it's hard to justify letting some of those deals go unchallenged in order to burn staff time and dollars on more experimental cases where the prospect of harm is harder to see, and where the chances of success are much lower. (My point is not that agencies shouldn't bring experimental cases to develop the law, but rather that the costs of doing so are very high when you're struggling to cover even the most troubling deals.) In second place I'd put the views of the federal judiciary regarding the meaning and application of Section 7. In third place, by a narrow margin, I'd put the tight time constraints imposed by the HSR Act (especially following substantial compliance with a second request) which force agencies to make rapid up-or-down decisions with incomplete information, risking kneejerk decisions to file, or forgo, suit. There is plenty of room for reasonable minds to differ about whether and to what extent it's a good or a bad thing that the agencies face resource constraints, skeptical courts, and tight deadlines, but I don't think it's plausible that the text of the merger guidelines exert a limiting force of anything like the same magnitude.

Third: I think the most pressing difficulties and ambiguities in substantive merger law — including confusion around the causal standard ("may be"), the treatment of uncertainty, and the analytical role of efficiencies and upfront remedies — can only be fixed through some combination of litigation and legislation. I don't think guidelines are a plausible solution to those problems. The Supreme Court hasn't taken a substantive merger case since 1975 and Congress hasn't touched Section 7 since 1950: and, with the best will in the world, I don't think agency guidelines can fill the costly voids that have resulted. The Court or Congress, or maybe both, must help us out.

The rest of the essay is in two parts. Part I offers some general thoughts about the function and limitations of the guidelines; Part II sets out and explains some specific choices that I would make when waving a magic wand at the guidelines.

I. THE ROLE OF THE GUIDELINES

There's room for reasonable disagreement about what exactly merger guidelines should do: that is, what kind of function they are supposed to perform. Are they supposed to interpret existing law, maybe including specific cases? Describe agency practice? Explain the economic analysis of likely effects from mergers? Set out a vision of what the law *should* be in an effort to move the judiciary? Some combination of these things? Something else?

2 I'm not sure I can think of a case in which a merger enforcement effort was wrongly stymied by the text of the guidelines. (The closest I can think of is *Evonik*, in which the district court took a rather narrow approach to the role of supply-side substitution, based on what appears to have been a misreading of the guidelines. *FTC v. RAG-Stiftung*, 436 F.Supp.3d 278, 293–94 (D.D.C. 2020). But even there, I doubt the fault could fairly be laid at the feet of the guidelines.

My own view is that guidelines should primarily aim to describe agency practice to the public, to courts, and to businesses. They are an explanatory document to tell the world what the FTC and DOJ does when undertaking merger review. This involves: identifying the central questions that agency staff will ask during a merger review; helping readers to understand the kinds of evidence that will be the focus of agency attention; and explaining how that evidence will be analyzed.

This necessarily involves or reflects some interpretation of law — that is, a view about what merger law requires — because agency practice is and should be a function of what the law is. Other antitrust guidelines cite cases sparingly, and there is probably room for some of this in merger guidelines too.[3] And *of course* any agency view about what the law is will reflect some quantum of the agency's perspective about what the law should be: its sense of the "best reading" of existing law. It could not be otherwise.

But each step that the guidelines take into "interpretation of law" — and particularly into a self-aware effort to change or extend existing law — is fraught with danger. Because the antitrust agencies don't *just* issue the merger guidelines as an informational service to the world in a here's-what-we're-doing-this-week kind of way. They issue the merger guidelines partly to help win cases. In particular, it is very helpful for a litigating agency to be able to reassure courts during merger litigation that a challenged transaction stands condemned under an established analytical framework that has not been cooked up for this litigation in particular; is recognized as a sensible, balanced, and economically sound product of evidence and experience; and does not represent a partisan or transitory project that will be turned on its head every four years. In other words, the persuasive force of guidelines in court is a function of the extent to which courts really believe that the guidelines represent a genuine pre-commitment by the agencies to a consensus-based analytical framework.

The existing merger guidelines have been pretty successful in this regard.[4] When courts mention the guidelines, the references are overwhelmingly supportive: they are treated as highly persuasive at least.[5] They are even cited in conduct cases,[6] and in private merger challenges.[7] And even when courts reject agency claims that an individual transaction is anticompetitive, they virtually always accept the persuasive force of the guidelines.[8]

This judicial faith is a huge structural asset for the agencies and for the antitrust enforcement project — particularly given the importance and difficulty of providing trusted guidance to judges who may be fairly or completely new to antitrust or merger cases. Among other things, the quantification of the structural presumption itself is a critical resource for helping to explain to judges why a particular transaction is beyond the pale. But, while this judicial faith is an asset, it is a fragile one. And it may be increasingly vulnerable, as the federal judiciary appears to be taking a closer and more skeptical look at the work of the administrative state.[9] The FTC in particular has had some strikingly unpleasant experiences in recent years.[10]

In light of all this, I think it is fairly clear that persuasive force of the guidelines does not reflect a judicial view that, as a matter of law, the agencies know best, or deserve substantive deference, when it comes to interpreting Section 7. (Or at least, it's hard to think that view would survive being teed up and litigated in that form.) Rather, it is a function of the status of the guidelines as a reflection of broadly settled principles, themselves accepted as authoritative by the judiciary, refracted through years of experience across Administrations of both parties. In fact, the D.C. Circuit said almost exactly this in *Anthem*: "Although . . . the court is not bound by, and owes no particular deference to, the Guidelines, this court considers them a helpful tool, *in view of the many years of thoughtful analysis they represent*, for analyzing proposed mergers."[11] The

3 See, e.g. U.S. Dept. of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 12, 2017); U.S. Dept. of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors (April 2000).

4 See generally Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51, 53 (2021) ("[T]he 2010 Guidelines have continued to be well accepted by the courts and to assist the case law's (slow) incorporation of new economic learning and agency experience in analyzing the impact of mergers on competition.").

5 See, e.g. *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022) ("We begin our analysis with the Merger Guidelines."); United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) (guidelines are "a helpful tool, in view of the many years of thoughtful analysis they represent"); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority") (internal quotation marks and citations omitted).

6 See, e.g. *FTC v. Shkreli*, 581 F. Supp. 3d 579, 627 (S.D.N.Y. 2022).

7 See, e.g. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021).

8 See, e.g. *United States v. U.S. Sugar Corp.* No. CV 21-1644, 2022 WL 4544025, at *23 (D. Del. Sept. 28, 2022); *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 539 (E.D. Pa. 2020); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 985 (D.C. Cir. 1990).

9 See, e.g. *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

10 See, e.g. *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021); *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

11 *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (emphasis added).

changes to the 2010 guidelines, for example, reflected evolutionary changes in agency practice and developments in methods of economic analysis since the previous iteration.[12]

What happens if that confidence is shaken? What happens if courts come to believe that the guidelines represent an effort to reinterpret or reengineer principles of antitrust law, and to introduce a step-change break with previous experience rather than a reflection of it? Almost certainly the answer is that the guidelines will simply cease to be a point of judicial persuasion. And, given that there are a host of background reasons — including psychological ones — for courts to find for defendants than for plaintiffs who bear the burden of proof (see also the customary fate of plaintiffs in rule-of-reason litigation[13]),[14] then the loss of trust in the guidelines framework would almost certainly be bad news for the agencies and for U.S. merger enforcement.

To be clear: I am not suggesting that antitrust can be fully neutral, or that elections shouldn't have consequences for antitrust as they do elsewhere. Rather, I am suggesting that judicial confidence in the merger guidelines is a function of the fact that they are not seen as a partisan document. There would be nothing *democratically* illegitimate about guidelines that could not be expected to survive an election. But I think courts would start to tune out a document of that kind pretty fast, and the result would be the loss of a critical enforcement asset, and almost certainly more merger losses for the agencies in the end.

Most glaringly, the quantification of the structural presumption in particular is a critical tool for winning merger cases. A plausible story about exceeding the presumption (ideally by a margin!) is a tremendous comfort to agencies when deciding to bring a case, and surely also to courts when deciding to impose liability. And while the presumption itself is grounded in PNB,[15] the quantification is not. The identity between the Supreme Court's "undue" market share and "significant" increase in concentration, on the one hand, and specific HHI numbers, is wholly a creature of judicial trust in the status of the guidelines, and it is only as robust as that trust.

Public remarks suggest that the agencies seem to have some hope that courts will lean more, not less, heavily on the presumption in litigation. In a speech at Georgetown, for example, AAG Kanter recently emphasized the importance of the structural presumption in winning cases: specifically calling out the Heinz baby foods decision as one in which the FTC's remarkably strong structural case did plenty of heavy lifting.[16] *Heinz* itself was an extreme case, but I don't think the point was intended to be limited to such whopping whoppers as a 3:2 with heavy 2:1 vibes (the merging parties in Heinz competed intensively for the "second slot" on the supermarket shelf[17]) and a post-merger HHI of almost 5,300.[18] Rather, I take the point to be that the agencies hope to win more cases by pointing to market structure.

But if the agencies hope that the structural presumption — and specifically the quantification of it in the guidelines — will be doing more work in litigation, then it becomes all the more important to protect the status of the guidelines as a reflection of reasonably clear, reasonably settled principles of law and economic analysis. If courts come to see the next version of the guidelines as a break with "existing law" (however defined) and agency experience, then the litigation value of the presumption will be diluted, not augmented, and more losses seem likely to result. For this reason among others, my use of a magic wand would be a cautious and careful one.

There's a fair question about what "existing law" really is in the context of merger litigation. The Supreme Court's last substantive merger decision was in 1975[19] — just after the Expediting Act was amended to substantially narrow the fast-track route to the Court[20] — so merger law

12 Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51, 57–58 (2021) (explaining the evolutionary nature of the 2010 changes and noting that "none of [the 2010 guidelines'] 'new' concepts were truly novel: All of them had been developing in the economics and antitrust policy literature during the interval between 1992 and 2010, if not before").

13 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009).

14 See, e.g. Louis Kaplow, *Replacing the Structural Presumption*, 84 Antitrust L.J. 565, 615–19 (2022) ("[W]hen assessing the competing tangle of evidence, if a judge has the sense that the likelihood the government is right is somewhat over 50 percent — but it is all a mess — she may be more comfortable proclaiming and defending in a written opinion the proposition 'not convinced' than 'convinced.'").

15 *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963).

16 AAG Jonathan Kanter, *Respecting the Antitrust Laws and Reflecting Market Realities* (remarks of Sept. 13, 2022); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. 2001).

17 *Id.* at 717.

18 *Id.* at 716.

19 *United States v. Citizens and Southern Nat. Bank*, 422 U.S. 86 (1975).

20 See 15 U.S.C. § 29. See also, e.g. R. Hewitt Pate, *Antitrust Law in the U.S. Supreme Court* (May 11, 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court (describing post-amendment certifications).

today is a creature of the lower courts, with the D.C. Circuit having played a particularly active role in developing it. But I'm not sure that anyone can say with a straight face that "existing law" can be found exactly where the Court left it: *Brown Shoe, PNB, Von's*, and all the rest of it. Modern merger law owes at least as much, and maybe more, to *Whole Foods, HCA, Baker Hughes, Anthem/Cigna, Yamaha Motor, AT&T/Time Warner*, and all the rest of the complicated tapestry — as well as some influential district court cases (*H&R Block, Staples*, and so on). Merger guidelines that aim to reset the clock back to 1975, or earlier, will probably not be persuasive: either to the lower courts that have taken the project onward since then, or to the current Supreme Court.[21] Accordingly, any revision of the merger guidelines must be able to live fairly comfortably in the realm of modern case law — recognizing that there is a fair margin of room in its interpretation.

I don't mean by any of this to suggest that I think merger law is in the right place in every respect, or even every important respect. I think that Congress's intended meaning of "may be" in Section 7 has been pretty clearly lost[22]; Section 7's prohibition on transactions that "tend to create a monopoly" has been largely ignored by everyone; and the fact that we don't have reasonable clarity about the role of efficiencies in merger analysis, after more than a century of life under the Clayton Act, is completely wild. But I don't think any of those things can really be fixed with guidelines.

In Congress, for example, Senators Lee and Klobuchar have made helpful efforts to advance the conversation about revisions to our core antitrust rules, including Sections 2 and 7.[23] I think that conversation is a critically important one, and I regret that the effort to evaluate and update our core antitrust rules seems to have been overtaken by other things.

Of course, developing the law is a central part of the agencies' role too. The agencies have fought lengthy and successful campaigns to develop the law on hospital mergers, pay-for-delay, the scope of state-action immunity, and a host of other important issues. But the victories on those frontiers weren't created with guidelines. They were won through litigation — often over many years and across changes in Administrations — as civil prosecutors.[24] And I think the frontier of merger enforcement, if it is to be moved by the agencies, will have to be moved that way too.

In revisiting the guidelines, then, I would aim to work within a plausible reading of existing law. I would aim to fill out the existing text to address some topics that aren't currently covered, and to adjust existing language to reflect the learning of the last dozen years. In so doing, I would aim for a document that could hope to survive not just the next Presidential election but the next few. (More than that is probably too ambitious.) And I think, maybe perversely, that that may be easier right now that it has been in a long time, because I think it's true that there is a "new bipartisan consensus" is emerging about antitrust enforcement — even if it's not the one that some commentators perceive.

My own sense is that a new bipartisan antitrust consensus is forming between the extremes of hard Neo-Brandeisianism and hard Chicago-ism. I take the foundations of that consensus to be something like the following: (1) a recognition that vigorous, principled antitrust enforcement is a necessary precondition for competitive free markets; (2) a recognition that antitrust enforcement should receive more attention, support, and resources than it has in some years (including in particular more funding for enforcement); (3) that on some important margins the content of federal antitrust doctrine has become a little blunter — that is, a bit more pro-defendant — than it should be; (4) in cases where *prima facie* cases of competitive harm are clear, courts and agencies should not be waved off by airy, broad, or under-proved justifications from defendants; and (5) antitrust enforcement should focus on specific acts and practices that can be shown to harm market participants, including consumers and workers, by reason of lessening competition. I don't think this consensus supports proposals like digging up the Robinson-Patman Act[25]; authorizing collusion simply because a big player is on the other side of the table[26]; or refocusing competition policy on big-is-bad lines.[27] (And I don't think there is *any-*

21 Professor Hovenkamp wrote in 2005 that, "[w]hile antitrust casebooks continue to print 1960s-vintage merger decisions that have never been overruled, no one, not even federal judges and certainly not government enforcement agencies, pay much attention to them." Herbert J. Hovenkamp, The Antitrust Enterprise: Principle and Execution (2005) 208. That seems rather too strong today — some of those cases are being cited *a lot* right now — but the core point that the soul of merger law has changed plenty in recent decades is a crucial one.

22 See, e.g. *FTC v. Steris Corp.*, 133 F.Supp.3d 962 (N.D. Ohio 2015).

23 See, e.g. Tougher Enforcement Against Monopolists Act, S.R. 2039, 117th Cong. (2021); Competition and Antitrust Law Enforcement Reform Act, S.R. 225, 117th Cong. (2021).

24 One prominent exception to my point here might be the illegality of wage-fixing, which was previewed in the HR guidelines before DOJ launched its recent round of enforcement efforts. U.S. Dept. of Justice & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016). My own sense is that it was reasonably clear that naked collusion on prices among buyers of services, including of labor, was *per se* illegal before those guidelines were issued: what was novel was the exercise of prosecutorial discretion. Nevertheless, the example is at least arguably in a little tension with my point in the text.

25 See Alvaro Bedoya, *Returning to Fairness* (remarks of Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

26 See, e.g. Journalism Competition and Preservation Act, S. 673, 117th Cong. (2021).

27 Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, ProMarket (Apr. 26, 2019) (arguing among other things that Congress should impose a "no fault" ban on durable monopolies, which should be dissolved and ordered "to freely license all their technologies").

thing like a consensus, let alone a bipartisan one, about the nature of the specific problems in digital platform regulation or about the desirability of any particular solution. That's one reason I would prefer to focus on core antitrust reform while we think through the platform regulatory issues: soon with the benefit of experience from the European Union's own natural regulatory experiment. But that's another story.)

All of this adds up to a tremendous opportunity for the agencies — or anyone else who comes into possession of a "Magic Wand of Merger Guidelines Amendment." The goal would be to write within the (somewhat flexible) frame of existing law and within the emerging bipartisan consensus that favors reinforced, vigorous, principled enforcement in the interests of consumers and workers, preserving judicial trust while more fully explaining how the agencies think about merger review.

II. SPECIFIC CHANGES: TEN THOUGHTS

In light of all that, here are ten quick thoughts about what I would, and wouldn't, do with the magic wand, in no particular order.

1. Keep the Horizontal and Vertical Guidelines Separate. As a matter of structure, there are some appealing reasons to integrate vertical issues and horizontal issues in the same document. For one thing, there's plenty of overlap among the issues (market definition, evidence, entry, and so on). For another, and perhaps more importantly, verticality and horizontality are features of individual theories of harm, not discrete categories of transactions. Accordingly, in an ideal world, I would probably integrate the two sets of guidelines into a single document.

But the world is not ideal, and these are unusual times. The recent experience with the vertical guidelines suggests that vertical guidance may be controversial in a way that horizontal guidance need not be.[28] And if the vertical guidance is destined to be a battlefield, with the prospect of party-line votes for some time to come, then there is probably something to be said from keeping that controversy separated from horizontal guidance, in the hope of preserving the horizontal document, at least, as a point of bipartisan consensus.

2. Revise the Thresholds (A Little), and Further Clarify Market Definition. Some commentators have suggested that the current concentration thresholds — which trigger the structural presumption at a post-merger HHI of 2,500 and a delta HHI of 200, and which articulate a presumptive safe harbor with a post-merger HHI below 1,500 or a delta HHI below 100 — are set too high.[29] This raises the question of whether they should be adjusted downward.

I think the answer is: yes, modestly, but with limited expectations about the difference this will make. It is worth remembering that the thresholds got moved in the first place to reflect existing agency practice.[30] As Professors Rose and Shapiro have pointed out, "[t]he average post-merger HHI for litigated mergers from 2010 to 2020 was 5805, and the average increase in the HHI was 1938."[31] It is also worth remembering that the raising of the thresholds may, among other things, reflect a trend in modern practice — noted by Commissioner Wilson and Keith Klovers — toward narrower market definitions,[32] and the increasing use of targeted-customer markets.[33] Moreover, even before the thresholds were moved, courts were not always impressed with a structural case that marginally cleared the mark.[34]

28 See, e.g. FTC, Press Release, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021).

29 See, e.g. Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 Rev. Indus. Org. 81, 87–89 (2021).

30 Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale LJ. 1996, 2003 (2018).

31 Nancy L. Rose & Carl Shapiro, *What Next For the Horizontal Merger Guidelines?*, 36 Antitrust 4 (Spring 2022).

32 See generally Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How The Narrowing Of Product Markets Has Altered Substantive Antitrust Rules*, 84 Antitrust L.J. 55, 87–89 (2021).

33 See, e.g. *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47–58 (D.D.C. 2018); *Federal Trade Commission v. Sysco Corporation,* 113 F.Supp.3d 1, 41 (D.D.C. 2015); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 201 (D.D.C. 2017), aff'd 855 F.3d 345 (D.C. Cir. 2017).

34 In *Arch Coal I*, for example, the district court noted: "The various measures of market concentration . . . presented by the parties thus reflect an increase in HHI ranging from 49 to 224 [with 49 the best measure appearing to be 49]. . . . The FTC has, therefore, satisfied its prima facie case burden. Nevertheless, it is important to note that this case is not one in which the post-merger increase in HHI produces an overwhelming statistical case for the likely creation or enhancement of anticompetitive market power. . . . [The demonstrated HHI] increases are far below those typical of antitrust challenges brought by the FTC and DOJ. . . . [The HHI increases in recent cases filed by the federal government] dwarf even the highest increase arguably present here. Indeed, between 1999 and 2003, only twenty-six merger challenges out of 1,263 (two percent) occurred in markets with comparable concentration levels to those argued here. Thus, although the FTC has satisfied its prima facie case burden, the FTC's prima facie case is not strong. Certainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case." *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 129 (D.D.C. 2004) (citations omitted).

So it's not really clear that tweaking the thresholds a little is likely to do very much. In practice, after all, it is very seldom the case that structure alone carries the day: some combination of expert evidence, customer testimony, and support from ordinary-course documents is virtually always required.[35] *Heinz* perhaps represents an exception, as noted above: but that was a remarkably clear structural case that we could think of as halfway between a 3:2 and a 2:1.

There are other reasons, too, to think that a (re)turn to structure will not be a silver bullet for enforcement. For one thing, the agencies have not historically been shy about emphasizing concentration, and the importance of the presumption, when bringing cases. I don't think previous Administrations have been leaving many structural arguments on the table in merger litigations. For another thing, leaning harder on structure increases the load on market definition, and this might not be a development that would delight enforcers. An array of recent merger losses, from *U.S. Sugar to Jefferson/Einstein to Evonik*, have re-emphasized the role of market definition as a rock upon which a merger challenge can founder all too easily.[36] For a third, emphasizing the importance of structural evidence, including HHI levels, must be done delicately in order to avoid undermining the viability of unilateral-effects theories.[37]

Indeed, given the centrality of market definition to litigation, and the difficulty of the exercise itself in many cases, some further clarifying language on market definition would be desirable. Among other things, as Professors Rose and Shapiro suggest, it would be helpful to clarify that any candidate market that includes the merging parties and satisfies the hypothetical monopolist test is a valid market for antitrust analysis, even when a broader market definition would also do so.[38] And, as others have suggested, it is probably past time to explain cluster and bundle markets separately and clearly in the guidelines.[39]

Although market definition is likely to be more important in practice, a modest downward adjustment of the presumption thresholds toward 2010 levels — as one way among others of reasonably tightening the framework — seems appropriate. I doubt an adjustment of this kind will make much difference to outcomes,[40] but a downward correction may help to support a bit more enforcement in a sensible subset of cases. My intuition is that doing so will make a small practical difference only in cases that exceed the current (i.e. 2010) concentration thresholds, but only by a modest amount: in such cases, the change will help to reassure a court a little by increasing the margin of comfort. In other words, I think the practical effect of a modest downward adjustment, to the extent there will be one, will be to give a little more confidence to the court in a subset of cases that *exceed the 2010 thresholds*, and that is probably a good thing on balance. (There may be some room, while adjusting the thresholds, to emphasize the importance of delta HHI, in particular, in understanding the strength of a structural case.[41])

I would not reduce the "red zone" thresholds below their pre-2010 levels. It is one thing to conclude that the relaxation of 2010 has not been vindicated by time, but quite another to dilute the force of the structural presumption by attempting to expand its scope. I doubt that any courts would be persuaded by such a move, and I fear it would undermine the force of the presumption itself across the board.

Some have suggested that the agencies may be wrongly focusing on transactions at very high concentration levels, missing concerns that arise at lower levels.[42] Whether or not this is true, I don't think this is really a function of the HHI thresholds. Rather, I think it reflects resource

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35 See, e.g. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 992 n.13 (D.C. Cir. 1990) ("The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery").

36 *United States v. U.S. Sugar Corp*. No. CV 21-1644, 2022 WL 4544025, at *19 (D. Del. Sept. 28, 2022) ("The Government has failed to identify the proper relevant market because its product market and geographic markets ignore the commercial realities of sugar supply in the U.S."); *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 557–58 (E.D. Pa. 2020) ("Because the Government has not proven that the Northern Philadelphia and Montgomery Areas are relevant geographic markets for GAC services, or that the Philadelphia Area is a relevant geographic market for Acute Rehabilitation Services, the Government has not identified a single relevant market to make its prima facie case"); *FTC v. RAG-Stiftung*, 436 F.Supp.3d 278, 292 (D.D.C. 2020) ("The Court agrees with Defendants that the FTC has not met its burden of establishing its prima facie case because it has not identified a relevant market within which to analyze the merger's possible anticompetitive effects.").

37 Compare, e.g. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) with *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

38 Nancy L. Rose & Carl Shapiro, *What Next For the Horizontal Merger Guidelines?*, 36 Antitrust 4, 6 (Spring 2022).

39 See, e.g. Krisha A. Cerilli, *Staples/Office Depot: Clarifying Cluster Markets*, Comp. Pol'y Int'l (Aug. 2016); Nancy L. Rose & Carl Shapiro, *What Next For the Horizontal Merger Guidelines?*, 36 Antitrust 4, 6 (Spring 2022); Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51, 63 (2021).

40 See generally, e.g. Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51, 64 (2021) ("[W]e are unable to detect any change in merger enforcement associated with this additional transparency."); Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 Rev. Indus. Org. 81, 88 & n.18 (2021).

41 See, e.g. Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 Am. Econ. Rev. 1915 (2022).

42 See generally, e.g. John Kwoka, *The Structural Presumption And The Safe Harbor In Merger Review: False Positives Or Unwarranted Concerns?*, 81 Antitrust L.J. 837, 865–71 (2017) (noting that merger challenges between 1996 and 2011 shifted to a focus on higher-HHI transactions).

constraints and the plentiful supply of transactions that merit investigation. If there are enough very-high-concentration transactions to keep staff engaged, then the center of gravity of enforcement will move to higher concentration levels, with fewer resources left over to challenge the less egregious cases. Again, resources, not guidance, are doing the work. Nevertheless, to the extent that some harmful transactions may be going unchallenged on the margin for want of resources, a modest adjustment in the thresholds now can preserve the possibility of additional enforcement when resources arrive in the future. The balance of error costs seems to tilt in the right direction: it is hard to think there is much risk that the federal courts will rush to over-enforce Section 7 in a slew of weak cases simply because the thresholds have come down by a few hundred HHI points. A modest course correction seems prudent and sensible.

3. Add Some Discussion of Nascent and Potential Competition. The current merger guidelines are pretty light in their treatment of potential competition (that is, competition among businesses that are not yet in the same market, but where they may be in future) and nascent competition (that is, competition from a business that is in the relevant market, but which is new, emerging, or otherwise growing in competitive significance).

The agencies have amassed considerable experience challenging transactions that raise such issues: in fact, they have been bringing such cases for decades.[43] But they have been particularly prominent on the docket in recent years. In just the last few years, enforcement actions like *Harry's/Edgewell, Billie/P&G*, the FTC's Section 2 case against Meta (involving the acquisitions of Instagram and WhatsApp), *Visa/Plaid, Otto Bock/Freedom, Sabre/Farelogix, Illumina/PacBio, Illumina/Grail,* and *CDK/AutoMate* have all turned to some extent on future competition dynamics.

Accordingly, it is probably time to introduce some explicit language into the guidelines to explain how the agencies will think about nascent and potential competition, consistent with existing law. This discussion need not be lengthy or detailed: it would probably be enough to articulate some fundamentals. This could include, among other things:

(1) a statement that the agencies will examine the transaction's effects on competition over some reasonable time horizon (say, five years);
(2) a statement that, as a merger is reviewed against a counterfactual in which the transaction does not take place, rather than the *status quo ante*, a transaction may substantially lessen competition within the meaning of the statute even if it does not lead to a less competitive market than existed before the deal, including by eliminating future competition that may otherwise materialize[44];
(3) a statement that the agencies consider that, under existing law, a transaction's effect "may be" substantially to lessen competition even if the chances of the parties becoming direct competitors cannot be quantified with precision[45] (and, in particular, it may be worth explaining that, under existing law, the agency may conclude that a transaction harms competition even if it cannot conclude that specific, quantified impacts on the outcomes of competition, such as price, are more likely than not[46]); and
(4) a statement that the agencies will analyze effects on future competition by reference to "any reasonably available and reliable evidence," as in § 4 of the current horizontal guidelines, including the same kinds of evidence used to analyze effects on current competition.

4. Explain the Agencies' Approach to Serial Acquisitions. The agencies might take the opportunity to explain how merger review will handle a series of acquisitions in or affecting a single relevant market. It is clear that a business may substantially lessen competition, or

43 The cases are numerous and many are well known. For a selection, see, e.g. Statement of the Federal Trade Commission, In the Matter of Nielsen Holdings N.V. and Arbitron Inc., FTC File No. 131 0058 (Sept. 20, 2013); Bureau of Competition Statement Regarding the Announcement that Thoratec Corporation Will Not Proceed with Its Proposed Acquisition of HeartWare International (July 30, 2009); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 351 (2d Cir. 1982); *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 624 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

44 This concept is articulated in the current guidelines, but the implications for analysis of nascent and potential competition are not brought out clearly and succinctly. *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010) § 1; *see also* § 4.1.2; § 5.2; § 6.4.

45 See, e.g. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 & n.39 (1962) (stating that "[m]ergers with a probable anticompetitive effect were to be proscribed by this Act," and quoting a Senate Report indicating that the language "may be" "would not apply to the mere possibility but only to the reasonable probability of the [proscribed] effect"); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) ("Section 7 involves probabilities, not certainties or possibilities."); *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986) (Section 7 requires "appreciable danger of [adverse] consequences in the future"); *United States v. H & R Block, Inc.*, 833 F.Supp.2d 36 (D.D.C. 2011) (quoting authorities stating that a plaintiff must show a merger is "reasonably likely to cause anticompetitive effects," that this is a matter of "probabilities, not certainties," and that an "appreciable danger" of effects suffices)

46 See, e.g. *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019) ("[T]he court does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge[.]"); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) ("Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for.") (citation omitted); *FTC v. Hackensack Meridian Health, Inc.*, Case No. CV 20-18140, 2021 WL 4145062, at *20 (D.N.J. Aug. 4, 2021) ("An anticompetitive effect means that the transaction would create an incentive for the merged parties to raise prices, lower quality, and innovate less.") (emphasis added).

tend to create or maintain a monopoly, through serial acquisitions rather than an individual transaction.[47] Indeed, serial acquisitions might make a promising focus for efforts to develop some meaning for "tend to create a monopoly." (This does not, of course, mean that a particular transaction should be presumed unlawful simply because there is an incipient trend toward consolidation, or indeed vertical integration, in a market.)

In particular, the guidelines might usefully:

(1) state that the agencies consider that, under existing law, a series of acquisitions may substantially lessen competition or tend to create a monopoly even if no individual acquisition might, considered individually, do so;
(2) explain the circumstances under which the agencies will aggregate a series of transactions together for analytical purposes; and
(3) explain the role, if any, of analysis of the merging parties' *conduct* in merger review (for example: will the agencies consider, including for the purposes of applying Section 2, whether the transaction forms part of a series of exclusionary practices? or will the agencies regard this as a matter falling outside the scope of merger review and/or the merger guidelines?). Certainly it is probably not desirable to have the merger guidelines turn into Section 2 guidelines: but if the agencies can briefly state the relationship between merger analysis and the merging parties' conduct, that might help parties understand the relationship between merger enforcement and the broader antitrust function — and the significance, if any, of other practices for the fate of a merger review.

5. Avoid Industry-Specific Discussions. The agencies evidently have particular interest in certain industries or kinds of markets. Recent policy activity suggests interest, in various ways, in: "tech" markets[48]; pharma markets[49]; and labor markets.[50] As such, there might be some interest in including industry-specific discussions in the guidelines.[51]

My instinct is that this kind of industry- or category-specific discussion is probably undesirable in guidelines, at least for now, for a few reasons. First, guidelines are most likely to endure if they stay out of the weeds of individual markets and practices and focus on principles of general applicability. Otherwise, changes affecting those markets — changes in Administrations, in industry practices, and in substantive case law — are more likely to undermine the accuracy and applicability of the guidelines, aging them faster. General, trans-industrial principles are less likely to be overtaken by events.

Second, it's not clear that there is much to be said, at least right now, with both specificity and confidence about such markets. "Tech" markets are wildly diverse: e-commerce platforms, apps, ridesharing platforms, social networks, search engines, and so on are much more diverse than they are similar. (However, as noted below, there may be some value in illuminating the application of the merger guidelines to multisided platform businesses — whether tech or otherwise — by focusing on the antitrust economics of platforms, rather than anything about the "tech industry.")

There are plenty of open puzzles in the merger analysis of labor markets — including puzzles relating to market definition and to the measurement of shares and concentration —that would present challenges for guideline-drafters aiming to capture analytical consensus. Despite what is sometimes supposed, however, the agencies have been thinking about labor competition for some time and have opposed transactions on that basis.[52] Perhaps an easier focus might be expanded treatment of the analysis of buy-side competition. the agencies have extensive experience in thinking about the impact of mergers on buyer competition, and there is plenty of room to add to what is currently Section 12 of the horizontal guidelines.[53] Such a discussion could touch on, but would not be limited to, labor cases.

As for pharma markets: it is not clear whether the FTC's recent review of pharmaceutical competition has produced a concrete change or evolution in the FTC's analytical framework. It would be helpful to have that explained clearly in some forum, probably in a speech or (if there is something new to tell) in a separate document focused on pharmaceutical competition. But the merger guidelines are probably not the right forum for a deep dive into pharmaceutical markets.

47 See, e.g. *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966).

48 See, e.g. FTC, Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020).

49 See, e.g. FTC, Press Release, *Multilateral Pharmaceutical Merger Task Force Seeks Public Input* (May 11, 2021).

50 See, e.g. U.S. Dept. of Justice, Press Release, *Department of Justice Antitrust Division and Federal Trade Commission to Hold Workshop on Promoting Competition in Labor Markets* (Oct. 27, 2021).

51 See, e.g. U.S. Dept. of Justice & FTC, *Request for Information on Merger Enforcement* (Jan. 18, 2022).

52 For one example, see, e.g. FTC, Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services Have Terminated Their Acquisition Agreement (Jan. 30, 2020) (noting that both patients *and nurses* would continue to benefit from competition following the abandonment of the proposed transaction).

53 See generally, e.g., Scott Hemphill and Nancy Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018).

6. Briefly Describe the Agencies' Approach to Data in Merger Review. I am generally skeptical of claims that the presence of data (even if "big") or the use of algorithmic tools is likely to turn the fundamentals of merger review upside down. But there is tremendous interest, and perhaps some confusion, about the role and significance of data in merger review — and about the role and significance of tools that use data, such as algorithms. So the agencies could probably articulate some basics that would inform the public and policy-makers about how these things are considered in merger review, reflecting the agencies' long, long record of thinking about data in competition cases.[54]

These might include:

(1) a statement that data may play a variety of roles in a merger review, including as product or service, an input, or a complement;
(2) a statement that analysis of entry (including barriers to entry), will include an analysis of whether particular forms of data are necessary to compete effectively, either in general or for the business of particular key customers, whether the availability of certain kinds of data may facilitate entry, or whether lack of access to such data may hinder entry;
(3) a statement that access by the merging parties to data (including, but not limited to, as a result of the transaction) will be considered in determining whether and to what extent the merged firm will be able to engage in price discrimination, and whether it is appropriate to define a price-discrimination market accordingly; and
(4) a statement that the agencies recognize that whether, and to what extent, access to data may confer or contribute to market or monopoly power is a function of the unique circumstances and competitive realities in an individual market — merely having a lot of data, even unique data, does not mean market or monopoly power!

In other words, the merger guidelines could usefully emphasize that the agencies routinely do, and will, consider data as part of the regular analytical framework for merger analysis, and that regular merger-review principles govern their assessment.

Likewise, given the tremendous interest in (and anxiety regarding) the possibilities of algorithmic coordination, the agencies might reassure the public — and warn businesses — that they consider the role and importance of algorithmic pricing and decision-making when evaluating competitive effects. For example, when evaluating whether and how a market may be vulnerable to coordination, the agencies will examine whether algorithmic tools may play a role in facilitating such coordination.[55]

7. Briefly Describe the Agencies' Analysis of Multisided Platforms. The merger guidelines would surely benefit from a short discussion of platform businesses. The agencies have extensive experience in evaluating antitrust issues in connection with platform businesses, from social networks to real estate portals.[56] Again, the discussion need not be lengthy, but it could usefully clarify a few things — particularly in the wake of the Supreme Court's notorious AmEx decision.[57] In particular, the agencies could take the opportunity to state an understanding that the *AmEx* decision, on its face, is confined to a very narrow set of circumstances: indeed, not only is the decision limited to transaction platform *businesses*, but to particular *services* that exhibit the features emphasized in *AmEx* itself.[58]

These might include, for example:

(1) a statement that, in cases involving platform businesses, the agencies will define markets on the basis of demand-side substitutability, pursuant to the same principles applied in other markets, *except* in the narrow set of circumstances in which the products or services supplied on multiple sides of a platform constitute transactional services (i.e. are jointly and simultaneously consumed in fixed propor-

54 See, e.g. Complaint, In the Matter of Verisk/EagleView, Dkt. No. 9396 (Dec. 16, 2014); Complaint, In the matter of CoreLogic, Inc., Dkt. No. C-4458 (May 20, 2014); Complaint, In the Matter of Reed Elsevier NV; Complaint, *FTC v. Hearst Trust and First Databank, Inc.*, No. 1:01-CV-734 (D.D.C. filed Apr. 4, 2001).

55 See generally, e.g. Ai Deng, *Algorithmic Collusion and Algorithmic Compliance: Risks and Opportunities*, in Douglas H. Ginsburg & Josh Wright (eds.) Global Antitrust Institute, Report on the Digital Economy (2020); Francisco Beneke & Mark-Oliver Mackenrod, *Remedies for algorithmic tacit collusion*, 9 J. Antitrust Enforcement 152 (2021); Michal Gal, *Algorithms as Illegal Agreements*, 34 Berkeley Tech. L.J. 67 (2019); OECD, *Algorithms and Collusion: Competition policy in the digital age* (2017); FTC Acting Chairman Maureen K. Ohlhausen, *Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing* (speech of May 23, 2017). See also, e.g. U.K. Competition & Markets Authority, *Pricing algorithms: Economic working paper on the use of algorithms to facilitate collusion and personalised pricing* (October 2018).

56 See, e.g. First Amended Complaint, FTC v. Facebook, Inc., Case No. 1:20-cv-03590 (D.D.C. filed Aug. 19, 2021); Complaint, FTC v. Surescripts, Inc., Case No. 1:19-cv-01080 (D.D.C. Apr. 17, 2019); In the Matter of DraftKings, Inc., Dkt. 9375 (complaint filed 19 June 2017); Complaint, In the Matter of CoStar Group, Inc./RentPath Holdings, Inc., Dkt. No. 9398 (Nov. 30, 2020); Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc., FTC File No. 141-0214 (February 19, 2015).

57 For a fuller (critical) discussion, see Steven C. Salop, Daniel Francis, Lauren Sillman, and Michaela Spero, *Rebuilding Platform Antitrust: Moving On from* Ohio v. American Express, 84 Antitrust L.J. (forthcoming 2022).

58 For a fuller discussion, *see* Daniel Francis, *Proving Antitrust Effects* (manuscript on file).

tions by customers on multiple sides of a platform), such that in economic substance only a single product or service is being supplied to transacting customer pairs;

(2) a statement that, in evaluating transactions involving platform businesses that may harm competition in one relevant market, the agencies will apply the general rule that efficiencies and benefits on another side of the platform will be cognizable only if inextricably linked with the harms *and* sufficient in magnitude to ensure that the transaction does not substantially lessen competition overall (recognizing that "[i]nextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall"[59]);

(3) a brief discussion of how merger analysis will be conducted when products or services are supplied at a zero or negative price (perhaps including the outlines of how the agencies think about the application of the HMT to such markets, recognizing that scholarship and practice are continuing to evolve in this respect); and

(4) a statement that a multisided business may compete with other multisided businesses, single-sided businesses, or both.[60]

8. Close the Merger-Conduct Loophole? For a long time, it has not quite been clear whether and to what extent Section 7 might permit a merger to be challenged on the ground that the effect of the transaction may be to substantially lessen competition by giving the merged firm the ability and incentive to engage in collusive or exclusionary conduct that would itself be unlawful under the antitrust laws. In other words: should merger review analyze whether the deal might make a *separate antitrust violation* more likely?

I used to think that this kind of thing ought to be outside the bounds of merger control.[61] For one thing, it is not obvious why merger control should be a vehicle for pre-emptively prohibiting something that would, itself, be independently prohibited. For another, it may be very hard to prove that a merged firm — particularly one with an unimpeachable record of compliance — would choose to violate the law. For a third, I am not aware that the agencies have ever brought any merger challenges on such a theory, suggesting that the problem may not be a particularly important one in practice.

But, over the 12-year history of the current guidelines, I have reconsidered that view. One reason is textual: the text of Section 7 makes illegality contingent on harm to competition or tendency to create a monopoly: it does not limit the proscribed means to those that would be independently lawful. Another is doctrinal: much of the conduct we are accustomed to testing for in merger review might violate Sections 1 or 2. For example, coordinated-effects analysis under the guidelines expressly includes an assessment of whether the transaction enables or encourages the formation of a cartel.[62] Likewise, the kind of foreclosure on which vertical merger analysis is customarily focused could be challenged as an unlawful refusal to deal.[63] A third reason is practical: post-merger behavior that violates the antitrust laws may simply go undetected or unpunished. It seems unwise and inefficient to conclude that a transaction will create the ability and incentive to engage in illegality but to blithely insist that we will spot and prevent it if necessary. (It is also not obvious that illegality of conduct, including in particular forms of foreclosure following a vertical transaction, is a binary that we can accurately judge during merger review.) A fourth reason is conceptual: it makes no sense to analyze whether a deal might harm competition while excluding from that analysis a set of behaviors that are so reliably harmful to competition that we prohibit them directly.

More generally, I no longer fear a flood of speculative claims by the agencies, in part because there have been none at all since the language about exclusionary conduct was added in 2010. It will be, and *should* be, pretty hard to prove that a transaction will give the merged firm the ability and incentive to, say, form a cartel or engage in anticompetitive tying. The antitrust agencies do not have a history of rushing to assert weak theories that undermine the force of their complaints. In cases where the evidence really does indicate that a transaction will encourage harmful and unlawful conduct, the agency should be free to follow it, and the guidelines should state that possibility clearly and crisply.

So I think the guidelines should be clear — clearer than they are — about the fact that, in appropriate cases, merger review will involve an appraisal of whether the merged firm will have the ability and incentive to harm competition *including through collusive or exclusionary means that are or may be independently unlawful*. In the vast majority of cases, this will be a theoretical prospect only. But not always. Indeed, in *Teva/Allergan*, the FTC expressly looked for — and did not find — evidence of whether the merged firm would have the ability and incentive to engage in anticompetitive bundling.[64] I think the agency was right to investigate that possibility.

59 U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010) § 10 n.14.

60 See, of course, *United States v. Sabre Corp.*, 452 F.Supp.3d 97 (D. Del. 2020) (vacated as moot) (missing this point).

61 See D. Bruce Hoffman & Daniel Francis, *Including Exclusion in the 2010 Horizontal Merger Guidelines*, 10 Antitrust Source (October 2010).

62 Horizontal Merger Guidelines § 7 ("Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws.").

63 See, e.g. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020) (refusal to deal challenge following acquisitions).

64 Statement of the Federal Trade Commission, In the Matter of Teva Pharmaceuticals Industries Ltd. and Allergan plc, FTC Dkt No. C-4589 (July 27, 2016).

9. Fill Out the Vertical Discussion. I generally think the existing vertical guidelines are pretty solid, but I'd expand them a bit. I would consider adding, among other things:

(1) some more specific discussion of the analysis of mergers between suppliers of complements, which in the existing document are treated fairly briefly;
(2) a brief explanation about how the agencies will think, during merger review, about commitments offered by the merging parties to trading partners guaranteeing protection from adverse consequences — in the wake of *AT&T/Time Warner* and *Illumina/Grail* this seems likely to be a critical issue in future merger reviews (and, as the facts of the private merger challenge in Steves reminds us, a merged firm may be able and willing to foreclose around a pre-existing contract[65]);
(3) as much explanation as possible about how the agencies will evaluate the elimination of double marginalization (including whether the agencies will regard it as an efficiency for which the burden of proof is on defendants, or a component of the analysis of changes in incentives that the agency must undertake to prove harm); and
(4) a slightly fuller discussion of theories of vertical harm, in the interests of completeness and fair notice to merging parties.[66]

10. Don't Forget Everything Else. Finally, as I noted above, I think other things are much more important than guidelines as barriers to a suitably vigorous, suitably principled merger enforcement function. So before putting my magic wand down I would take one more run at some of the more pressing issues.

The most important constraint on merger (and conduct) enforcement is the shortage of resources. The agencies desperately need money and staff to meet a workload that has grown at a remarkable rate. From fiscal year 1979 to fiscal year 2021, for example, HSR filings increased from 814 to 3,644: an increase to more than 400 percent of the 1979 level.[67] But in fiscal year 1979 the FTC's staffing was 1,746 FTE; in fiscal year 2021 it was 1,123: a fall by more than 35 percent from the 1979 level.[68] Those numbers speak for themselves. Changing the guidelines without increasing funding is just not going to increase overall enforcement levels: and given scarce resources, the most harmful (and/or most clearly illegal) transactions will still have to be prioritized, regardless of how the guidelines are recalibrated. If Congress wants more enforcement — including close oversight of tech, pharma, and hospital mergers — it will have to pay for it.

Another critical, if slightly neglected, frontier of merger control's province is HSR. Although it's important of course that the merger review process be brisk and efficient — and early termination should be restored for that reason! — agency staff could be given a little more time to analyze the small subset of cases involving a second request, following the parties' substantial compliance with that request.[69] Having a little more time will help the agencies allocate staff more flexibly across merger matters, and will help to avoid the twin risks that (1) the agency is forced to file a complaint to protect its position when a little more time would have enabled staff to reach comfort, or (2) the agency is forced to let a harmful transaction close for lack of time to complete an investigation build a case. Merging parties and the agencies alike would be better served by a system that allowed the very large set of untroubling deals to close before the end of the waiting period, while that the small subset of most troubling deals is given the time and attention needed to get to the right result. Among other things: a system that effectively requires the agency and the parties to negotiate a timing agreement so that the agency can cover the necessary ground cannot really be anyone's idea of an ideal process.

Failing an amendment to the Act, perhaps the agencies could think about requiring a little more information in the HSR notification form to help staff triage and spot issues earlier in the process: this would likely help agency staff as well as help businesses navigate the process more efficiently. For example, some basic questions designed to highlight vertical issues might help the agencies to spot vertical issues earlier in the review process, saving everyone some time.

65 *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690 (4th Cir. 2021).

66 For some helpful reflections, see generally Steven C. Salop, A Suggested Revision of the 2020 Vertical Merger Guidelines (December 2021).

67 https://www.ftc.gov/enforcement/premerger-notification-program.

68 https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

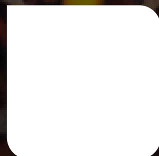
69 15 U.S.C. § 18a(e).

III. CONCLUSION

So: that's what I would do with a magic wand to the merger guidelines. It's not a whole lot, because I generally think other frontiers are more important, or more in need of agency attention, and because I think the merger guidelines as they stand offer a decent guide to what the agencies actually do. But it's not nothing, because think the guidelines are certainly important, and twelve years is long enough to merit a refresh and a polish. (We've all aged a lot since 2010...) And in light of the increased public attention to antitrust and competition policy, it is probably more important than ever that the guidelines offer an accurate, candid, and up-to-date explanation of what the agencies really do.

TREATING LIKE CASES ALIKE: THE NEED FOR CONSISTENCY IN THE FORTHCOMING MERGER GUIDELINES

BY KEITH KLOVERS, ALEXANDRA KECK & ALLISON SIMKINS[1]



1 Keith Klovers, Alexandra Keck, and Allison Simkins are attorneys in the Washington, D.C. office of Wilson Sonsini Goodrich & Rosati LLP. The authors thank Scott Sher, Ben Labow, and Michelle Yost Hale for helpful comments. Wilson Sonsini was involved in several of the cases discussed herein, including Illumina/Pacific Bio and Visa/Plaid. The opinions expressed are those of the authors and do not necessarily reflect the views of the firm or its clients.

I. INTRODUCTION

Earlier this year the U.S. Department of Justice and Federal Trade Commission (hereinafter "the Agencies") announced their intention to revise "federal merger guidelines," including the 2010 Horizontal Merger Guidelines.[2] As Assistant Attorney General ("AAG") Jonathan Kanter explained, these revised Guidelines (hereinafter "New Guidelines") will "ensure our merger enforcement tools are fit for purpose in the modern economy."[3] FTC Chair Lina Khan similarly emphasized how the New Guidelines will "equip us to forcefully enforce the law against unlawful deals."[4] To be successful in this endeavor, the Agencies must persuade the courts to adopt the New Guidelines and incorporate the Guidelines' analysis into antitrust jurisprudence.

Although there are many factors that will affect the persuasiveness of the New Guidelines, we focus here on one critical aspect: *Consistency*. As Attorney General Merrick Garland recently explained, "[t]he essence of the rule of law is that like cases are treated alike."[5] This principle is sometimes restated as a requirement that "the laws be applied equally, without unjustifiable differentiation."[6]

As we describe here, we believe the New Guidelines should strive for both *internal* and *external* consistency, meaning that they should treat the same concept the same way (i) within the document and (ii) as existing legal doctrines, particularly binding precedent.

Based on recent statements and enforcement actions, there is a risk that the New Guidelines will adopt internally or externally inconsistent positions. For example, and as described below, recent discussions of "nascent competition" suggest the Agencies might adopt one (fairly lenient) test for assessing the competitive significance of entrants deemed "nascent competitors," but a different (and fairly stringent) test for assessing the competitive significance of any other potential entrants. Although other possibilities abound, we briefly mention two others: (1) the risk that the New Guidelines will dispense with market definition despite clear Supreme Court precedent requiring it, and (2) the risk that the New Guidelines will consider out-of-market competitive harms (e.g. in conglomerate mergers) but not out-of-market competitive benefits (efficiencies).

II. THE VALUE OF CONSISTENCY IN MERGER GUIDELINES

Merger Guidelines can serve a variety of purposes. FTC Commissioner Christine Wilson recently identified four: (1) to summarize the law, (2) to clarify how the Agencies intend to approach topics on which there is no clear binding precedent, (3) to disclose and formalize an approach that the Agencies have heretofore used informally, and (4) to advance new analytics techniques.[7]

Thus, Guidelines can be descriptive (describing the law or agency practice), persuasive (arguing what the law *should be* going forward), or both. The 1992 Horizontal Merger Guidelines illustrates each of these modes. As Commissioner Wilson explains, the 1992 Horizontal Merger Guidelines "formally codified" several unilateral effects analyses the DOJ had been using for years – a descriptive function. [8]

As Jonathan Baker observes, the 1992 Guidelines also introduced a new test for "easy" entry that requires it to be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects or concern"[9] – an attempt largely aimed at judi-

2 Fed. Trade. Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

3 Dept. of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

4 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers, Jan. 18, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

5 Dept. of Justice, Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime, (Mar. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime.

6 Karen Steyn, *Consistency – A Principle of Public Law?*, 2 Judicial Rev. 22-26 (1997).

7 Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Fed. Trade Comm'n, (2019)

8 *Id.* at 6.

9 The U.S. Dept. of Justice Horizontal Merger Guidelines §3.0 (1992) [hereinafter 1992 Guidelines]; Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines, Dep. Of Justice* (Aug. 5, 2015), https://www.justice.gov/archives/atr/responding-developments-economics-and-courts-entry-merger-guidelines.

cial persuasion. And as Greg Werden states, the 1992 Guidelines clarified the "hypothetical monopolist" test, an effort that was arguably both descriptive (because the Agencies were already using it) and persuasive (because the Guidelines made some modifications and sought judicial adoption).[10]

Merger Guidelines are occasionally persuasive because, as Hillary Greene has observed, they are not the law. They are still quite important, and the Agencies have historically sought to use Guidelines to persuade the courts to adopt their proposed analysis into law, to influence how businesses evaluate potential mergers or other conduct, and to inform a variety of other constituencies. For all these purposes, then, the Guidelines depend on the strength of their ability to persuade others that their approach is (or should be) the law.

To earn judicial adoption, consistency is particularly important. As Attorney General Garland put it earlier this year, "[t]he essence of the rule of law is that like cases are treated alike."[11] This principle has been widely espoused and is often summarized as requiring that "the laws be applied equally, without unjustifiable differentiation."[12] Thus, because consistency is the "essence" of the rule of law, courts cannot adopt an approach that would lead to like cases being treated differently.

Consistency also aids predictability, and therefore helps businesses and other constituents accurately forecast how the Agencies are likely to approach a particular fact pattern. Or to put it the other way around, without a consistent set of Guidelines, the business and legal communities will be ill-equipped to understand when the Agencies will scrutinize a transaction. Thus, consistency helps businesses and their counsel predict which transactions enforcers are likely to declare "should never have emerged from the boardroom" in the first place.[13]

III. MARKET ENTRANTS AND "NASCENT" COMPETITORS

Among other areas, the Agencies should strive in the New Guidelines to take a consistent approach to entry.

The 2010 Horizontal Merger Guidelines[14] already proscribe a stringent test for entry. Under Section 9, "[a] merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger."[15] Entry is easy if it "would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[16] Following the introduction of the concept of "easy" entry in the 1992 Guidelines, courts adopted the same language that entry must be *"timely, likely,* and *sufficient"* to deter or counteract the competitive effects of concern."[17] The Agencies continue to apply this test when seeking to dispel would-be entrants advanced by defendants. In Altria-Juul, for example, FTC Complaint Counsel argued that "neither the entry of new producers, nor repositioning by existing producers would be timely, likely, or sufficient to counteract the competitive effects of Altria's agreement to exit the relevant market,"[18] which in that case included alleged harms to innovation.[19]

The courts have widely accepted and adopted this relatively stringent test for assessing would-be entrants. Indeed, since at least *Marine Bancorporation*, courts have rarely credited firms advanced either by plaintiffs or defendants as likely entrants or "would be" competitors.[20]

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10 Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines: Learning from Experience*. 16 Geo. Mason L. Rev. 839, 842 (2009).

11 Dept. of Justice, *Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime*, (Mar. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime.

12 Karen Steyn, *Consistency – A Principle of Public Law?*, 2 Judicial Rev. 22-26 (1997).

13 This quote was first attributed to former AAG Bill Baer, but has since become a common credo. See, e.g. Kirk Victor, *A Bad Merger Proposal? It's in the Eye of the Beholder*, MLex.com, Nov. 11, 2019, https://www.mlexwatch.com/articles/6912/print?section=ftcwatch (attributing the quote to both AAG Bill Baer and subsequently to Ian Conner, then the Director of the FTC's Bureau of Competition).

14 The U.S. Dept. of Justice Horizontal Merger Guidelines § 9 (2010) [hereinafter 2010 Guidelines].

15 *Id.* § 9 (Entry).

16 *Id.*

17 See, e.g. *Cardinal Health*, 12 F.Supp.2d at 55 (quoting Guidelines § 3.0) (emphasis in original).

18 Complaint at *4, *In re* Altria Grp. Inc., 2020 FTC Lexis 71 (F.T.C. Apr. 2, 2020).

19 *Id.* at *22.

20 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

In *Marine Bancorporation*, a potential competition case, the Supreme Court rejected the Government's attempt to include potential entrants in the relevant geographic market, observing that the Government "failed to establish that NBC [a subsidiary of the merging party] has alternative methods of entry that offer a reasonable likelihood of producing procompetitive effects."[21]

Courts have shown an equal willingness to reject defendants' theories of entrants. For example, when the FTC challenged Staples' attempted acquisition of Office Depot, defendants argued that market entrants like Amazon would be timely and sufficient to restore lost competition.[22] However the court the rejected the defense, contending that the relevant temporal scope for entry was two to three years and any potential entry would occur beyond then.[23] In these assessments, courts routinely reject what Administrative Law Judge Chappell, in the *Altria-Juul* matter, recently called "[u]ncabined speculation"[24] about competitive entry.

Despite this apparently clear legal test, recent enforcement efforts suggest the current Agency leadership believes a different entry test should apply to acquisitions of purportedly nascent competitors. In this situation, the Agencies rarely allege that the nascent firm's entry will be "timely, likely, and sufficient," let alone that it is the only firm to meet these conditions. For example, in Visa-Plaid, the DOJ argued that Visa would eliminate "a nascent competitive threat" because Plaid was "developing and launching new, innovative solutions in competition with Visa" that would "drastically lower costs for online debit transactions."[25] The DOJ stipulated that Plaid would enter the market simply because Plaid powers modern innovative financial technology, including Venmo, Acorns and Betterment, and maintains connections to "11,000 U.S. financial institutions."[26] But the DOJ did not allege that Plaid's entry would be timely, likely, or sufficient to substantially increase competition in the relevant market, let alone that it was the only potential entrant that could do so.

Likewise, in *Illumina-PacBio* the FTC alleged that the merger would "extinguish" a nascent competitive threat because PacBio's DNA sequencing system "offers substantial benefits over Illumina's systems, including longer individual sequence read lengths."[27] Echoing the DOJ's approach in *Visa-Plaid*, the FTC did not allege that PacBio's entry would, absent the merger, be timely, likely, and sufficient to substantially increase competition in the relevant market. In both of these examples, the Agencies eschewed the "timely, likely, sufficient" test they first proposed in the 1992 Horizontal Merger Guidelines.

This trend away from the traditional entry test seems likely to continue. On September 22, 2022, FTC Chair Khan testified before Congress that the agency challenged the *Meta-Within* transaction because "the mere possibility of Meta's entry has likely influenced competition in the virtual reality dedicated fitness app market."[28]

In these circumstances, if the Agencies intend to use a different entry test for nascent competitors in the New Guidelines, then they would do well to explain how it is consistent with the basic legal requirement to treat "like cases alike."

IV. OTHER POTENTIAL SOURCES OF INCONSISTENCY

Although not fully addressed nor explored here, the Agencies would do well to take consistent positions on several other that may arise in the new Guidelines. Here we briefly mention two: market definition and out-of-market competitive effects.

The Supreme Court has long said that market definition is a statutory requirement. In *Marine Bancorporation*, the Court held that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."[29] Most recently, in the Section 1 case *Ohio v. American Express*, the Court explained that "we must first define the relevant market" before

21 *Id.* at 639, 652.

22 FTC v. Staples, Inc., 190 F. Supp. 3d, 1000 (D.D.C. 2016).

23 *Id.* at 72.

24 *In re* Altria Grp., Inc., 2022 FTC Lexis 6, (F.T.C. Feb. 23, 2022), at *557.

25 Complaint at ¶¶ 13, 66, 76, *United States v. Visa Inc. and Plaid Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).

26 *Id.* at ¶ 7.

27 Complaint at *2, *In re* Illumina, Inc. and Pacific Biosciences of California, Inc., 2019 FTC Lexis 97, (F.T.C. Dec. 17, 2019).

28 *Id.* at 6.

29 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974).

assessing even direct evidence of anticompetitive effects.[30]

The Guidelines have long fought against this approach, but to little avail. For example, the 2010 Merger Guidelines assert that "[t]he Agencies' analysis need not start with market definition" and [s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition."[31] Even so, however, the Guidelines state that "evaluation of competitive alternatives available to customers is always necessary as some point in the analysis."[32]

Recent statements suggest the Agencies may be tempted to push the New Guidelines even further from judicial precedent. In connection with the proposal to revise the Merger Guidelines, in January 2022 the Agencies sought public comment on the "use of market definition in analyzing competitive effects."[33] Since then, AAG Kanter has argued that "market realities" — like indicia of market power or the existence of head-to-competition — "should drive the antitrust analysis, not merely market definition."[34] FTC Chair Khan likewise endorsed the elevation of "market realities" to "tackle the pressing issues of today and tomorrow"[35] and committed to issuing "updated guidelines or rules to ensure our merger analysis aligns with market realities."[36]

There is likewise some risk that the Agencies will treat out-of-market effects inconsistently in the New Guidelines. Today the Guidelines typically ignore out-of-market effects on both sides of the ledger, focusing on both harms and cognizable efficiencies that will occur within a given relevant market. (There is, however, an exception in the current Guidelines for out-of-market efficiencies that are "inextricably linked" to a particular market.) Yet in a speech earlier this year, FTC Chair Khan noted her enthusiasm for scrutinizing cross-market effects in conglomerate mergers,[37] even though conglomerate effects occur when a deal has an impact on competition "but the products affected are not in the same product market and are not inputs or outputs of one another."[38] We shall have to see whether this willingness to consider out-of-market competitive harms also includes a willingness to consider out-of-market competitive benefits, i.e. out-of-market efficiencies.

V. CONCLUSION

Antitrust jurisprudence for the last several decades has relied upon the consistency and durability of the Horizontal Merger Guidelines. Guidelines can be both descriptive and persuasive, but cannot persuade courts to create legal rules that would not treat like cases alike. Therefore, the Agencies should strive for both internal and external consistency when drafting the New Guidelines, including any revisions to the standards used to assess potential entrants, the necessity of defining a relevant market, and the treatment of out-of-market effects.

30 *Ohio v. Am. Express* Co., 138 S. Ct. 2274, 2284–85 (2018).

31 2010 Guidelines § 4.

32 2010 Guidelines § 4.

33 Fed. Trade. Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

34 Dept. of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

35 Fed. Trade Comm'n, *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights "Oversight of the Enforcement of the Antitrust Laws,"* (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

36 Fed. Trade Comm'n, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

37 Keynote Remarks of Lina M. Khan at the ICN, Berlin, Germany, May 6, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%2C%202022_final.pdf.

38 Alex Wilts, US agencies considering conglomerate issues during merger guideline review, Khan says, GCR, Apr. 25, 2022, https://globalcompetitionreview.com/gcr-usa/article/us-agencies-considering-conglomerate-issues-during-merger-guideline-review-khan-says; see Roundtable on Conglomerate Effects of Mergers – Background Note by the Secretariat, at 2, June 10-12, 2020, https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf ("Conglomerate effects arise when the products of the merging firms are not in the same product market, nor are they inputs or outputs of one another.").

ADAPTING MERGER GUIDELINES TO A DIGITAL ENVIRONMENT

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I. INTRODUCTION

Companies engage in mergers for many reasons, including to respond to deregulation or to technology change, or because of a desire to achieve scale or acquire resources.[2] Another reason is to eliminate existing or potential competition in specific markets.[3] Because of this potential of lessening competition, antitrust regulators scrutinize and potentially stop mergers that, in their opinions, have a high likelihood of decreasing competition to the harm of consumers.[4]

Merger analysis is generally a two-step process where, first, the competition authority defines the markets where the merger might increase power – i.e. the ability to avoid competitive pressure – and second, whether the merger does indeed result in greater market power to the harm of consumers.[5] The first step is data intensive and requires that analysts study which products produced by the merging firms and by other firms are viewed as substitutes by customers.[6] The second step is to then combine the market shares of the merging firms and, if the change in market concentration is sufficiently great, conduct an investigation into the possible impacts on consumers.[7]

This approach is reminiscent of how medical professionals sometimes diagnose illnesses, namely by observing symptoms and conjecturing that there is an underlying illness. This symptom-driven approach is problematic for industries dominated by digital technologies because the rapid technology change gives off many signals or symptoms, such as attractive profits and large market shares, that often have nothing to do with market power.[8] Also evolving market boundaries make the exercise of identifying the boundaries based on historical data nearly irrelevant because of the intertemporal mismatch between the data and the markets that would actually be affected by the merger.[9]

Focusing on horizontal mergers, this paper addresses this difficulty by proposing merger guidelines that emphasize identifying causes of market power rather than potentially problematic symptoms. Such a change in merger guidelines would require agencies and scholars to conduct additional research as the root causes of enduring market power, a topic that is not given much attention in the literature.[10] The next section provides a summary of the operation of today's merger guidelines. Section III describes the dynamics of information technology markets and why they make contemporary merger analysis unworkable. Section IV describes the proposed alternative and the needed research agenda. Section V is the conclusion.

II. CONTEMPORARY MERGER ANALYSIS

Merger analysis is largely based on analysis of current situations using historical data.[11] It typically begins with determining which markets would be affected by the merger, which in turn begins with defining the boundaries of relevant markets.[12] The U.S. approach for defining relevant markets examines markets in two dimensions – product aspects and geographic aspects – and has remained essentially the same for several years.[13] Two or more products are considered to be in the same market if customers view them as effective substitutes. Two or more geographic areas are considered

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2 Mark Jamison & Janice Hauge 2015, *Lessons from the evolution of merger guidelines in the United States*, 4 J. Contemp. Mgmt. 59 (2015).

3 C. Scott Hemphill & Tim Wu, Nascent Competitors, 168 U. Pa. L. Rev. 1879 (2020).

4 Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L. J. 129-173 (2007).

5 Jamison & Hauge, *supra* note 2.

6 Baker, *supra* note 4.

7 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010). Available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

8 David J. Teece & M. Coleman, The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries 43 Antitrust Bull. 801, 804 (1998).

9 Janice Hauge & Mark Jamison, Identifying Market Power in Times of Constant Change, (Univ. of Florida, Warrington Coll. of Bus., PURC Working Paper, 2016), available at https://bear.warrington.ufl.edu/centers/purc/docs/papers/1607_Jamison_Identifying%20Market%20Power%20in%20Times %20of%20Constant%20Change.pdf.

10 Mark A. Jamison, *Towards a Theory of Market Power*, 1 Ariz. St. U. Corp. & Bus. L. J. 1-22, 2020 http://cablj.org/wp-content/uploads/2020/06/Ready-Jamison.pdf.

11 Ronald A. Cass, *Antitrust for High-Tech and Low: Regulation, Innovation, and Risk* 9 J. L., Econ. & Pol'y 169, 193-95 (2013); Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation* 74 Antitrust L. J. 1 (2007).

12 Baker, *supra* note 4.

13 Baker, *supra* note 4; Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 Competition Pol'y Int'l 3-27 (2007); Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 Marq. L. Rev. 123-215 (1992).

to be in the same market if customers do not believe that the geographic difference limits their product choices.[14] The analyses are done using a hypothetical monopolist test, which considers whether a hypothetical monopolist within the product or geographic boundaries being considered would be able to profitably raise and maintain prices above competitive levels. If the price increase is unprofitable, then the market boundaries in question are deemed too narrow because substitutes exist elsewhere. The boundaries are then expanded, and the process is repeated until such a price increase is profitable.[15] Once markets are defined, then the analysis shifts to determining whether there is market power in the defined markets.[16]

The most recent merger guidelines -- adopted in 2010 -- provide tools for estimating competitive effects that are not reliant on market definition,[17] for example, the Upward Pricing Pressure Analysis.[18] However, the methods are just as reliant on history as the traditional market definition approach, and rely upon analyses of existing products. For example, the Upward Pricing Pressure Analysis is "based on the price/cost margins of the merging firms' products and the extent of direct substitution between them."[19]

III. DYNAMICS OF HIGH-TECH MARKETS

Digitization has changed markets by enabling rapid evolution, rivalries between firms that seem to be in different markets, and competition for future markets rather than within current markets. Digitization has also enabled the emergence of Big Tech, i.e. Alphabet, Amazon, Apple, Meta, and Microsoft. The sizes and perceived influence of these companies has shocked some people, prompting populist calls for governments to attack their size and scope,[20] reflecting the anti-bigness sentiments triggered a little over one hundred years ago when industrialists such as Andrew Carnegie and John D. Rockefeller were growing companies to unprecedented size.[21]

Rapid Evolution. — With digitization, disruptions happen quickly and episodically,[22] with major disruptions occurring when a new computer class forms, which is roughly each decade.[23] New and existing firms and startups compete intensely for these breakthrough innovations.[24] Rapid change defies the notion of enduring market power, which underlies antitrust and market power as defined by Lerner.[25]

Profits. — To some observers, tech leader profits appear substantial, are indicators of market power, and are causes for concern.[26] But such shallow reasoning should be rejected. Profits are hard to measure.[27] Even when they can be accurately measured, apparent high profits might result from sources other than market power, including: (1) Shumpetarian profits from superior efficiency[28] or from unimitated product

14 Baker, *supra* note 4.

15 Jamison & Hauge, *supra* note 2.

16 *Ibid.*

17 U.S. DOJ and FTC *supra* note 7.

18 Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. Theoretical Econ. Article 9 (2009), available at: https://www.degruyter.com/document/doi/10.2202/1935-1704.1563/html.

19 *Ibid.*

20 Elizabeth Warren, *Here's How We Can Break Up Big Tech: It's Time to Break Up Amazon, Google, and Facebook*, Medium (Mar. 8, 2019), available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

21 Tim Wu, The Curse Of Bigness: Antitrust in the New Gilded Age (2018).

22 David J. Teece & M. Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries* 43 Antitrust Bull. 801, 804 (1998).

23 Gordon Bell, *Bell's Law for the Birth and Death of Computer Classes: A Theory of the Computer's Evolution,* Tech. Rep. MSR-TR-2007-146 https://www.microsoft.com/en-us/research/wp-content/uploads/2007/11/tr-2007-146.pdf (2019).

24 Cass *supra* note 11, at 194-96.

25 *See* Abba P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 Rev. Econ. Stud. 157, 157-165 (1934).

26 Scott Galloway, Hidden DNA of Amazon, Apple, Facebook, and Google, at 1 (2017).

27 *See* Carl Shapiro, *Antitrust in a time of populism* 61 Int'l J. Ind. Org. 714 (2018).

28 See Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann, & J. Fred Weston eds., 1974); Teece & Coleman, *supra* note 22.

innovations;[29] (2) resource scarcities;[30] and (3) exogenous shocks, such as economic or regulatory changes. High-tech industries exhibit Shumpetarian rents more than do other industries because of the rapid technology evolution and episodic disruptions. Only Porterian or Smithian profits should be considered as problematic. Porterian profits result from firms constructing barriers to competition, i.e. creating situations for no economic purpose other than to curb pressure from rivals.[31] Smithian profits result from government-created barriers to competition.[32]

Network Effects. — Network effects are present in many industries historically but are particularly pronounced in digital markets when accompanied by relatively high fixed costs.[33] They sometimes enable firms to become relatively large, such as Meta or TikTok. The sizes might trigger some to conclude that there is market power. But the potential for network effects to create actual market power appear overstated. Customers are generally able to preserve choices by multihoming,[34] such as people using both Facebook and TikTok. According to Backlinko, the average American has more than seven social media accounts. And people are finding more and more social media options: On a global basis, the number of accounts per person nearly doubled between 2014 and 2020.[35] Also, studies of intertemporal network effects – i.e. the situation where a firm creates network effects over time – and that were influential in the *WorldCom-MCI* merger and the U.S. government's antitrust case against *Microsoft*[36] – ignore the Shumpetarian competition for the initial market.

Dynamics. — The dynamic patterns in digital markets derive in part from their network effects and constant change, technology paths, development of competencies, and competition for the next innovation. Sidak and Teece explain:

> "New technologies can enhance or destroy a firm's competency. The essence of the dynamic competition approach is that technological change itself shapes industry structure. Also, path dependencies and dynamic increasing returns may exist. Put differently, the rate and direction of innovation at the level of the firm do not depend on market structure but on the firm's competencies, the internal and external knowledge upon which the firm can draw, the intellectual property regime, and the firm's complementary assets. Entry conditions are a function of appropriability and 'cumulativeness.' Learning and innovation will also shape the firm's boundaries."[37]

Business Ecosystem. — Firms in digital markets are generally part of a business ecosystem that defines firms' competitive pressures.[38] For example, apps in the Google Play Store compete with similar apps, but there is also rivalry between the Android and Apple iOS operating systems. This complicates defining market power as a service such as Google search may appear to have market power within an internet browser ecosystem, but its success depends upon the success of the browser ecosystem.

IV. ADDRESSING THE HIGH-TECH CHALLENGE

Various persons have suggested ways to address the high-tech challenge. Katz and Shelanski suggest basing analyses on predicted technological changes,[39] but it is unlikely that governments can reliably predict technologies and their effects.[40] Indeed making such predictions reliably

29 Teece & Coleman, *supra* note 22.

30 *Ibid*.

31 *Ibid*.

32 See Adam Smith, The Wealth of Nations, (Modern Library Edition 1937) (1776).

33 Hal R. Varian, Joseph Farrell, & Carl Shapiro, The Economics of Information Technology: An Introduction (2004).

34 Sami Hyrynsalmi, Arho Suominen, & Matti Mäntymäki, *The influence of developer multi-homing on competition between software ecosystems*, 111 J. Sys. & Software 119-127 (2016).

35 Backlinko, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2022?* available at https://backlinko.com/social-media-users.

36 See Jacques Crémer, Patrick Rey, & Jean Tirole, *Connectivity in the Commercial Internet* 48 J. Indus. Econ. 433 (2000); 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).

37 Gregory Sidak & David Teece, *Dynamic Competition in Antitrust Law*, 5 J. Competition L. Econ. 581, 612 (2009).

38 David J. Teece, *Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy*, 9 J. of L., Econ. & Pol'y 97, 102 (2012); Jeffrey Eisenach, *Broadband Competition in the Internet Ecosystem*, AMERICAN ENTERPRISE INSTITUTE, (Oct. 18, 2012); Jeffrey A. Eisenach, *US Merger Enforcement in the Information Technology Sector*, in THE CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY, AND HIGH TECH 445 (Roger Blair and Daniel Sokol eds., 2017).

39 Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation* 74 Antitrust L. J. 1, 12-13 (2007).

40 Cass *supra* note 11, at 193-95.

conflicts with the understanding that innovation is a surprise to almost everyone, including the innovator to a certain extent. Khan argues for common carrier-like regulations for Amazon.[41] This remedy fails because it assumes that: (1) Users of the Amazon platform would prefer that Amazon be a blander version of eBay, which these customers have already rejected in their choice of using Amazon; (2) There are no vertical synergies that affect Amazon's investment in platform quality;[42] and (3) Government regulators have the expertise to significantly redesign a business in which they have no experience. The alternative to these three assumptions is that the proposal is intended, in the name of competition, to lower the value customers receive from Amazon and its rivals. Rivals' quality choices would be affected if they strategically respond to Amazon's government-induced lower quality.

Others argue that regulators should focus on firm sizes or market shares.[43] This idea fails for several reasons. One is that the proponents have been unable to justify the inevitable outcome of limiting business size, namely denying customers their legitimate choices of products and suppliers. For example, if the thought is that Google search is too big, what is the justification for capping the number of searches that Google could perform and forcing users to search with an engine that they believe is inferior? The idea also assumes that firms and markets are reasonably stable, which is demonstrably false. For example, various state attorneys general and the Federal Trade Commission ("FTC") have filed multiple cases against Meta in the past two years, calling it or its Facebook platform a "monopoly," "the world's dominant online social network," a "behemoth," and an "empire."[44] Yet within two weeks of the FTC's last complaint, Pew Research released a report showing that "TikTok has established itself as one of the top online platforms for U.S. teens [a critical market segment], while the share of teens who use Facebook has fallen sharply."[45] Facebook's popularity among US teens (measured by numbers of teens who say they use the social media service) had dropped from 71 percent in 2015 to just 32 percent in 2022, finishing 5th behind Meta's Instagram product (62 percent) and Snapchat (59 percent).[46] That is hardly the performance of "monopoly" or of an "empire," and it begs the question: If Facebook is "the world's dominant online social network," exactly what is meant by "dominant"? Also, anti-bigness as a quickening force for antitrust was used in the early days of competition policy in the United States[47] and research has found that it was ineffective.[48]

A more promising change to the merger guidelines would be to look for Porterian or Smithian advantages and challenge mergers that extend these advantages' reach.[49] A Porterian advantage is one created by a firm and has no economic purpose other than to limit pressure from rivals.[50] A Smithian advantage is government-created.[51]

Porterian advantages are based on Michael Porter's work on competitive advantage.[52] Porter identifies competitive forces and strategies for firms to avoid these forces. Most of the strategies he describes improve economic efficiency in that they add product value, lower costs, or

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41 Lina M. Khan, *Amazon's Antitrust Paradox*, 126(3) Yale L.J. 710 (2017).

42 Interestingly, this assumption contradicts the conclusion of Crémer, Rey, & Tirole *supra* note 35, which was instrumental in the European Union's case against the merger of Worldcom and MCI.

43 See John M. Newman, *Antitrust in Digital Markets*, 72 Vand. L. Rev. 1497, 1503-04 (2019); Wu *supra* note 21.

44 Plaintiff States v. Facebook, Inc. in the United States District Court for the District of Columbia (December 9, 2020) available at https://ag.ny.gov/sites/default/files/facebook_complaint_12.9.2020.pdf; Federal Trade Commission v. Facebook, Inc., Case No.: 1:20-cv-03590, *COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF* in the United States District Court for the District of Columbia (December 9, 2020) available at https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf; Federal Trade Commission v. Facebook, Inc., Case No.: 1:20-cv-03590-JEB, *FIRST AMENEDED COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF* in the United States District Court for the District of Columbia (August 19, 2021) available at https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf; *Federal Trade Commission v. Meta Platforms, Inc., Mark Zuckerberg, and Within Limited, Inc.*, Case 3:22-cv-04325, *COMPLAINT FOR A TEMPORARY RESTRAINING ORDER*
AND PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(B) OF THE FEDERAL TRADE COMMISSION ACT in the United States District Court Northern District of California San Francisco Division (July 27, 2022) available at https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

45 Pew Research, *Teens, Social Media and Technology 2022*, (August 10, 2022) available at https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

46 *Ibid.*

47 Wu *supra* note 21.

48 Robert W. Crandall, *The Dubious Antitrust Argument for Breaking Up the Internet Giants*, 54(4) Rev. of Indus. Org. 627 (2019); George Stigler, *The Economic Effects of the Antitrust Laws*, 9 The J. of L.& Econ. 225 (1966).

49 Antitrust authorities might also address the advantages outside of the context of a merger, but that is beyond the scope of this paper.

50 Teece & Coleman, *supra* note 22.

51 Smith *supra* note 32.

52 Michael E. Porter, *How competitive forces shape strategy*, 57(2) Harv. Bus. Rev. 137-145 (Mar/Apr 1979).

produce innovations.[53] Even if such strategies diminish competitive pressure, they should be of little concern to competition regulators because they are the types of things companies should be doing to add value to the economy. Strategies that could be of particular interest for antitrust would include developing superior access to essential resources, controlling all or nearly all favorable locations, controlling distribution channels, developing proprietary access to suppliers or buyers, and creating switching costs.

Many of these strategies include actions that have legitimate business purposes, so the key for antitrust regulators is to separate those actions from the ones whose primary effects are to hinder competition. For example, superior access to essential resources could include Alphabet's cost advantage from locating its servers near hydroelectric plants, which provide low-cost electricity.[54] Achieving this cost advantage is a legitimate business strategy as it improves efficiency even though it might prevent rivals from achieving similar cost efficiencies if Alphabet exhausts that generating capacity. An antitrust regulator might be tempted to conclude that Alphabet must share this advantage with rivals, but such a requirement diminishes firms' incentives to achieve such efficiencies.

The questions an antitrust regulator should ask about strategies should assess whether each strategy is profitable only because, or perhaps primarily because, of its keeping rivals at bay. Examples include:

(1) If a firm obtains superior access to resources or favorable locations, has the firm extended that beyond its needs? For example, did Alphabet gain control of so much electricity generation from hydropower generators that rivals cannot gain a similar efficiency and, if it did, did the action also exceeded the amount of power that it would reasonably need?
(2) Is the strategy cost minimizing or value increasing, or do the actions result in the firm actually giving up some efficiencies while raising its rivals' costs even more?
(3) Do the switching costs serve a legitimate business purpose, such as managing risk given the fixed costs of production, product development, or customer acquisition, or do the investments in creating switching costs place an unprofitable financial burden on the company?

To minimize the costs and delays caused by case-by-case analyses of these strategies, antitrust authorities should promote or conduct industry studies so that it they know, in advance of cases being filed, where Porterian strategies are employed and their impacts on efficiency. Such studies would also inform businesses of the types of strategies that would likely trigger antitrust inquiries.

Smithian advantages are based on Adam Smith's inquiry where he identified governments as the primary enablers of monopoly. John Stuart Mill also identified government as a primary cause of monopoly and added that a monopoly might also form naturally if a firm had sole access to a resource that it did not create, and that any rival would have to use in order to compete.[55]

There are several government-provided advantages that a firm could enjoy and that would give it market power. One is exclusive or nearly exclusive grants of market access. Telephone company service territories during the 20th century are an example of the government limiting competition.[56] Government subsidy programs exclusive to telephone companies is another example.[57] What these government efforts have in common is that the government provided a benefit that was unavailable to actual or potential rivals and that the beneficiary companies did not acquire in a competitive process, including the process of innovation but not including competition for political favors. Exclusive territories for electric utilities might not quality as a Smithian advantage because while the utilities generally did not compete for these government barriers to entry, studies of the effects of the exclusivities on economic efficiency have given ambiguous results.[58]

Like the research agenda for Porterian advantages, the program of study for identifying Smithian advantages would at least initially be dominated by industry studies that seek to find where governments favor some companies over others, including excessive regulations that by

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53 There are four types of economic efficiency, namely allocative (does the mix of product quantities produced maximize consumer utility?), technical efficiency (do the production methods maximize production given the amount of resources used?), dynamic efficiency (are innovations occurring the pace that maximizes consumer welfare?), and structural efficiency (does the arrangement of production across firms maximize scope economies?).

54 Bobbie Johnson, *Google's power-hungry data centres*, THE GUARDIAN, May 3, 2009, available at https://www.theguardian.com/technology/2009/may/03/google-data-centres.

55 John Stuart Mill, Principles of Political Economy (1848).

56 Gerald W. Brock, The Telecommunications Industry: The Dynamics of Market Structure (1981).

57 Mark A. Jamison, *A Competitive Framework for Pricing Interconnection in Global Telecommunications Markets* 23(3) Denver J. Int'l L. & Pol'y 513-33 (1995).

58 *See* Theodore J. Kury, *Price effects of independent transmission system operators in the United States electricity market*, 43 J. Reg. Econ. 147–167 (2013); Theodore J. Kury, *The impact of coordination on wholesale market participation: The case of the U.S. electricity industry*, 32 Util. Pol'y. 38–44 (2015).

their costs favor large firms. These studies should also determine whether benefits, such as patent protection, are achieved through a competitive process, or are simply granted. Where Smithian advantages are found, the government is the primary culprit and should be the focus of the competition authorities' efforts to address market power.

V. CONCLUSION

Contemporary merger guidelines are heavily dependent on empirical observations of the past and present, which make these methods inadequate for addressing market power in the dynamic high-tech industries. Competition regulators should refocus by identifying features of the industries that do or will create market power, and then adopt policies that challenge mergers that would extend the reach of such monopoly-inducing features and adopt strategies for diminishing the presence of such features to the extent practicable.

THE NEO-BRANDEISIAN APPROACH TO VERTICAL MERGERS – A ZIPLINE TO OBLIVION?

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I. INTRODUCTION

Neo-Brandeisians now have full control of both federal antitrust agencies, with strong support from Congressional Democrats, the President, and an amen corner of NGO's (among others). Almost halfway through the Biden Administration, it is now obvious that agency leadership regards vertical integration with far greater and more consistent hostility than any administration in living memory. The agencies' recent hot pursuit of vertical cases has become a significant element of the Neo-Brandeisian mutiny against the broader antitrust consensus that has prevailed in the half-century since *General Dynamics,*[2] *Sylvania*[3] *and Brunswick*.[4] President Biden acknowledges that the U.S. has become "the wealthiest, most innovative nation in history,"[5] yet he has denounced the longstanding antitrust consensus as an "experiment" that "failed," blaming it on "people like Robert Bork."[6]

Without seeking public input (and, at least in the FTC's case, apparently without consulting its own professional staff) on September 23, 2021 the agencies summarily rescinded their joint Vertical Merger Guidelines issued in June, 2020.[7] The FTC also withdrew the associated Commentary on Vertical Merger Enforcement that it had published in December, 2020. As a part of their effort to rewrite the current Horizontal Merger Guidelines (announced January 18, 2022), the agencies signaled their intent to revisit vertical merger analysis as well. If the official speeches and recent merger challenges are any indication, the entire effort seems like a zipline to oblivion. Assuming that the critical substance of Clayton Act Section 7 (last amended in 1950) will apply for the foreseeable future, the agencies should carefully reflect on the potential consequences of their present course.

They might wish to acknowledge why merger enforcement shifted in the 1970's, from heavy reliance on a simplistic (and flawed) structure/conduct/performance paradigm and invocation of vague political themes (e.g. "fairness," protection of small businesses in spite of economic cost) to case-by-case analysis based on sound theoretical and empirically-supported economics as provided in recent versions of the merger guidelines. Extensive scholarly analysis and years of open debate regarding merger enforcement had exposed serious weaknesses in the pre-*General Dynamics* approach. The agencies would do well to ensure that future merger guidelines adopt an economically sound and fact-based approach with regard to vertical transactions, keeping agency policy within hailing distance of well-regarded precedents and mainstream understandings.[8]

The Vertical Guidelines and Commentary attempted to distill lessons learned from years of previous analysis and enforcement experience, as explained by courts, scholars of law and economics, enforcers, practitioners and others in the antitrust community. It has long been recognized that there are few simple objective tests that allow confident predictions of the competitive effects of vertical transactions. Traditional reliance on key market structure variables – concentration, barriers to entry, product differentiation, transaction characteristics and the like – can be of some help with regard to horizontal transactions, where loss of direct competition is a central concern. But these guideposts may not be especially useful for vertical transactions. Such transactions do not reduce the number of direct competitors, so more sophisticated theorizing is required about how vertical deals can inhibit competition.

Many mechanisms have been proposed as potential sources of competitive restraint from vertical transactions – facilitation of cartel activity (e.g. by improving access to information required to monitor and enforce cartel agreements), regulatory evasion, or price discrimination (where such discrimination is likely anticompetitive). Antitrust literature is rich with existence theorems regarding conditions in which vertical

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2 *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

3 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

4 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

5 @POTUS, Sept. 27, 2022.

6 White House, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy, July 9, 2021, available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/. For this purpose, "people like Robert Bork" would include former Supreme Court Justices Ruth Bader Ginsburg and Stephen Breyer, as well as Donald Turner (Lyndon Johnson's first AAG for antitrust) among many other respected antitrust experts and agency officials (economists and lawyers) of both political parties who for many years have supported the use of sound, fact-based economic analysis in antitrust enforcement.

7 https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

8 The most recent plenary Supreme Court decision on the analysis of the competitive effects of mergers as required by Section 7 goes all the way back to *General Dynamics, supra* note 2, and *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). A substantial lower-court jurisprudence, exemplified by *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (opinion by Thomas, J. joined by Ginsburg, J.), tethers merger analysis to the fundamentals of post-*General Dynamics* Supreme Court antitrust decisions.

transactions might restrict competition, but there are few shortcuts available to determine their realism and accuracy in specific cases. Antitrust enforcers and courts are condemned to muddle through, forced to engage in fact-based case-by-case analysis in order to reach outcomes that make sense in vertical cases.

Brown Shoe[9] – an early Supreme Court case that applied the current version of Clayton Act Section 7 to a transaction with both horizontal and vertical aspects – focused on "foreclosure" in the elementary sense of limits that might be set by a vertically integrated firm on sales/purchases to/from a competing downstream/upstream firm. *Brown Shoe* clearly stated, however, that mere foreclosure (unless at one or the other extreme of *de minimis* or monopoly levels) is not determinative in evaluating future competitive effects of vertical transactions.[10] In closely related substantive areas involving this same type of potential foreclosure – requirements contracts, exclusive dealing – a rule of reason is applied and the *competitive effect* of a substantial foreclosure (as distinct from mere loss of opportunity to transact) is the key consideration.[11] Nevertheless, *Brown Shoe* condemned a transaction involving minimal foreclosure, with no sinister element other than the possibility that in the relevant sector, "a cumulative series of vertical mergers . . . if left unchecked, will be likely 'substantially to lessen competition.'" [12] By so doing, it suggested a strong presumption against vertical combinations, since many industries might be susceptible to such a development. How would parties to a vertical transaction rebut government speculation that a future "unchecked" vertical merger trend "will be likely substantially to lessen competition"?

Aside from doubts that such fortune telling could or should satisfy the government's statutory burden to prove a sufficient likelihood of substantial anticompetitive effect, the idea of a presumption against vertical transactions seems especially questionable in light of the settled principle that anticompetitive use of vertical control can be challenged at the time of suit (even decades after the vertical acquisition that produced such control, without regard to any statute of limitations).[13] This should render it unnecessary for courts to speculate about future competitive conduct at the time of acquisition if there is concern regarding future anticompetitive foreclosure.

As mentioned above, it is well recognized that trying to specify objective circumstances in which vertical transactions create unacceptable anticompetitive risks is a treacherous area because there are few reliable quantitative landmarks, a bewildering variety of speculative theories of harm, and mixed historical evidence regarding the effects of vertical transactions. In rescinding the Vertical Guidelines and Commentary, the agencies have abandoned the prior approach based on claims that the Guidelines and Commentary are imperfect, without offering any alternative analysis. In various statements on the subject, the mutineers reject consideration of efficiencies, or heavily discount their existence and/or magnitude. They downplay or ignore that over the long course of U.S. industrial history problematic vertical transactions are rare compared to problematic horizontal transactions, and they question the reality and significance of "elimination of double marginalization," ignoring other obvious rationales for vertical acquisitions (discussed below) even where double marginalization may not be significant.

The long history of antitrust enforcement suggests resources should be focused on horizontal rather than vertical transactions. It is easy to identify major horizontal combinations that occurred during the Second Industrial Revolution – before there were any effective legal constraints on such conduct – whose anticompetitive effects demonstrated the danger of competitor combinations. Formation of the Standard Oil Company, the American Tobacco Company, the Sugar Trust, and the Whiskey Trust, for example, were important developments whose impact inspired support for efforts to enact and enforce the Sherman Act. Standard Oil and American Tobacco were dissolved as a result of groundbreaking antitrust prosecutions in the early 20th Century Progressive Era. Some question whether these prosecutions were helpful on balance, but the present mainstream view, based on a century of debate, seems to be that these cases appropriately terminated mergers to monopoly and/or cartel arrangements – unvarnished anticompetitive conduct. This seems true even for *Standard Oil* – a case that did not receive a persuasive rationale until 1996.[14] Although now so obvious that one rarely stops to consider it, the clarity of the prohibition on merger to monopoly has essentially extinguished any realistic possibility that under normal conditions, well-advised business enterprises operating subject to U.S. antitrust

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

10 *Id.* at 329.

11 *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 (1961).

12 *Id.* at 334. It bears pointing out that shoe manufacturing fled the United States at about this time, with mid-20th Century industry employment of around 250,000 declining drastically. At the same time the Antitrust Division aggressively prosecuted the leading shoe machinery supplier, United Shoe Machinery Corp. of Beverly, Massachusetts, ultimately leading to Supreme Court-mandated dissolution of the firm. 98-99% of shoes sold in the U.S. are now imported.

13 *United States v. E. I. du Pont de Nemours Co.*, 353 U.S. 586 (1957) (automotive finishes). The wisdom of this rule has been questioned, but *Brown Shoe* was decided only five years after *du Pont.*

14 Elizabeth Granitz & Benjamin Klein, Monopolization by "Raising Rivals' Costs": The Standard Oil Case, 39 J.L. & Econ. 1 (1996) (demonstrating that the key anticompetitive behavior consisted of Standard Oil's agreement to allocate petroleum shipments in accord with railroad cartel agreements, in return for railroad imposition of exclusionary rates and other terms of service on Standard Oil's competitors).

jurisdiction would attempt it.

By contrast, infrequent antitrust prosecutions resulting in break-ups aimed at vertical integration have not proven especially effective in improving competition in the affected markets. The *Paramount Decrees*[15], which sliced the motion picture industry into separate tranches including film production, distribution and exhibition; the *Meatpackers Decree*,[16] separating meatpacking from other lines of business (including, *inter alia*, stockyards, transportation and communication services and facilities associated with livestock markets, and meat retailing); and the *Network Decrees*,[17] requiring television networks to allocate production of a specified portion of their programming inputs to unaffiliated suppliers, have produced questionable competitive benefits, if any. Even for vertical cases that result in major industry restructuring, it is difficult to discern whether competition was ultimately enhanced.[18]

The recent shift in the agencies' approach to vertical mergers was anticipated in at least one key respect during the Trump Administration. Soon after his investiture as AAG for Antitrust in 2017, Makan Delrahim – who otherwise generally maintained merger enforcement and other antitrust policies within the prevailing post-*General Dynamics* mainstream – chose a high-profile setting in which to declare strong antipathy to the use of conduct restrictions as a form of antitrust remedy, calling specific attention to vertical transactions.[19] This back-footed the antitrust bar, given the long-standing and common practice of settling vertical cases by having parties submit to conduct limitations addressing any narrow competitive concerns.

The practice has long been based on the accepted realities that (1) competitive concerns with vertical deals have been rare (since as defined they do not involve the elimination of direct competition, and correction for Type II error in a vertical context is in principle available at time of suit, at least where foreclosure is a main concern) and (2) experience powerfully suggests that conduct remedies – although challenging to implement, especially where continuing enforcement is required – can be justified if relatively limited decree provisions seem likely to limit any risks while preserving the substantial benefits characteristically associated with vertical transactions. By strongly asserting an aversion to conduct remedies, AAG Delrahim was setting up a major change in enforcement policy toward vertical transactions. Perhaps not widely anticipated at the time, the potential combination of antipathy to conduct remedies with a Neo-Brandeisian emphasis on competitive risks of vertical transactions coupled with rejection of recognized procompetitive aspects of such combinations might imply frequent or even per se opposition to such transactions.

AAG Delrahim's shift anticipated an Antitrust Division challenge to AT&T's acquisition of Time Warner. The Division's request for injunction was rejected by a district judge with significant recent experience in a similar matter: in 2011 the judge had approved an antitrust consent

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15 There have been numerous antitrust challenges to alleged horizontal and vertical competitive practices of the motion picture industry. Following Supreme Court affirmance of a district court decision condemning a variety of such practices, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the defendant firms entered into consent decrees that imposed numerous restrictions on their vertical scope (in addition to conduct restrictions). Efforts to modify or vacate these decrees have extended almost to the present day, with the decrees finally scheduled to terminate, pursuant to court order, only two months prior to this writing. *United States v. Paramount Pictures, Inc.*, Order in Case 1:19-mc-00544-AT (S.D.N.Y. Aug. 7, 2020) (decrees terminated subject to a two-year "sunset period" for certain prohibitions). Although the decrees still have their supporters, evidence that the vertical limitations had any positive competitive impact is mixed at best.

16 The *Meatpackers Decree* has a long and complex history originating with complaints about industry practices that predate the Sherman Act. A government antitrust complaint impending in 1919 (based on a report on the industry compiled by the FTC at Presidential Wilson's request) was settled with entry of an industry-wide consent decree in 1920, followed by enactment of closely related regulatory legislation in 1921 (Packers and Stockyards Act). More than a half-century of court proceedings involving interpretation of and proposed modifications to the Decree followed. See e.g. *United States v. Armour & Co.*, 402 U.S. 673 (1971). The Decree was terminated on joint motion of the parties in 1982, *United States v. Swift & Co.*, 1982-1 Trade Cas. (CCH) 64,464 (N.D. Ill. 1981), although regulation of and continuing antitrust action against the industry remains ongoing.

17 These decrees were entered in 1978-1981 in settlement of Antitrust Division litigation against the three major broadcasting networks, essentially regulating certain forms of integration and contractual relationships with suppliers of broadcast content. Similar to the relationship between the *Meatpackers Decree* and the Packers and Stockyards Act, there was a parallel scheme of Federal Communications Commission regulation of broadcasters governing much of the same subject matter addressed in the decrees. The *Network Decrees* were substantially modified in 1993. *United States v. National Broadcasting Co., Inc.* (Case No. CV74-3601-R); United States v. American Broadcasting Companies, Inc. (Case No. CV74-3600-R); *United States v. CBS, Inc.* (Case No. CV74-3599-R) (C.D. Cal., November 10, 1993).

18 Arguably the break-up of the former Bell System by consent decree after years of litigation can be placed in a category of non-horizontal divestitures that ultimately led to significant procompetitive results. This case also involved important parallel developments in telecommunications regulation at both federal and state levels (e.g. FCC administration of a scheme of "access tariffs" governing the rates, terms and conditions upon which competing long-distance telecommunications carriers would obtain interconnections to local telephone systems). The persistence of major unresolved issues following the divestiture and during the administration of the decree eventually elicited Congressional intervention through the Telecommunications Act of 1996, pursuant to which the decree court was required to vacate the antitrust remedy.

19 Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (November 16, 2017). https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar

> "At the beginning of the last administration, the Division entered into several behavioral consent decrees to resolve vertical mergers it determined to be illegal, such as those in *Comcast/NBCU, Google/ITA, and LiveNation/TicketMaster.* Several observers took issue with this regulatory approach to antitrust enforcement . . ..
>
> "I agree with that skepticism. . ..“

decree permitting NBC Universal (entertainment supplier) to combine with Comcast (entertainment distributor), subject to conduct relief. The remedy followed a classic anti-foreclosure remedy model, establishing mechanisms to resolve disputes arising from a potential future denial of distribution competitors' access to content (actual or constructive) provided by the combined firm. So far as public sources disclose, however, only a single material dispute occurred during the decree's seven-year initial period. Arguably this may have been among the reasons why the Antitrust Division did not request extension of the *NBC Universal/Comcast* decree, even though the litigation against *AT&T/Time Warner* was pending. Reportedly the Division did wag a finger at *NBC Universal/Comcast*, stating its intent to maintain a watching brief on future conduct, presumably to inspire some degree of continuing constraint on the firm.[20]

In June 2018 the same judge who had approved and then presided over implementation of the *NBC Universal/Comcast* decree rejected the Division's request to enjoin *AT&T/Time Warner*. The D.C. Circuit affirmed in February 2019, and the Division then abandoned the case. The sky failed to fall as the Division had predicted, however, and only two years later AT&T, newly focused on the suddenly white-hot world of content-streaming, announced a spin-off of its recently acquired affiliate.

The Neo-Brandeisians are apparently undeterred by either the demonstrated judicial skepticism of the Division's recent apostasy regarding conduct remedies, or by the Division's loss in the challenge against *AT&T/Time Warner*. The Neo-Brandeisians have effectively discouraged a number of significant vertical transactions submitted for HSR review (*Nvidia/ARM, Lockheed Martin/Aerojet Rocketdyne*), but they are now 0 and 2 on litigated vertical cases (the FTC administrative complaint against *Illumina/Grail* and the Antitrust Division complaint against *UnitedHealth Group/Change Healthcare*), although the game is far from over: one decision by an FTC ALJ has been appealed to the full Commission by staff, and the other, a district court decision, remains subject to appeal by the Division. I limit the discussion to the *Illumina/Grail* case, but the district court decision in the *UnitedHealth Group/Change Healthcare* matter is worth reading since, like the ALJ Initial Decision in *Illumina/Grail*, it systematically and effectively explains why the government complaint does not justify any finding of illegality.

The FTC case challenges an acquisition by Illumina, the leader in what is called "Next-Generation Sequencing" ("NGS") – a system for deciphering human genetic code. Illumina's technology is reported to have increased the speed and reduced the cost of genetic sequencing by multiple orders of magnitude, opening up many new approaches to the fight against various diseases, specifically including cancer, the second-leading cause of death in the U.S. Illumina proposed to reacquire an entity it had partially spun off to pursue research on early cancer detection technologies enabled by Illumina's NGS. The spin-off, "Grail" (as in the Holy Grail of early cancer detection), fulfilled its sponsor's expectations by developing a prototype test that might detect with a single blood draw as many as 50 forms of cancer, most of which have no other viable early detection protocol (and which therefore are not diagnosed until treatment is less likely to succeed). The field of play is referred to as MCED – multi-cancer early detection. But there are no FDA-approved products as of yet and therefore no "market."

Grail then faced the realty of conducting a costly and complex multiyear campaign to persuade the FDA to grant necessary approvals, to obtain commercially critical assurances that services and treatments based on the technology would be reimbursable (by health insurers including Medicare/Medicaid, *inter alia*) and to produce, distribute and market all required elements of any MCED offering. Although Grail was considering an IPO to finance these major long-term efforts, Illumina (still a minority owner in Grail) proposed a recombination instead, which Grail accepted. The FTC attacked the transaction, claiming that Illumina would thereby gain the incentive and ability to deprive potential future competitors (at the Grail level) of equal access to Illumina's NGS offerings.

The FTC's *Illumina* complaint has far-reaching negative implications for competition and innovation. The substance of FTC's approach powerfully suggests *per se* illegality for downstream vertical integration by firms with superior technology or other competitive advantages. The key allegation seems to be that a post-merger *Illumina/Grail* will control access to its unique NGS technology by any later-emergent MCED competitors and is likely to exclude or limit them by denial of access or imposition of unfavorable transaction terms for its system and its enabling technology. The key objections to this story start with the fact that any firm should be permitted to control its own proprietary technology (if it has any) by choosing the parties with whom it will deal, and by setting prices and other terms and conditions for transactions with customers, licensees and other similarly situated parties. These are inherent and indispensable features of being a distinct business entity in a market system that *encourages* the development of unique advantages (a/k/a, competition on the merits, superior skill, foresight and industry, etc.).

Perhaps Illumina has stumbled into a narrow and unique sector with characteristics that justify regulation, but Congress should make any such judgment and establish an appropriate regulatory framework. Possession of superior technology is not an antitrust problem in any event, and antitrust institutions (law enforcement agencies and courts) are poorly equipped to set terms and conditions for compelled dealings, particularly when Congress has not identified either the key tradeoffs or the required regulatory mechanisms. As Justice Brandeis put it in dissent

20 Dawn C. Chmielewski, "DOJ Notifies Comcast It Will Continue to Keep an Eye on The Company — Report," Deadline (Aug. 30, 2018); https://deadline.com/2018/08/doj-comcast-scrutiny-continue-post-consent-decree-nbcu-1202455013/.

to a 1918 decision creating judicial protection for uncopyrighted news content:

"Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations."[21]

Although Illumina's advantages are not based primarily on copyright, the institutional objections to judicial implementation and management of the terms and conditions upon which Illumina would be required to provide its system to independent parties are identical. Courts are not equipped to identify industries and firms that are candidates for regulation and then impose and administer specific regulatory requirements that they deem appropriate; the fundamental judgments regarding the need for regulation are legislative questions for Congress, as are related questions regarding the design and implementation of appropriate instrumentalities for administration of any regulatory scheme.

Since Illumina could choose to license an independent Grail only, and thereby exclude competitors at that level, how does a combination change competition at either level (NGS or products and services relying on NGS)? Is the Commission suggesting that a firm with superior competitive abilities selling to multiple downstream outlets should be forced to provide different prices and terms than in the case where the firm has integrated downstream? And even if lower prices/more favorable terms were to result, what is the antitrust injury involved in the parties' election to integrate?

The Commission's approach seems to echo earlier cases such as *Otter Tail*[22] where the government's antitrust theory would require courts to force the superior firm to provide access on specified prices and terms to customers (as determined by the Federal Power Commission, in *Otter Tail*), but without identifiable competitive benefit at either level of commerce. In *Otter Tail* the problem was that both upstream (wholesale production and transmission of electricity) and downstream (retail distribution of electricity) levels were destined to be monopolies (due to federal regulation upstream and state regulation downstream) under any foreseeable outcome. In this case nothing will change the fact that Illumina controls technology that is essential to the full market development of Grail or any MCED competitor relying on Illumina's NGS.

Another fundamental point that the Commission might have considered is that there is no accepted formula that can predict relationships among structure, competition and innovation. On what basis, therefore, does the Commission assert that vertical integration by a firm like Illumina is likely to suppress innovation? Given the broad and longstanding recognition that the majority of long-run economic growth is attributable to technical improvements, scholars have focused on the structure/competition/innovation relationship, but research and debate are inconclusive. In any event, there is no widely accepted understanding that an innovator is more likely to succeed if it utilizes only independent routes to market, as distinct from relying on resources internal to the firm (i.e. a combined Illumina-Grail). Illumina might also pursue hybrid approaches following acquisition of Grail, encouraging other independent licensees of its NGS technology to pursue other applications. One can imagine outcomes involving reliance on downstream and complimentary resources that are internal, external, or a combination of both, but it is difficult to imagine why an antitrust agency would have a better assessment of the possibilities than the party that developed the technology, considering that the innovator has powerful incentives to promote widespread downstream utilization of its technology.

The Neo-Brandeisian views underlying the *Illumina/Grail* complaint minimize other antitrust policy considerations relevant to vertical integration. As suggested above, the agencies question efficiencies of vertical integration and specifically view elimination of double marginalization as exaggerated. Elimination of double marginalization, however, may not be determinative because there are other economic aspects of vertical integration that need not even relate to double marginalization. Every enterprise, without exception, must select the range of its activities: should a steel producer also mine its inputs, and/or fabricate products (in addition to raw steel)? There are clear objective elements to the make-buy decision: a classic example (used by George Stigler to discuss fundamental scope-of-the-firm issues going back to Adam Smith[23]) is the combination of steel production with steel product fabrication. Steel ingot made by a non-integrated producer will have to be reheated to allow end-product fabrication, whereas the integrated producer can avoid the expense and burden of facilities, operations and energy for reheating. Even if both steel production and fabrication were perfectly competitive (i.e. no EDM) there would be a cost minimization rationale for integration between the two stages. There may be transactional/administrative advantages to integration as well.

21 *International News Service v. Associated Press*, 248 U.S. 215, 267 (1918) (dissent of Justice Brandeis). This federal common-law approach, more characteristic at the time, was nullified along with other federal common-law doctrines by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Concern with the judiciary's lack of capacity to fashion and administer decrees (without legislative authorization) imposing regulatory obligations on firms with unique competitive resources remains a major theme of modern antitrust cases. *Verizon Communications, Inc. v. Trinko, LLP*, 540 U.S. 398 (2004).

22 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

23 George J. Stigler, The Division of Labor is Limited by the Extent of the Market, 59 J. Pol. Econ. 185 (1951).

There are myriad similar considerations – related to every stage and every element of productive activity – that might influence the firm's choice of functional scope, even apart from EDM. Transactional structure and relative monitoring and enforcement costs as between market versus internal transactions may also be influential. To suggest that there must be serious antitrust review for every instance in which the firm seeks to acquire rather than "grow" a new function organically would burden vast numbers of transactions when only a tiny handful are ultimately likely to be considered problematic. The enormous diversity of the relevant considerations and the great number and complexity of the business issues surrounding the decision to "make or buy" mean that any antitrust threat to the exercise of business judgment regarding this fundamental issue may lead to the classic "chilling effect" – having to balance every business decision against the risk of provoking investigation or challenge by government agencies or by private attorneys general. The lack of any convenient analytical short-cut by which the agencies could second-guess business judgments on these questions strongly suggests that agency efforts to conduct an economy-wide dragnet to review run-of-mill vertical transactions would constitute extreme overkill.

The mutineers' doubts about efficiency and EDM in vertical transactions echo previous arguments challenging the competitive merits of vertical agreements in an earlier era. Among many procompetitive rationales cited for vertical agreements is prevention of free riding – encouraging downstream entities to make output-enhancing investments by steering rewards to those who actually invest. Opponents of vertical agreements sometimes attacked the validity of this rationale as if the merits of having a rule-of-reason approach depended on whether such a rationale applied in every case.

This was and remains a flawed approach to vertical restraints. Since vertical agreements only rarely implicate competitive concerns directly, it is doubtful that extensive review, investigation and/or legal challenge of the general run of such agreements could be justified as an appropriate use of enforcement resources. Just as with vertical acquisitions, there may well be circumstances in which competitive concern is justified. But without a realistic picture of the frequency and significance of such instances, enforcement policy is unguided. If efficiencies don't exist or are never enough to justify vertical integration, and if behavioral remedies are always pointless or guaranteed to be ineffective, we may as well build an enforcement machine without an off switch – a solution appropriate only for hard-core cartel behavior. That is no way to make antitrust policy for run-of-mill vertical acquisitions.

VERTICAL MERGERS AND COORDINATED EFFECTS: IMPLICATIONS FOR MERGER POLICY

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In this comment we discuss the role that vertical relationships have in coordinated effects and the implications for any revisions of the U.S. Department of Justice merger guidelines. We highlight empirical evidence in support of our recommendation that the merger guidelines provide for review of mergers of vertically connected firms with the risk of coordinated effects in mind.

Our research has shown that, despite increased efforts to prosecute explicit collusion, increased fines, and the use of creative detection and enforcement techniques, firms continue to engage in explicit collusion, harming consumers, competitors, and economic dynamism.[2] Further, our empirical research has shown that the two most important challenges to cartels are cheating and entry.[3] Firms engage in a wide variety of behaviors to prevent cheating or entry from disrupting collusion. In some cases, those behaviors include mergers.

Here we focus in particular on the role that vertical mergers have played in expanding the scope for monitoring, coordination, punishment, and exclusion on the part of horizontally colluding firms. We also note the very high horizontal concentration levels observed in markets with explicit collusion and urge that the merger guidelines be updated to address the emergence of such patterns of market dominance.[4]

In our sample of 81 international cartels, determined by the European Commission ("EC") or the U.S. Department of Justice to have engaged in horizontal price fixing between 1990 and 2007, we found that in a quarter of the cartels, vertical relationships were a feature of the collusive arrangement.[5] Antitrust authorities documented these vertical relationships in passing, as they are not central to the legal definitions of collusion; it is thus likely that 25 percent is an underestimate of the frequency with which cartels use vertical relationships to sustain collusion. In a subsequent study, examining cartels in (English speaking) jurisdictions around the world, we identified multiple examples of cartels using vertical relationships or vertical restraints to monitor and enforce collusion.[6] Cartels using vertical relationships occurred in a variety of industries, including consumer goods, such as chocolate and bicycles, and intermediate goods, such as chemicals and graphite products.

Focusing on the potential use of vertical restraints to support collusion seems to fly in the face of long-established economic theory demonstrating that vertical restraints can benefit consumers.[7] This research led to a presumption of efficiency benefits from vertical mergers. However, subsequent theoretical modeling has demonstrated that vertical mergers and vertical restraints can facilitate collusion, even when one might otherwise expect that vertically connected firms would have an incentive to disrupt collusion.[8]

Our studies of explicit collusion demonstrate that this is not simply a theoretical possibility. Cartels can and do use vertical relationships, including using vertical acquisitions, to help monitor collusive agreements and create barriers to entry. Cartels almost always engage in some sort of monitoring to reduce the incentive for participants to cheat.[9] Downstream firms may observe sales and be able to make them visible to a cartel. Thus, the inclusion of downstream firms in a collusive conspiracy can reduce the incentive for cartel members to cheat. For vertically integrated firms, sales managers often play this role. Where cartel members rely on vertically separate distributors, achieving this functionality can be difficult. Thus, a vertical merger provides a cartel with more readily accessible information to monitor compliance with a collusive agreement.

A successful, profitable cartel will naturally lead to new entry or the expansion of fringe firms. Cartel stability requires that entry or fringe expansion be controlled.[10] Cartels use vertical relationships to create barriers to entry in two ways. First, in many cases, downstream firms have

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2 See, e.g. Margaret C. Levenstein & Valerie Y. Suslow, What Determines Cartel Success?, 44 J. ECON. LITERATURE 43, 57 (2006); Margaret C. Levenstein & Valerie Y. Suslow, Breaking Up Is Hard to Do: Determinants of Cartel Duration, 54 J.L. & ECON. 455, 460–61, 474 (2011) Margaret C. Levenstein & Valerie Y. Suslow, Price Fixing Hits Home: An Empirical Study of US Price-Fixing Conspiracies,48 REVIEW OF INDUSTRIAL ORG 361-379 (2016)

3 Levenstein & Suslow, *supra* note 2 (2011).

4 Levenstein & Suslow, *supra* note 2 (2011), find that two-thirds of the cartels in the study were in an industry with a four-firm concentration ratio of 75 percent or more (p. 470).

5 Margaret C. Levenstein & Valerie Y. Suslow, How Do Cartels Use Vertical Restraints? Reflections on Bork's The Antitrust Paradox, 57 J.L. & ECON. S33, S41–42 (2014).

6 Margaret C. Levenstein & Valerie Y. Suslow, How Do Cartels Use Vertical Restraints? Horizontal and Vertical Working in Tandem, Antitrust L. J. 83, 15-40.

7 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288–91 (The Free Press 1993) (1978). Lester G. Telser, Why Should Manufacturers Want Fair Trade?, 3 J.L. & ECON. 86, 89–93 (1960).). Economic research has demonstrated these benefits empirically (Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in HANDBOOK OF ANTITRUST ECONOMICS 391, 392–97 (Paolo Buccirossi ed., MIT Press 2008); Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LITERATURE 629, 677–80 (2007).

8 See, e.g. John Asker & Heski Bar-Isaac, Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals, 104 AM. ECON. REV. 672 (2014); B. Douglas Bernheim & Michael D. Whinston, Common Marketing Agency as a Device for Facilitating Collusion, 16 RAND J. ECON. 269 (1985); Patrick Rey & Jean Tirole, The Logic of Vertical Restraints, 76 AM. ECON. REV. 921 (1986).

9 See, e.g. *supra* note 2 Levenstein & Suslow (2006).

10 *Supra* note 2 Levenstein & Suslow (2011) at 470–73.

access to and control information regarding brand reputation, and relationships with customers, and, more broadly, distribution channels. In this case, cartels of upstream firms can collaborate with downstream firms, sharing rents from the restriction of output. In return, the downstream firms use their information and relationships to foreclose entry from potential upstream competitors. Second, relationships between upstream and downstream firms can prohibit downstream firms from contracting with alternative suppliers. Threats of boycotts or refusals to deal can corral recalcitrant firms into colluding. Mergers between upstream and downstream firms, especially where the downstream firms have a brand reputation, a relationship with customers, or a much broader scope of products (i.e. a full product line) can create barriers to entry that facilitate collusion.

For example, in the haberdashery products cartel, a downstream distributor (Coats) and a vertically integrated producer (Prym) colluded, using the distributors' reputations with customers to prevent entry/expansion by a non-vertically integrated producer (Entaco).[11] Entaco's access to UK customers was made conditional on accepting geographic and product diversification restrictions established by Coats and Prym. Coats and Prym distributed one another's products, a frequent device used for balancing cartel quotas, and limited Entaco's ability to compete and innovate by limiting Entaco's direct contact with customers.

The specialty graphites cartel also used distributors to monitor sales, making visible transactions, and discouraging cheating that might otherwise limit a cartel's ability to raise price. According to the European Commission, vertically integrated firms were more successful in this regard: "In this respect, it should be recalled that SGL and LCL sold most of their graphite products via subsidiaries in Europe. As a result, they were able to control the price to the end users. On the other hand, producers like Ibiden and Tokai sold via independent distributors and machine shops and did not have detailed knowledge of the end users prices charged by these distributors or machine shops, nor were they able to control these prices."[12]

There are also cartels in which the cartel members acquired downstream firms to facilitate collusion. For example, in both the electrical and mechanical carbon and the cement cartels, vertical mergers along their supply chains were undertaken specifically to control recalcitrant, non-vertically integrated firms.[13] In a case still under investigation, it has been alleged that a Norwegian salmon producer (Mowi) acquired a downstream firm (Morpol) just prior to establishing a new cartel that used the distributor to manipulate the NASDAQ salmon index with the goal of increasing salmon prices.[14] Many of these examples are European, because the EC makes public more narrative information about the nature of collusion as part of its decision, but there is no reason to believe that these behaviors or relationships are not also occurring in the United States.

The existing U.S. vertical merger guidelines presume the irrelevance of concentration levels. When one considers the role of vertical mergers in facilitating collusion, concentration appears to be quite relevant in determining whether a merger is pro or anti-competitive. For example, if a proposed vertical merger involves an upstream producer in a highly concentrated industry and a downstream distributor in an unconcentrated industry, there might still be concern that the merger would facilitate collusion in the upstream industry, because of the role of the downstream distributor in monitoring the market (as discussed above). Analogously, if the downstream market is concentrated and downstream distributors have a brand recognition or other mechanism that limits entry, a vertical merger could allow them to maintain otherwise unsustainable collusion.

In general, the current U.S. vertical merger guidelines consider the potential for vertical mergers to facilitate dominance or unilateral effects, but do not explicitly consider their potential to support collusion or coordinated effects. We recommend that any guidelines for vertical mergers (whether separate or not from the guidelines for horizontal mergers) explicitly consider such risks. For example, foreclosure is an important device used by cartels to maintain their control of markets. Foreclosure or boycotts can be used to enforce participation in a cartel or punish deviations. Foreclosure can also limit access to markets by potential entrants; in some cases, cartels explicitly excluded entrants from market access through their ownership, control, or collaboration with vertically connected firms. Similarly, access to competitively sensitive information, may facilitate the monitoring necessary to sustain collusion.

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11 See Case COMP F-1/38.338—*PO/Needles*, Comm'n Decision, ¶ 61 (Oct. 26, 2004) (summary at 2009 O.J. (C147) 23), ec.europa.eu/competition/antitrust/cases/dec_docs/38338/38338_332_1.pdf.

12 Case COMP/E-2/37.667—Specialty Graphite, Comm'n Decision, ¶¶ 43, 48, 53, 64 (Dec. 17, 2002) (summary at 2006 O.J. (L180) 20), ec.europa.eu/competition/antitrust/cases/dec_docs/37667/37667_86_1.pdf, par 192.

13 Case C.38.359: Electrical and Mechanical Carbon and Graphite Products], par. 157, and Commission Decision of November 30, 1994 [Cases I V/ 33. 126 and 33. 322: Cement], 56.

14 See paragraph 27 of "In Re: Farm-Raised Salmon and Salmon Products Antitrust Litigation, 2nd Consolidated Amended Direct Purchaser Class Action Complaint" filed in US District Court Southern District of Florida, Miami Division, October 16, 2020.

The current horizontal merger guidelines consider historical events that are informative about competitive effects of a potential merger. We recommend that competition agencies consider prior evidence of collusion as an important historical event that is informative about the likelihood that a merger would have anti-competitive effects. Some research shows that prior experience with collusion itself increases the effectiveness of collusion in the future, including tacit collusion.[15] Prior experience with collusion also suggests that industry participants see potential profits from reducing competition, and prior collusion should be treated as creating an a priori assumption that such is the primary goal of a merger. For example, Davies et al. (2015) analyzes a set of EU cartels and concludes that "there is typically a period of increased merger activity among the former cartelists" (p. 581).[16] Similarly, Hüschelrath & Smuda (2013) found that "the average number of all merger transactions increase by up to 51 percent when comparing the three years before the cartel breakdowns with the three years afterwards… for the subset of horizontal mergers, merger activity is found to increase even more — by up to 83 percent — after the cartel breakdowns" (p. 408).[17] Permitting mergers among co-conspirators undermines competition and the impact of anti-cartel policy interventions.

The current horizontal merger guidelines note that it is particularly important not to permit acquisition of firms that have been recalcitrant, or even disruptive, participants in tacit or explicit collusion. There are cases where cartels strategically acquired such maverick firms to stabilize a secret cartel. For example, "the organic peroxide producers 'agreed that each of them would purchase [a] competitor. Akzo agreed to acquire . . . Nobel and Enichem Laporte would purchase Aztec.'"[18] Being attentive to industry dynamics, particularly any history of collusion in the industry or among industry participants – even in other markets – is particularly important to avoid the possibility of acquisitions that facilitate collusion.

The general focus and tone of the existing merger guidelines suggests that there is much greater risk of unilateral than coordinated effects and that vertical relationships are unlikely to affect the ability of firms to collude. The broad increase in concentration across many markets has made this presumption less tenable. Amnesty and high fines for price fixing have been in place for a quarter century. We continue to discover explicit secret collusion. Explicit collusion is a real threat, and the profits associated with collusion continue to be high enough that firms have an incentive to engage in legally risky coordinated behavior. Merger review should make sure to consider the potential that a merger would facilitate collusion for both vertical and horizontal mergers.

15 See *supra* note 2 Levenstein & Suslow (2006), especially pp. 69-73. For examples of path dependence of collusive success in particular markets, see Barbara J. Alexander (1994) "The Impact of the National Industrial Recovery Act on Cartel Formation and Maintenance Costs." *Review of Economics and Statistics*, 76(2): 245–54 or Debora L. Spar (1994) *The Cooperative Edge: The Internal Politics of International Cartels*. Ithaca: Cornell University Press.

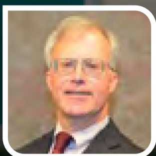
16 Stephen Davies, Peter Ormosi & Martin Graffenberger. Mergers after Cartels: How Markets React to Cartel Breakdown. *Journal of Law and Economics*, vol. 58 (August 2015), 561-583.

17 Kai Hüschelrath & Florian Smuda. Do Cartel Breakdowns Induce Mergers? Evidence from EC Cartel Cases," *European Competition Journal*, 9:2 (May 2013), 407-429,

18 See European Commission Decision of December 10, 2003 [Case COMP/E-2/37.857: Organic Peroxides], par. 271, quoted in Levenstein & Suslow *supra* note 2, p. 472.

SHOULD PRICE MODELING REMAIN IN THE MERGER GUIDELINES?

BY MALCOLM B. COATE[1]



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I. INTRODUCTION

The expected revision of the 2010 Merger Guidelines is likely to result in changes to the merger review process at the enforcement agencies, some of which were signaled by official commentary. In a recent speech, Assistant Attorney General Jonathan Kantor raised three issues with the consumer welfare standard; the approach that controlled antitrust enforcement for the last 40 years.[2] His first concern noted the consumer welfare standard offered no protection against unconstrained corporate power, an antitrust goal with an even longer history.

The second concern involved the evolution of consumer welfare analysis from a qualitative review of the factual evidence to theoretical simulation of post-merger pricing. These modeling techniques, colorfully characterized by Kantor as the "central planning standard," were introduced into the 2010 Guidelines and have been actively employed in merger litigation, with mixed success.

The third problem focused on the inability of the consumer welfare standard to address labor market issues. To this economist, the first and third concerns are related to an oversimplification of the consumer welfare standard and can be addressed on a case-by-case basis.[3] However, the second concern, the Agencies' broad-based application of price simulation modeling represents a more serious problem. Too often, mathematical modeling of competitive concerns will apply only a veneer of quantification to the complex competitive questions raised by the merger.

Thus, price modeling could either miss actual competitive concerns, or manufacture artificial problems that exist only in theory. Although one could argue that the potential for error is acceptable for mature (legacy) markets, many of the most interesting mergers filed in the United States involve dynamic marketplaces, in which price is simply one competitive tactic employed by the firms in the market. Moreover, even the idea of a legacy industry is becoming obsolete, as innovation drives change across the economy.

Chicago economists have long known that Nash-Bertrand price models such as those endorsed in the 2010 Merger Guidelines are only "possibility models" that define what could happen, not "generalizing models" that define how specific structural changes (e.g. a merger to monopoly in a market characterized by barriers to entry) lead to anticompetitive effects (e.g. higher prices).[4] Inapplicable price analysis is likely to generate flawed predictions on consumer welfare, and thus this "central planning standard" fails as a general policy tool. Merger simulation proponents would likely respond by noting that their price models only relax two of the assumptions (homogeneous goods and large numbers of firms) in the foundational competitive model and then use a little math to derive a generalizing competitive equilibrium for a post-merger world. Both changes are thought to make the competitive model more realistic, as consumers clearly demand differentiated products and ubiquitous economies of scale obviously preclude large numbers of firms. This paper suggests that the competitive complications introduced by product differentiation generally preclude the use of static price-based modeling structures.

To understand the problem, it is helpful to explore the economic foundations of price modeling (technically Nash-Bertrand analysis). In effect, theorists blend three classic methodologies, Bertrand's model of market equilibrium, Chamberlin's model of product differentiation, and Lerner's model of monopoly pricing together, sprinkle in a little game theory, and voila, they have produced, a price model of competition for differentiated products. The problem with this analysis is that each classic model has specific limitations that affect their applicability, and these limitations are often lost in the blending process. Once one understands the concerns, the Nash-Bertrand price model must be seen as only a possibility model. Economic price modeling may very well work for a few markets, but special cases should not be written into the Merger Guidelines and certainly should not be applied simply because some type of price data is available.[5] Instead, the Guidelines should focus on defining how to build a general understanding of the competitive process potentially affected by a merger.

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2 Jonathan Kantor, "Remarks at the New York City Bar Association's Milton Handler Lecture," May 18 2022. In a later speech, Kantor referred to price modeling as a "sometimes artificial exercise." Jonathan Kantor, "Keynote Speech at Georgetown Antitrust Law Symposium," September 13, 2022.

3 Corporate power can be addressed under the consumer welfare standard by evaluating the welfare losses associated with problematic conduct. Although such behavior would lower corporate profits, in theory, a monopolist has no need to optimize. Harvey Leibenstein, *Allocative Efficiency vs. X-efficiency*, 56 Am. Econ. Rev. 392 (1955). To take a very recent potential example of corporate power, big technology companies may have censored speech on medical issues at the bequest of government officials. This could be considered a cartel orchestrated by bureaucrat ringmasters. See, https://nclalegal.org/2022/03/ncla-takes-on-u-s-surgeon-generals-censoring-of-alleged-covid-19-misinformation-on-twitter/. As for labor market issues, monopsony is an antitrust concern and affected workers could be protected given the required facts.

4 Franklin M. Fiaher, *Games Economists Play: A Noncooperative View*, 20 RAND Journal of Economics, 113-124 (1989); Sam Peltzman, *The Handbook of Industrial Organization: A Review Article*, 99 Journal of Political Economy, 201-217 (1991).

5 Coate and Fischer study a sample of 92 differentiated markets and identify 41 markets in which the competitive process was clearly dynamic and seemed driven by non-price considerations. In 51 markets, price was the key aspect of competition However, sufficient price data was available in only 12 of those mergers. Even here, the firm had to be assumed to dictate price for a price model to be appropriate. Malcolm B. Coate & Jeffrey H. Fischer, *Is Market Definition Still Needed After all these Years*, 2 J. Antitrust Enforcement 422 (2014).

II. EVOLUTION OF THE DIFFERENTIATED PRODUCTS PRICING MODEL

The Nash-Bertrand pricing model combines Bertrand's assumption that firms set price based on the assumption their rivals will hold price constant in response to their actions, with Chamberlin's characterization of differentiated products, and Lerner's monopoly analysis to define what is alleged to be a more realistic characterization of competition. To better understand the modeling process, it is first necessary to present the background for all three analyses.

A. Bertrand's Model of the Competitive Process

In his commentary on the Cournot model, Bertrand recognized that the Cournot's duopoly equilibrium would change if instead of competing on quantity, the two firms set price while assuming the rival competes on price.[6] Instead of converging to a price noticeably above the competitive level, the duopoly price is competed down to the competitive level. Formally, the Bertrand conjecture with homogeneous goods and constant costs mirrored the optimization process that occurred within a perfectly competitive model in which firms set price based on the assumption that their rivals will not directly respond with a price adjustment. Each firm performs the thought experiment simultaneously, updating their observations on rival's decisions and repeating until the market reaches equilibrium.

One important issue with the Bertrand methodology is the inability of the static modeling structure to offer insights into a competitive adjustment process. For Bertrand competition with homogeneous goods and constant cost firms, entry is not considered, because no profits exist once the market reaches equilibrium. For example, changes in input costs lead to changes in marginal cost and therefore price and firm-level output, but no profit exists to trigger entry. Likewise, reductions in the number of rivals does not trigger entry as long as at least two rivals remain. Thus, the simple version of the Bertrand model seems unable to address the introduction of new firms, hardly a surprising result for a model from the 19th century. However, entry is a key consideration in merger analysis, and a modeling structure that abstracts from entry is a problem for more realistic competitive environments.

Second, in contrast to the "invisible hand" concept of perfect competition, economic models rely on the strategic decisions of the competitors to generate the equilibrium. This modeling structure transforms the competitive process to allow firms to set price, while customers are only allowed to make purchase decisions. Although such a strategic assumption may be reasonable in certain fact scenarios, restricting strategic behavior to one side of the market is clearly a limiting assumption.

B. Chamberlin's Model of Product Differentiation

Chamberlin asked what would happen if each firm sold a differentiated product, instead of the homogeneous product envisioned by perfect competition.[7] To simplify the analysis, each firm's product was considered to be a symmetric substitute for every other product. By modeling the competitive process as a collection of firm-specific demand and supply (marginal cost) curves, Chamberlin recognized that each firm would raise price above marginal cost, potentially earning a profit. In effect, each market would include a collection of micro-monopolists, each raising price above cost and thereby restricting output below the "efficient" level. Profits would be earned as long as price exceeded average total cost. Chamberlin "closed" the model by allowing entry to occur in response to profits, thereby shifting firm-level demand curves, lowering prices and eliminating profits. A "perfect" product differentiation model could be characterized by a zero-profit equilibrium, but this structure is alleged to result in social welfare loss, as firms did not set price equal to marginal cost.[8] As one would expect, economists have expanded the product differentiation literature over the last 90 years, with numerous studies offering alternative modeling techniques for product differentiation.

Chamberlin's analysis also contains a number of implicit assumptions that drive the analysis. First, product differentiation is assumed to be exogenous to the competitive process, an assumption more acceptable for the 1930s than the 2020s. Instead of modeling differentiation as a form of innovation driven by the profit opportunities in the market, Chamberlin assumed differentiation simply existed and therefore, was not generated by innovation in style or quality that intentionally improves consumer welfare through the exercise of entrepreneurship. By imposing the exogenous differentiation assumption, Chamberlain's model is able to offer initial insights into the effect of exogenous product differentiation

6 Joseph Bertrand, *Book review of Theorie Mathematique de la Richesse Sociale and of Recherches sur les Principles Mathematiques de la Theorie des Richesses*,67 J. de Savants 499–508 (1883). https://dl.dropboxusercontent.com/u/9050876/Bertrand1883.pdf.

7 Edward Chamberlin, The Theory of Monopolistic Competition (Harvard, 1933).

8 This social loss conclusion was (obviously) controversial, and was developed more in the commentary than in the original article. Minimal consideration of the problem would identify an oversight in the informal welfare discussion, because welfare gains from differentiation would need to be balanced against the welfare losses associated with pricing above cost, leaving social efficiency as an empirical question.

on the competitive process. On the other hand, modern models that assume differentiation is exogenous on the product side offer limited insight into the competitive process.

Second, the differentiation assumption is imposed with little consideration of consumer informational problems likely to occur once products become too complex for the standard assumption of perfect information to be credible. Chamberlin's analysis did allow for marketing costs associated with the firm creating new product features, but this analysis falls short of addressing complex information problems. Obviously, claiming the product offers certain consumer benefits, does not mean the consumer believes the benefits exist, since the consumer needs some reason to believe the firm's representations. Thus, it seems reasonable to assume the customer will behave strategically to obtain the required information at a low cost.

More importantly, posted price models may not even be credible once firms sell complex products that are differentiated with respect to a wide range of functionalities and services. As sellers will interact with buyers, it is possible, or even likely, to see price being set through complex negotiations. Such negotiations may not be easy to represent as auctions, because each firm's product is not necessarily completely defined prior to the negotiations process. Firms and customers could negotiate on characteristics of the differentiated product. For example, the customer may want to define a specific delivery schedule, agree on a customization of the physical product design, obtain a commitment for rush orders, when necessary, mandate rapid follow up on technical glitches, or guarantee some type of supply when shortages exist. On the other hand, the producer may negotiate for substantial volume commitments, feedback on the product's functionality when used in the customer's manufacturing process, or specific acceptance of shipment dates. Price negotiations occur in the light of these complexities and each firm is likely to customize the transaction to the specific customer. Even if firms post price lists, those numbers may have little economic meaning without an understanding of relationships between buyers and sellers.

C. Lerner's Monopoly Model

Lerner's paper searched for a monopoly index.[9] He started with a representative firm in a perfectly competitive market, assumed a monopolist to "roll up" all the firms in that market, and then asked how the monopolist would behave. After a lengthy discussion, Lerner's "thought experiment" arrived at his classic definition of monopoly power as the ratio of price minus marginal cost to price. By replacing marginal cost with marginal revenue, Lerner observed that his monopoly formula equaled the inverse of the firm's elasticity of demand. In effect, Lerner's model of the monopolist's optimal pricing decision defined the polar opposite of perfect competition.[10]

Implicit assumptions are also important in Lerner's paper. First, Lerner's monopoly model is inherently static. Demand and cost conditions can change but the monopoly control over price remains. This would be a reasonable assumption for a model of a socialist take-over of an industry, but is quite restrictive for a more general competitive process. For example, Lerner's modeling construct imposes the assumption that only one firm exists, thus no potential for competitive prices exists within the market. Moreover, the Lerner model focuses only on marginal costs, a restrictive assumption that can lead to policy errors in more complex competitive markets.[11] Static modeling, and the focus on marginal costs seem reasonable for Lerner's goal of a benchmark model of monopoly, but its practical uses seem limited.

Second, by design, Lerner's model does not explicitly address the potential for exogenous considerations to affect the monopolist's pricing. Lerner recognized the restrictive nature of his result and cautioned that "it would be best to consider this [the Lerner equation] as a special case," and his equation offers only limited insight into the competitive process.[12] Lerner lists three examples of situations in which his equation need not define the market price (non-economic objectives of the firm, responses to political pressure, and entry deterrence). Numerous other examples of the equation not predicting price can be easily posited based on various customer counter-strategies to mitigate monopoly power over time. Simply put, Lerner recognized that actual economic decisions are often more complicated than the static math would suggest.

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9 Abba Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).

10 For an interesting commentary on the application of the index, see, Kenneth G. Elzinga, and David E. Mills, *The Lerner Index of Monopoly Power: Origins and Uses*, 101 AM. ECON. REV. 558 (2011).

11 For model-agnostic approach to balancing estimated price and efficiencies over time see, Joseph J. Simons, and Malcolm B. Coate, "A Net Present Value Approach to Merger Analysis." 2022, Available at SSRN: http://ssrn.com/abstract=4104499 2022).

12 Lerner, *supra* note 9 at 170.

III. IMPLICATIONS OF THE ASSUMPTIONS FOR STATIC PRICE MODELS

Insights from Bertrand, Chamberlin, and Lerner set the foundation on which the game theoretic price models for differentiated products are based. However, when reaching back in time to make use of those classic models, it is also important to address the clear limitations of the analyses and integrate the limitations into any policy predictions generated by the models. Although theorists often attempt to justify their analyses after a price simulation is complete, such an approach is backwards. A careful industry analyses is necessary prior to the application of the price model, and such analyses are likely to identify issues that significantly complicate the modeling process. In merger review, price (simulation) modeling should be an after-thought, useful only in special case situations. Two important insights, relevant to a competitive analysis, are identified by reviewing the classic theories.

First, the three classic models are all relatively static in nature, with only Chamberlin offering an endogenous entry process similar to that used in perfect competitive. Both the Bertrand and Lerner models incorporate a competitive adjustment process within their core analysis, thereby abstracting from the entry issue. Bertrand's model expects constant cost firms to expand to clear the market, while Lerner's model adjusts the monopoly price to clear the market. In effect, all three models offer no real dynamic insight into the competitive process.[13] One would think that this is a show-stopper for a modern product differentiated model, because differentiated products generally involve some form of innovation to better meet consumer demand.

Simply claiming merger policy focuses only short run (static) price increases seems problematic when the model's goal is to explain pricing of differentiated products. Technically, the Lerner index remains an equilibrium condition in a dynamic pricing model (one that sets the optimal price for each time period in light of the effects of that price on future prices), but the Lerner equation could contain any number of shadow prices that exist in the dynamic equilibrium, and these considerations are not included in standard static implementations.[14] Thus, although general Lerner analysis exists in theory, practical insights are available only the simplest special case situations in which the dynamic and static equations are basically the same.[15]

Second, all three models make clear assumptions on how firms and customers interact in the economy. Firms post prices and customers decide to buy or not to by. In technical terms, firms are strategic players when they choose price, but customers remain passive. However, this is simply a modeling assumption and must be validated by evidence for the price model to be useful. Once price negotiation is allowed, it seems necessary to model the possible interactions between the buyers and sellers. Commitment contracts offered by buyers could preclude marginal pricing, as the customer offers to buy substantial product at a set price. Overall, negotiations create the potential for a wide range of competitive outcomes, with pricing just one of many considerations that must be addressed.[16]

A more complicated model would consider the potential for buyers to endogenously react to a material change in market structure. Here, even if the analyst had a mathematical representation of the pre-merger competitive process, strategies employed by the buyers could change after the merger in consummated. Again, marginal analysis could be of little use. Without the price setting assumption, even a dynamic version of Lerner-based analysis is problematic.

Because the theory suggests that price modeling often fails to add insight into the competitive analysis, it appears reasonable to remove or marginalize references to this modeling in the Merger Guidelines. Unilateral effects analyses remain important, but should be based on qualitative factual evidence, such as those undertaken in the years between the release of the 1992 and 2010 Merger Guidelines. The next section explores whether this change is likely to limit agency success in litigation.

IV. PRICE MODELING IN LITIGATED MERGER CASES

Mathematical price modeling has achieved mixed success in the courts. In Oracle, the court offered a primer on unilateral effects analysis; identifying the key factors in the model. In particular, the plaintiff must show differentiated products, the merged products are close substitutes, the

13 Generalizing a Bertrand model for product differentiation creates the potential for entry to reestablish a zero-profit equilibrium, but such an analysis is complicated by the exogenous nature of the differentiation assumption. If one allows the product differentiation to be endogenous, the static modeling structure is problematic.

14 Optimization models often include constraints on the choice variables that limit the values that the choice variable can take on. Shadow prices enforce these limits in the first order(optimization) condition.

15 Even here, an assumption is necessary to determine the time period over which marginal cost is measured. The longer the period, the more costs become marginal.

16 Once competition exists in multiple dimensions (e.g. price, product support, delivery services, and supply assurance) any given product may face close competition from different rivals with respect to different product characteristics. Thus, a firm may have a number of close competitors and diversion ratios may have little relevance to the analysis.

merged firm can impose a material price increase, and repositioning in response to the price increase is unlikely.[17] The plaintiff's price model did not meet all these requirements and was rejected. A few years later, the court in *CCC Holdings* evaluated a price model, and again, rejected the analysis because the model "cannot be reasonably confirmed by evidence in the record."[18]

During the government's 16 horizonal merger winning streak, from late 2011 through 2019, unilateral effects modeling had more success, with viable presentations in eight matters.[19] Usually, the analysis was considered as supplementing the merger review, but modeling played a more prominent role in Aetna (offering empirical support for the structural concerns) and *Anthem* (addressing the balance between anticompetitive effects and efficiencies).[20] More recently, price models have been less successful, with models compatible with the overall evidence in two matters, but rejected in three other cases.[21] Overall, it is hard to argue that price (simulation) modeling has played an important role in the litigation decisions, and thus, removing it from the Guidelines is unlikely to affect the Agencies success. In effect, because the courts evaluate the totality of the evidence available in the record, it is the case law - not the modeling or the Merger Guidelines - that controls the merger review process.

V. CONCLUSION

Summing up, game theoretic price models (i.e. those associated with the "the central planning standard") may fail to represent competitive realities and therefore generate poor predictions of merger-related price effects. Thus, removal or marginalization of price modeling from the 2022 Merger Guidelines is clearly warranted. Of course, analysts can still use the models in their work, but should prove, at a minimum, the marketplace is relatively stable and the assumption of posted prices is credible. These requirements seem most likely to be met in moribund legacy markets involving sales to consumers through distribution chains that do little more than markup prices. Possibly the cigarette industry is an example of such a dying industry. Broadly defined, economic considerations remain the controlling intellectual authority in merger review. Market definition defines the playing field, with structural considerations, ease of entry, insights on competitive effects and efficiencies, taken together determine if the merger is likely to substantially lessen competition.

17 *U.S. v. Oracle*, 331 F. Supp. 2nd 1098, 1113-1121 (N. D. Cal. 2004).

18 *FTC v. CCC Holdings*, 605 F. Supp. 2nd 26, 72 (D.D.C. 2009).

19 For citations for the cases, see, Malcolm B. Coate, "Innovations in the 2010 Merger Guideline: Theoretical Foundations, Legal Overview, and Impact of the Changes on Merger Analyses," Available at SSRN: http://ssrn.com/abstract=3988160 (2021).

20 Judge, now Justice, Kavanaugh dissented on the *Anthem* appeal. He observed that the relevant competitive process involves insurers negotiating with providers and the demonstrated savings from discounts the post-merger firm would obtain from providers implies the merger is procompetitive. This suggests that Justice Kavanaugh would have accepted an efficiency defense. For a discussion on efficiency presentations, see, Malcolm B. Coate, Malcolm B. and Arthur Del Buono, "A Commentary on Presenting Efficiencies in a Horizontal Merger Review," 2022, Available at SSRN: http://ssrn.com/abstract=4127486 (2022).

21 In the *T-Mobil* merger, the court concluded the decision with an extensive discussion of competition in dynamic markets; the static pricing model presented in this case ignored all these considerations and therefore offered no value to the analysis. *State of New York v. Deutsche Telekom*, No. 1:19-cv-05434 (S.D.N.Y. February 11, 2020) at 144-151.

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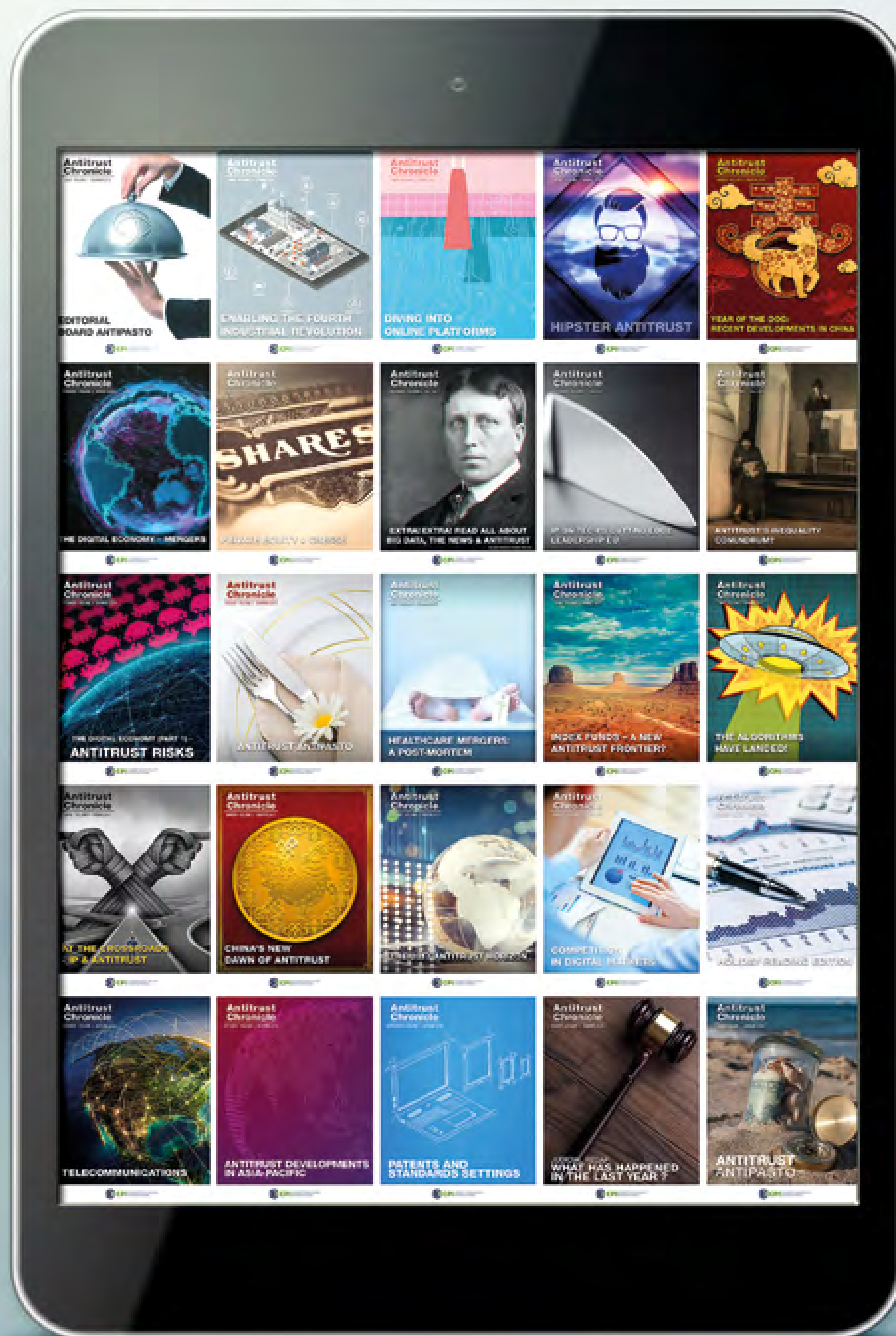

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