International Center for Law & Economics

Comments of the International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines

Docket No. FTC-2023-0043-0001

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Executive Summary: Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines

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We appreciate the opportunity to comment on the Draft Merger Guidelines (Draft Guidelines) released by the U.S. Department of Justice (DOJ or Division) and the Federal Trade Commission (FTC) (jointly, the agencies), Docket No. FTC-2023-0043. Our comments below mirror the structure of the main body of the Draft Guidelines: guidelines, market definition, and rebuttal evidence. Section by section, we suggest improvements to the Draft Guidelines, as well as background law and economics that we believe the agencies should keep in mind as they revise the Draft Guidelines. Our suggestions include, *inter alia*, the recission of some of the draft guidelines and the integration of others.

Much of the discussion around the guidelines focuses on whether enforcement should be more or less strict. But the stringency or rigor of antitrust scrutiny is not a simple dial to turn up or down. For example, what should be done with HHI thresholds? It may seem obvious that lower thresholds allow the agencies to challenge more mergers. In a world with limited agency resources, however, that may not be true. Under the 2010 Horizontal Merger Guidelines, the agencies did not challenge—much less block—all mergers leading to "moderately concentrated" or even "highly concentrated" markets. If we assume, as the Draft Guidelines appear to, that mergers leading to relatively high-concentration markets are generally more likely to be anticompetitive, lowering the thresholds would result in fewer of such challenges, to the extent that the agencies would necessarily allocate some of their scarce enforcement resources to matters that would not have raised competitive concerns under the thresholds specified in 2010.

Our main recommendations are as follows:

> **Guideline 1** places increased emphasis on structural presumptions and concentration measures. This rests on the assumption that the economy is becoming more concentrated, that this is problematic, and that lowering the thresholds would help to tackle this problem. But, as our comments explain, this seemingly simple story is not actually so simple. The changes contemplated by guideline 1 thus appear ill-founded. As written, guideline 1 could be used to block mergers without needing to show any actual harms to consumers or sellers/workers. Whether this is the intent or not, the answer should be made explicit. We argue that mergers should not be challenged based on concentration measures alone, given

the long-known—but also recently empirically supported—disconnect between concentration measures and competitive harms.

Guideline 2: The guidelines mostly ignore the real distinctions between horizontal and vertical mergers. Guideline 2 is about horizonal mergers, as a footnote suggests, and provides an opportunity to make explicit that horizontal mergers exist, are unique, and will be treated differently than vertical mergers for reasons underlined by the guideline.

Guideline 6: To the extent that guideline 6 goes beyond what is included in guideline 5, it simply adds additional structural presumptions that are not justified by the law or the economics. In a part of the *Brown Shoe* decision ignored by the Draft Guidelines, the court wrote that "the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive," yet guideline 6 would make a structural-presumption decision. This is especially problematic in the context of vertical mergers, where the "foreclosure share" does not require an incentive to foreclose. As written, the guideline would treat as inevitable even foreclosure that was highly unprofitable.

Guideline 8: As concentration is not (by itself) harmful to consumers, neither is a trend toward concentration. As with guideline 1, guideline 8 should make explicit whether the intent is that it be used regardless of any harm to consumers. If an industry that has become more concentrated through more competition—as a large, recent economic literature documents is the norm—will the agencies block a merger that increases concentration but does not increase prices? Guideline 8 is especially problematic when paired with the statement that "efficiencies are not cognizable if they will accelerate a trend toward concentration." This effectively negates any efficiency defense, since any efficiency will allow a merged party to win a larger share of the market. If these customers come from smaller competitors, that will increase concentration.

We conclude by explaining how the Draft Guidelines are not law and that it remains up to the courts whether to follow them. Historically, courts have followed such guidelines, given their reflection of current legal and economic understanding. These Draft Guidelines, by contrast, seem much more geared toward pursuing stronger merger enforcement. Rather than reflect current knowledge, the agencies are seemingly looking to reverse time and return to an outdated set of policies from which courts, enforcers, and mainstream antitrust scholars have all steered away. The net effect of these problems is to undermine confidence in the agency.

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I. Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets

Draft Guideline 1 of the Draft Merger Guidelines ("Draft Guidelines")[1] appears to suggest a standalone structural presumption[2] that mergers that "significantly increase" concentration in "highly concentrated" markets are unlawful; and it does so under a lower-threshold Herfindahl-Hirschman Index ("HHI") for highly concentrated markets than that specified in the 2010 Horizontal Merger Guidelines, and a lower change in HHI than that specified in the 2010 Guidelines.

Several of these changes are salient. First, the Draft Guidelines replace a threshold HHI for "highly concentrated markets" of 2,500 with one of 1,800. Under the 2010 Guidelines, horizontal mergers that would increase HHI at least 100 points, resulting in an HHI of between 1,500 and 2,500 (inclusive), would be regarded as mergers that "potentially raise significant competitive concerns." While they might warrant investigation, they would not implicate a structural presumption of illegality.

Second, under the considerably higher thresholds specified in 2010, mergers leading to highly concentrated markets that involved changes in HHI of between 100 and 200 would still be considered among those that "potentially raise significant competitive concerns," and they would "often warrant scrutiny," but they would not implicate a presumption of illegality. Only "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points [would] be presumed to be likely to enhance market power."

Third, under the 2010 Guidelines, the presumption that mergers "likely to enhance market power" could be "rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." Draft guideline 1—even with lower thresholds for change and total market concentration, as measured by HHI—identifies no potential for rebuttal of the presumption.

Fourth, the 2010 Guidelines expressly identify mergers that are "unlikely to have adverse competitive effects and ordinarily require no further analysis"; namely, those involving increases in HHI of less than 100 and those resulting in an HHI less than 1,500. The Draft Guidelines do not identify any such mergers, whether under the 2010 thresholds or otherwise.

Fifth, the 2010 thresholds were specified in the Horizontal Merger Guidelines and, as such, applied to horizontal mergers. Other guidelines and agency practice recognized—correctly—that vertical mergers could raise competition concerns. At the same time, they recognized general distinctions

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[1] U.S. Dep't of Justice & F.T.C., *Draft Merger Guidelines for Public Comment* (Jul. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0001 [hereinafter "Draft Merger Guidelines" or "Draft Guidelines"].

[2] Draft Merger Guidelines, *supra* note 1, at 31 ("The Agencies may assess whether a merger may substantially lessen competition or tend to create a monopoly based on a fact-specific analysis under any one or more of the Guidelines discussed above.")

between horizontal, vertical, and other "non-horizontal" mergers, such as "conglomerate mergers," that are absent in—if not repudiated by—the Draft Guidelines. The lower thresholds and altered presumptions of the draft guideline 1 make no mention of horizontal-specific revisions; and, as we discuss below, draft guidelines 5-8 and 10 expressly extend the scope of the Draft Guidelines to vertical and other non-horizontal mergers.

If the Draft Guidelines' "basis to presume that a merger is likely to substantially lessen competition" is not such a presumption of illegality, or is not so independent of market power, or is rebuttable, then revisions should say so. Also, if the agencies believe that there is any category of mergers that are unlikely to have adverse competitive effects, and unlikely to require further scrutiny, they should say so.

The Draft Guidelines state that this type of structural presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition. Unfortunately, this reasoning overlooks a crucial aspect of the antitrust apparatus (and of all regulation, for that matter): the error-cost framework. Administrability is a virtue, all things considered, but so is accuracy. Any given merger might be anticompetitive, but most are not, and enforcement should not routinely condemn benign and procompetitive mergers for the sake of convenience. As we explain below, the key insight is that policymakers should always consider antitrust enforcement as a whole. In other words, it is never appropriate to look at certain categories of judicial error in isolation (such as authorities wrongly clearing certain mergers). Instead, the challenge is to determine which set of rules and presumptions minimizes the sum of three social costs: false convictions, false acquittals, and enforcement costs.

When this is properly understood, it becomes clear that false negatives are only one part of the picture. It is equally important to ensure that new guidelines do not inefficiently chill or otherwise impede procompetitive deals. This is where proposals to lower current thresholds and alter existing presumptions run into trouble.

A. Should Concentration Thresholds Be Lowered?

Draft guideline 1 puts concentration metrics front and center and introduces new structural presumptions. The Draft Guidelines evince a strong skepticism toward concentration that is unwarranted by the economic evidence. Two sets of questions are related: what, if anything, does the economic evidence say about the new HHI thresholds advanced by the Draft Guidelines? And what does the economic evidence indicate about strong structural presumptions in antitrust analysis?

Should new merger guidelines lower the HHI thresholds? We agree with comments submitted in 2022 by now-FTC Bureau of Economics Director Aviv Nevo and colleagues, who argued against such a change. They wrote:

> Our view is that this would not be the most productive route for the agencies to pursue to successfully prevent harmful mergers, and could backfire by putting even further emphasis on market definition and structural presumptions.
>
> If the agencies were to substantially change the presumption thresholds, they would also need to persuade courts that the new thresholds were at the right level. *Is the evidence there to do so? The existing body of research on this question is, today, thin and mostly based on individual case studies in a handful of industries. Our reading of the literature is that it is not clear and persuasive enough, at this point in time, to support a substantially different threshold that will be applied across the board to all industries and market conditions*. (emphasis added)[3]

Instead of following the economics literature, as summarized above, the Draft Guidelines lower the structural presumptions and add an additional one for when the merged firms share exceeds 30% and the HHI increase exceeds 100.

One argument for this increased emphasis on structural presumptions and concentration measures is that the economy is becoming more concentrated, that this is problematic, and that lowering the thresholds helps to tackle this problem. The following sections explain why the story is not so simple.

B. Empirical Trends in Concentration

The first mistake is to suppose that concentration trends have reached unprecedented levels, that extant levels are generally harmful, and that current undue levels of concentration across the economy are due to lax antitrust enforcement. However, market concentration is not, in itself, a bad thing; indeed, recent research challenging the standard account demonstrates that much observed concentration is driven by increased productivity, rather than by anticompetitive conduct or anticompetitive mergers. In addition, several recent studies show that *local* concentration—which is the most likely to affect consumers, and where most competition happens—has been steadily decreasing. In fact, as we show, increased concentration at the national level is itself likely the result of more vigorous competition at the local level. Further complicating matters for the "accepted" story (and exacerbated by these national/local distinctions) is the longstanding problem of drawing inferences from national-level concentration metrics for antitrust-relevant markets.

There is a popular narrative that lax antitrust enforcement has led to substantially increased concentration, strangling the economy, harming workers, and saddling consumers with greater markups in the process. Much of the contemporary dissatisfaction with antitrust arises from a suspicion that overly lax enforcement of existing laws has led to record levels of concentration and a concomitant decline in competition.

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[3] John Asker *et al*, *Comments on the January 2022 DOJ and FTC RFI on Merger Enforcement*, *available at* https://www.regulations.gov/comment/FTC-2022-0003-1847 at 15-6.

However, these beliefs—lax enforcement and increased anticompetitive concentration—wither under scrutiny.

1. National versus local competition

Competition rarely takes place in national markets; it takes place in local markets. And although it appears that national-level firm concentration is growing, this effect is driving *increased* competition and *decreased* concentration at the local level, which typically is what matters for consumers. The rise in national concentration is predominantly a function of more efficient firms competing in more—and more localized—markets. Rising national concentration, where it is observed, is a result of increased productivity and competition, which weed out less-efficient producers.

This means it is inappropriate to draw conclusions about the strength of competition from national-concentration measures. This view is shared by economists across the political spectrum. Carl Shapiro (former deputy assistant attorney general for economics in the DOJ Antitrust Division under Presidents Obama and Clinton) for example, raises these concerns regarding the national-concentration data:

> [S]imply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, i.e., for the products and locations over which competition actually occurs. As a result, it is far from clear that the reported changes in concentration over time are informative regarding changes in competition over time.[4]

The 2020 report from the President's Council of Economic Advisors sounds a similar note. After critically examining alarms about rising concentration, it concludes they are lacking, and that:

> The assessment of the competitive health of the economy should be based on studies of properly defined markets, together with conceptual and empirical methods and data that are sufficient to distinguish between alternative explanations for rising concentration and markups.[5]

In general, competition is *increasing*, not decreasing, whether it is accompanied by an increase in concentration or not.

The narrative that increased market concentration has been driven by anticompetitive mergers and other anticompetitive conduct derives from a widely reported literature documenting increased *national* product-market concentration.[6] That same literature has also promoted the arguments that

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[4] Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74, 74 (2018).

[5] EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 215 (Feb. 2020).

[6] *See, e.g.*, Germán Gutiérrez and Thomas Philippon, *Declining Competition and Investment in the U.S.*, NBER Working Paper

increased concentration has had harmful effects, including increased markups and increased market power,[7] declining labor share,[8] and declining entry and dynamism.[9]

There are good reasons to be skeptical of the national concentration and market-power data on their face.[10] But even more important, the narrative that purports to find a causal relationship between these data and the depredations mentioned above is almost certainly incorrect.

To begin with, the assumption that "too much" concentration is harmful assumes both that the structure of a market is what determines economic outcomes, and that anyone knows what the "right" amount of concentration is. But as economists have understood since at least the 1970s (and despite an extremely vigorous, but futile, effort to show otherwise), market structure is *not* outcome determinative.[11]

> Once perfect knowledge of technology and price is abandoned, [competitive intensity] may increase, decrease, or remain unchanged as the number of firms in the market is increased.... [I]t is presumptuous to conclude... that markets populated by fewer firms perform less well or offer competition that is less intense.[12]

No. 23583 (2017), https://www.nber.org/papers/w23583; Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2021 (2020).

[7] *See* Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020).

[8] *See* David Autor, *et al.*, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 635 (2020).

[9] Ryan A. Decker, John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S,* 86 EUR. ECON. REV. 4, 5 (2016).

[10] Several papers simply do not find that the accepted story—built in significant part around the famous De Loecker and Eeckhout study, see De Loecker, et al., *supra* note 2 7—regarding the vast size of markups and market power is accurate. Among other things, the claimed markups due to increased concentration are likely not nearly as substantial as commonly assumed. *See, e.g.,* James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements*, Stigler Center Working Paper (Feb. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849; *see also* WORLD ECONOMIC OUTLOOK, APRIL 2019 GROWTH SLOWDOWN, PRECARIOUS RECOVERY, INTERNATIONAL MONETARY FUND (Apr. 2019), https://www.imf.org/en/Publications/WEO/Issues/2019/03/28/world-economic-outlook-april-2019. Another study finds that profits have increased but are still within their historical range. *See* Loukas Karabarbounis & Brent Neiman, *Accounting for Factorless Income*, 33 NBER MACROECONOMICS ANNUAL 167 (2018). And still another shows decreased wages in concentrated markets but also that local concentration has been *decreasing* over the relevant time period. *See* Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality,* 57 J. HUMAN RESOURCES S251 (2022), *available at* http://jhr.uwpress.org/content/57/S/S251.full.pdf+html.

[11] *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973). *See also, e.g.*, Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 Handbook of Industrial Organization 951-1009 (Richard Schmalensee & Robert Willig, eds., 1989); William N. Evans, Luke M. Froeb & Gregory J. Werden, *Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993); Steven Berry, *Market Structure and Competition, Redux*, FTC Micro Conference (Nov. 2017), *available at* https://www.ftc.gov/system/files/documents/public_events/1208143/22_-_steven_berry_keynote.pdf; Nathan Miller, *et al.*, *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENFORCEMENT 248 (2022).

[12] Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140-41 (1995).

This view is well-supported, and it is held by scholars across the political spectrum.[13] To take one prominent, recent example, professors Fiona Scott Morton (deputy assistant attorney general for economics in the DOJ Antitrust Division under President Obama), Martin Gaynor (former director of the FTC Bureau of Economics under President Obama), and Steven Berry surveyed the industrial organization literature and found that presumptions based on measures of concentration are unlikely to provide sound guidance for public policy:

> In short, there is no well-defined "causal effect of concentration on price," but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration....
>
> Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that *regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates*.[14]

Furthermore, the national concentration statistics that are used to justify invigorated antitrust law and enhanced antitrust enforcement are generally derived from available data based on industry classifications and market definitions that have limited relevance to antitrust. As Luke Froeb (former deputy assistant attorney general for economics in the DOJ Antitrust Division under President Trump and former director of the FTC Bureau of Economics under President Bush) and Greg Werden (former senior economic counsel in the DOJ Antitrust Division from 1977-2019) note:

> [T]he data are apt to mask any actual changes in the concentration of markets, which can remain the same or decline despite increasing concentration for broad aggregations of economic activity. Reliable data on trends in market concentration are available for only a few sectors of the economy, and for several, market concentration has not increased despite substantial merger activity.15

Agency experience and staff research in the critical area of health-care competition represents a signal model of the application of applied industrial-organization research to policy development and law enforcement. Notably, the underlying research program has provided solid ground for blocking anticompetitive hospital mergers, while militating against SCP assumptions in provider mergers. Results suggest, for example, that various "the new screening tools (in particular, WTP and UPP) are

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[13] *See* Nathan Miller, *et al.*, *supra* note 11.

[14] Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 48 (2019) (emphasis added). *See also* Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, JOHN M. OLIN PROGRAM IN L. & ECON., STANFORD LAW SCH. WORKING PAPER 24 (Sep. 2006) ("The Chicago identification argument has carried the day, and structure-conduct-performance empirical methods have largely been discarded in economics.").

[15] Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74, 74 (2018).

more accurate than traditional concentration measures at flagging potentially anticompetitive hospital mergers for further review."[16]

Most important, these criticisms of the assumed relationship between concentration and economic outcomes are borne out by a host of recent empirical studies.

The absence of a correlation between increased concentration and both anticompetitive causes and deleterious economic effects is demonstrated by a recent, influential empirical paper by Sharat Ganapati. Ganapati finds that the increase in industry concentration in non-manufacturing sectors in the United States between 1972 and 2012 is "related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. [The] data suggests that national oligopolies are strongly correlated with innovations in productivity."[17] The result is that increased concentration results from a beneficial growth in firm size in productive industries that "expand[s] real output and hold[s] down prices, raising consumer welfare, while maintaining or reducing [these firms'] workforces."[18] Sam Peltzman's research on increasing concentration in manufacturing has been on average associated with both increased productivity growth and widening margins of price over input costs. These two effects offset each other, leading to "trivial" net price effects.[19]

Several other recent papers look at the data in detail and attempt to identify the likely cause of the observed national-level changes in concentration. Their findings demonstrate clearly that measures of increased national concentration cannot justify increased antitrust intervention. In fact, as these papers show, the reason for apparently increased concentration trends in the United States in recent years appears to be technological, not anticompetitive. And, as might be expected from that cause, its effects appear *beneficial*. More to the point, while some products and services compete at a national level, much more competition is local—taking place within far narrower geographic boundaries.

By way of illustration, it hardly matters to a shopper in, say, Portland, Oregon, that there may be fewer grocery-store chains nationally if she has *more* stores to choose from within a short walk or drive from her home. If you are trying to connect the competitiveness of a market and the level of concentration, the relevant market to consider is *local.* The same consumer, contemplating elective

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[16] Christopher Garmon, *The Accuracy of Hospital Screening Methods*, 48 RAND J. ECON. 1068, 1070 (2017) (reviewing post-merger price changes for 28 hospital mergers, initially published as a BE Working Paper).

[17] Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, Working Paper (Oct. 6, 2018) at 13 (*forthcoming* in AM. ECON. J.: MICROECONOMICS), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966.

[18] *Id.* at 1.

[19] Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration*, Working Paper (May 10, 2018, rev. Feb. 3, 2021), https://ssrn.com/abstract=3168877.

surgery, may search in a somewhat broader geographic area, but one that is still local, not national, and best determined on a merger-by-merger basis.[20]

Moreover, because many of the large firms driving the national-concentration data operate across multiple product markets that do not offer substitutes for each other, the relevant *product*-market definition is also narrower. In other words, Walmart's market share in, *e.g.*, "retail" or "discount" retail implies virtually nothing about retail produce competition. In the real world, Walmart competes for consumers' produce dollars with other large retailers, supermarkets, smaller local grocers, and local produce markets. It also competes in the gasoline market with other large retailers, some supermarkets, and local gas stations. It competes in the electronics market with other large retailers, large electronic stores, small local electronics stores, and a plethora of online sellers large and small—and so forth. For example, when the FTC investigated the Staples/Office Depot merger, it analyzed a far-narrower market than simply "office supplies" or "retail office supplies"; it found that general merchandisers such as Walmart, K-Mart, and Target accounted for 80% of office-supply sales "in the market for "consumable" office supplies sold to large business customers for their own use."[21]

This conclusion is not mere supposition: In fact, recent empirical work demonstrates that national measures of concentration do not reflect market structures at the local level. Moreover, recent research published by the Federal Reserve Bank of New York concludes that a focus on nationwide trends may be misleading, to the extent that the data omit revenue earned by foreign firms competing in the United States.[22] The authors note that accounting for foreign firms' sales in the U.S. indicates that market concentration did not increase, but "remained flat" over the 20-year period studied. They argue that increasing domestic concentration was counteracted by increasing market shares associated with foreign firms' sales.

In a recent paper,[23] the authors look at both the national and local concentration trends between 1990 and 2014 and find that:

1. Overall, and for all major sectors, concentration is increasing nationally but decreasing locally.

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[20] Regarding geographic market area for hospitals, *see*, *e.g.*, Joseph Farrell, *et al.*, *Economics at the FTC: Hospital Mergers, Authorized Generic Drugs, and Consumer Credit Markets*, 39 REV. INDUS. ORG. 271 (2011) (INITIALLY PUBLISHED AS BE WORKING PAPER): Garmon, *The Accuracy of Hospital Screening Methods*, *supra* note 16.

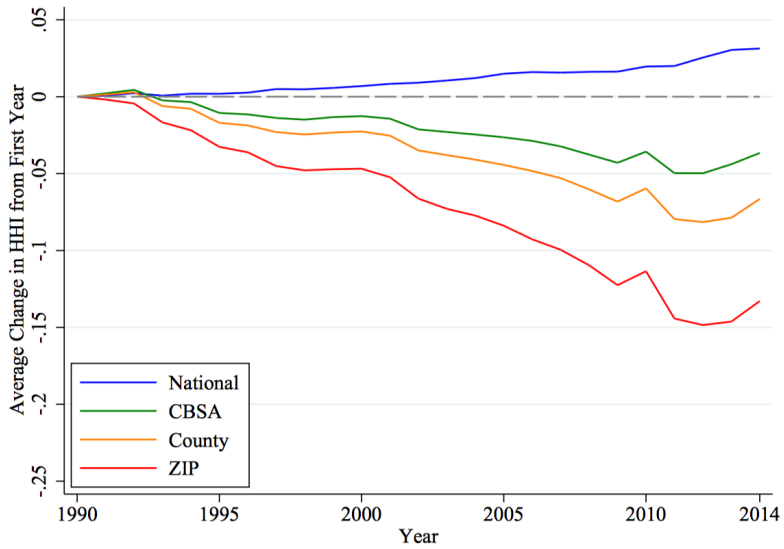
[21] W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & DAVID E. M. SAPPINGTON, ECONOMICS OF REGULATION AND ANTITRUST (2005) at 214-15.

[22] Mary Amiti & Sebastian Heise, *U.S. Market Concentration and Import Competition*, FEDERAL RESERVE BANK OF NEW YORK, Working Paper No. 968 (May 2021), *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr968.pdf.

[23] Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, in NBER MACROECONOMICS ANNUAL 2020, VOL. 35 (Martin Eichenbaum & Erik Hurst eds., 2020).

2. Industries with diverging national/local trends are pervasive and account for a large share of employment and sales.
3. Among diverging industries, the top firms have increased concentration nationally, but *decreased* it locally.
4. Among diverging industries, opening of a plant from a top firm is associated with a long-lasting decrease in local concentration.[24]

Figure 1: Diverging economy-wide national and local concentration trends



Source: Rossi-Hansberg, et al. (2020)[25]

Importantly, all of the above applies not only to product markets, but to *labor* markets, as well:

> The proportion of aggregate U.S. employment located in all SIC 8 industries with increasing national market concentration and decreasing ZIP code level market concentration is 43 percent. Thus, given that some industries have also had declining concentration at both the national and ZIP code level, 78 percent (or over 3/4) of U.S. employment resides in industries with declining local market concentration.[26]

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[24] Rossi-Hansberg, *et al.*, *Presentation: Diverging Trends in National and Local Concentration*, slide 3, *available at* https://conference.nber.org/conf_papers/f132587/f132587.slides.pdf.

[25] Rossi-Hansberg, *et al*, *supra* note 23, at 9.

[26] *Id.* at 14 (emphasis added).

There are disputes about the data used in this study for sales concentration. Some authors argue it more likely reflects employment concentration, instead of sales concentration.[27] It is well-documented that employment concentration has been falling at the local level.[28]

Instead of relying on NAICS or SIC codes, Benkard, Yurukoglu, & Zhang construct concentration measures that are intended to capture consumption-based product markets.[29] They use respondent-level data from the annual "Survey of the American Consumer" available from MRI Simmons, a market-research firm. The survey asks specific questions about which brands consumers buy. They define markets into 457 product markets categories, separated into 29 locations. Product "markets" are then aggregated into "sectors." Since they know the ownership of different products, even if the brand name is different, they can lump products into companies.

If antitrust enforcers want one paper to get a sense of aggregate trends, this is the one. Their study more closely matches and aggregates antitrust markets than studies that rely on NAICS codes. Against the narrative of the draft guidelines, they find falling concentration at the product-market level (the narrowest product), both at the local and the national level. At the sector level (which aggregates markets), there is a slight increase.

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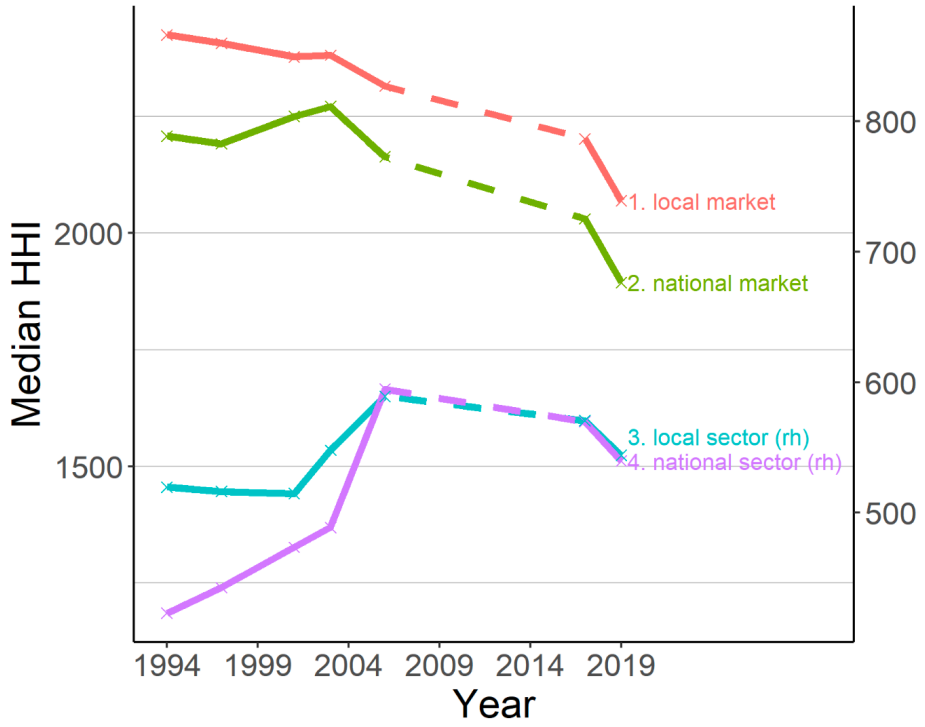
[27] Ryan Decker, *Discussion of "Diverging Trends in National and Local Concentration," available at* https://rdeckernet.github.io/website/2020ASSA_discussion_RST.pdf.

[28] *See* Rinz, *supra* note 10. *See also* David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147 (2022).

[29] C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets,* NBER, Working Paper No. 28745 (Apr. 2021), *available at* https://www.nber.org/papers/w28745.



Source: Benkard, et al (2021)[30]

With any concentration measure, one must define the relevant market. As in any antitrust case, this is not trivial when defining markets to measure concentration for the overall economy. Some work, such as Autor, *et al.*, use industries with "time-consistent industry definitions."[31] Other work finds falling concentration, even at the national level, between 2007 and 2017, when one includes the full sample of industries.[32]

The main implication of these studies for the merger guidelines is not that we need to take a stance on a technical debate in the academic literature, but to recognize that such a healthy debate exists and that it would be unwise to proceed as if we know for certain the direction of empirical trends (and that the agencies can reverse them).

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[30] *Id.* at 4.

[31] Autor, *et al. supra* note 8. *See* David Autor, Christina Patterson & John Van Reenen, *Local and National Concentration Trends in Jobs and Sales: The Role of Structural Transformation,* NBER, Working Paper No. 31130 (Apr. 2023), *available at* https://www.nber.org/papers/w31130.

[32] Robert Kulick & Andrew Kard, *A Tale of Two Samples: Unpacking Recent Trends in Industrial Concentration*, AEI Economic policy Working Paper, *available at* https://www.aei.org/wp-content/uploads/2023/06/Kulick-Tale-of-Two-Samples-WP.pdf?x91208.

2. *Larger national firms can lead to less-concentrated local markets*

What is perhaps most remarkable about this data is the unique role large firms play in driving *reduced* concentration at the local level:

> [T]he increase in market concentration observed at the national level over the last 25 years is being shaped by enterprises expanding into new local markets. This expansion into local markets is accompanied by a fall in local concentration as firms open establishments in new locations. *These observations are suggestive of more, rather than less, competitive markets.*[33]

A related paper explores this phenomenon in greater detail.[34] It shows that new technology has enabled large firms to scale production and distribution over a larger number of establishments across a wider geographic space. As a result, these large national firms have grown by increasing the number of local markets they serve, and in which they are relatively *smaller* players.[35]

What appears to be happening is that national-level growth in *concentration* is driven by increased *competition* in certain industries at the local level. "The increasing presence of top firms has decreased local concentration in local markets as the new establishments of top firms gain market share from local incumbents."[36] The net effect is a *decrease* in the power of top firms relative to the economy as a whole, as the largest firms specialize more and are dominant in fewer industries.

These results turn the commonly accepted narrative on its head:

1. First, rising concentration, where it is observed, is a result of increased productivity and competition that weed out less efficient producers. This is emphatically a good thing.
2. Second, the rise in concentration is predominantly a function of more efficient firms competing in more—and more localized—markets. This means that competition is increasing, not decreasing, whether it is accompanied by an increase in concentration or not.
3. Third, in labor markets, the effect of these dynamics is a reduction in monopsony power: "[T]he industrial revolution in services has implications on the employment of workers of different skills across locations. If labor markets are industry specific and local, the decline in local concentration of employment caused by the entry of top firms should reduce the monopsony power of employers in small markets."[37]

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[33] Rossi-Hansberg, *supra* note 23 at 27 (emphasis added).

[34] Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, Working Paper (May 12, 2021), *available at* https://www.princeton.edu/~erossi/IRS.pdf.

[35] *Id.* at 4 ("[T]he increase in national industry concentration documented by Autor et al. (2017) and others, is driven by the expansion in markets per firms by top firms.").

[36] *Id.* at 6.

[37] *Id.* at 41-42.

Another paper takes a similar approach to analyze the effect of increased firm size on labor-market share.[38] In a complete refutation of the popular narrative, it finds that, while the labor-market power of firms appears to have increased, "labor market power has not contributed to the declining labor share because, despite an overall increase in national concentration, we find that… local labor market concentration has declined over the last 35 years. Most local labor markets are more competitive than they were in the 1970s."[39]

Further studies have corroborated these findings, noting that, on an industry-by-industry basis, the explanatory power of increasing concentration (or increasing firm size) is extremely weak. For example, while Autor, *et al*. (2020) attribute the purported decline in the labor share of the U.S. economy to the rise of "superstar" firms,[40] Stanford economist Robert Hall shows that the data is far more nuanced. Thus, comparing the employment shares of firms with 10,000 or more workers in the 19 NAICS sectors between 1998 and 2015, Hall finds that:

1. "In four of the 19 sectors, very high-employment firms declined in importance over the 17-year span of the data. The weighted-average increase across all sectors was only 1.8 percentage points, from 25.3 percent to 27.1 percent. Thus it seems unlikely that rising concentration played much of a role in the general increase in market power…."; and
2. "[T]here is essentially no systematic relation between the mega-firm employment ratio… and the ratio of price to marginal cost…. Over the wide range of variation in the employment ratio, sectors with low market power and with high market power are found, with essentially the same average values. There is no cross-sectional support for the hypothesis of higher markup ratios in sectors with more very large firms and thus more concentration in the product markets contained in those sectors."[41]

3. *It is not clear that industry concentration harms consumers*

Economists have been studying the relationship between concentration and various potential indicia of anticompetitive effects—price, markup, profits, rate of return, *etc*.—for decades. There are, in fact, hundreds of empirical studies addressing this topic. Contrary to some common claims, however, when taken as a whole, this literature is singularly unhelpful in resolving our fundamental ignorance about the functional relationship between structure and performance: "Inter-industry research has taught us much about how markets *look*… even if it has not shown us exactly how markets *work*."[42]

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[38] Berger, *et al*., *supra* note 28.

[39] *Id.* at 1148.

[40] *See* Autor, *et al*., *supra* note 88.

[41] Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the US Economy*, Working Paper 16 (Apr. 27, 2018) (emphasis added), https://web.stanford.edu/~rehall/Evidence%20on%20markup%202018.

[42] Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION

Though some studies have plausibly shown that an increase in concentration in a particular case led to higher prices (although this is true in only a minority share of the relevant literature), assuming the same result from an increase in concentration in other industries or other contexts is simply not justified: "The most plausible competitive or efficiency theory of any particular industry's structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power."[43]

As Chad Syverson recently summarized:

> Perhaps the deepest conceptual problem with concentration as a measure of market power is that it is an outcome, not an immutable core determinant of how competitive an industry or market is… As a result, concentration is worse than just a noisy barometer of market power. Instead, we cannot even generally know which way the barometer is oriented.[44]

This does not mean that concentration measures have no use in merger enforcement. Instead, it demonstrates that market concentration is often unrelated to antitrust enforcement because it is driven by factors that are endogenous to each industry. Enforcers should be careful to not rely too heavily on structural presumptions based around concentration measures, as these may be poor indicators of the instances in which antitrust enforcement is most beneficial to consumers. The Draft Guidelines move in the opposite direction.

4. Labor market concentration is falling; Should we decrease antitrust attention?

One way to see potential problems with structural presumptions is to consider labor markets. The best data aggregating labor-market concentration finds either low and/or falling concentration over recent decades at the local level. Studies that use administrative data from the Longitudinal Business Database find that local labor-market concentration has been declining, while national concentration has been increasing, across various definitions of "local."[45]

951, 1000 (Richard Schmalensee & Robert Willig eds., 1989). *See also* Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1053-54 (Richard Schmalensee & Robert Willig eds., 1989) ("[A]lthough the [most advanced empirical literature] has had a great deal to say about measuring market power, it has had very little, as yet, to say about the causes of market power."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986) ("Today it is hard to find an economist who believes the old structure-conduct-performance paradigm.").

[43] Baker & Bresnahan, *supra* note 141414, at 26.

[44] Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions* 33 J. ECON. PERSP. 23, (2019) at 26.

[45] See Rinz, *supra* note 10

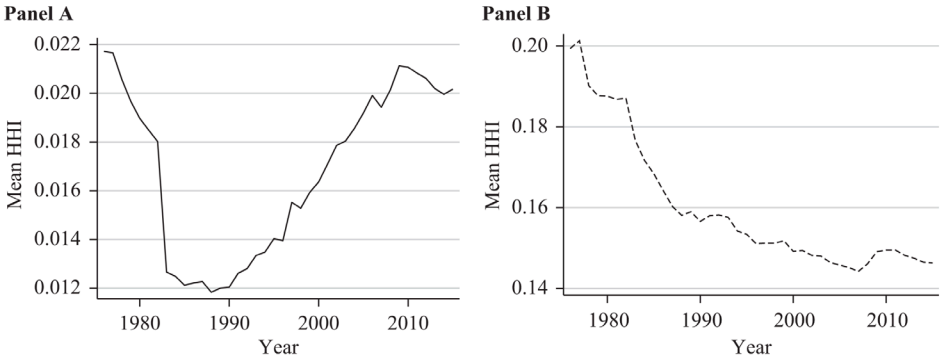

Figure 1

Trends in Industrial Concentration, 1976–2015

Source: Longitudinal Business Database 1976–2015

Note: Figure plots the mean Herfindahl-Hirschman Index across national four-digit NAICS industries in Panel A and commuting zone-level four-digit NAICS industries in Panel B, with industries standardized according to Fort and Klimek (2018), for each year, 1976–2015. Means are calculated using total market employment as weights.

Source: Rinz (2022)[46]

This fall in concentration has happened even as firms' labor-market power appears to be rising—which, again, illustrates the disconnect between concentration and market power. According to one recent study in the *American Economic Review*, while the average labor-market power of firms appears to have increased nationally, "despite the backdrop of stable *national* concentration, we… find that [local concentration] has declined over the last 35 years."[47]

Another study uses microdata from the Occupational Employment and Wage Statistics, mapped to the Quarterly Census of Employment and Wages, which records quarterly employment levels for each establishment in the United States that reports to state-level unemployment insurance departments.[48] They define markets using 6-digit SOC by metropolitan area. They find an average HHI that is relatively stable and low: the employment-weighted level of the employment HHI measure in the private sector is 0.0331.

In short, just as we should not use the low (or falling) average concentration as a reason to decrease HHI thresholds, we should not use high (or rising) average concentration to increase thresholds.

5. *Market structure and innovation.*

The problem with the focus on market concentration can be seen clearly when looking at innovation. The draft guidelines rightly put increased innovation as a pro-competitive effect on par with

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[46] *Id.* at S259.

[47] Berger *et al.*, *supra* note 28 at 1148.

[48] Elizabeth Weber Handwerker & Matthew Dey, *Some Facts About Concentrated Labor Markets in the United States.* INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY, (2023), *early view at* https://onlinelibrary.wiley.com/doi/abs/10.1111/irel.12341.

increased output or investment, higher wages or improved working conditions, higher quality, and lower prices.[49]

However, this emphasis on innovation is in tension with the guidelines' excessive focus on market concentration. How does a market's structure affect innovation? This crucial question has occupied the world's brightest economists for almost a century, from Schumpeter (who found that monopoly was optimal)[50] through Arrow (who concluded that competitive market structures were key),[51] to the endogenous-growth scholars (who empirically derived an inverted-U relationship between market concentration and innovation).[52] Despite these pioneering contributions to our understanding of competition and innovation, there is a growing consensus that no specific market structure is strictly superior at generating innovation. Just as the SCP paradigm ultimately faltered—because structural presumptions were a weak predictor of market outcomes[53]—so too have dreams of divining the optimal market structure for innovation.[54] Instead, in any given case, innovation depends on a plethora of sector- and firm-specific characteristics that range from the size and riskiness of innovation-related investments to regulatory compliance costs, the appropriability mechanisms used by firms, and the rate of technological change, among many others.

Despite this complex economic evidence, several antitrust agencies, including the FTC and the European Commission, believe they have cracked the innovation-market-structure conundrum. Throughout several recent decisions and complaints, these and other authorities have concluded that more firms in any given market will produce greater choice and more innovation for consumers. This could be referred to as the "Structuralist Innovation Presumption."[55] This presumption notably plays an important role in the FTC's recent case against Facebook, where the agency argues that:

> Competition benefits users in some or all of the following ways: additional innovation (such as the development and introduction of new features, functionalities, and business models to attract and retain users); quality improvements (such as improved features,

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[49] Draft Guidelines at 12.

[50] *See* J.A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 72 (1976).

[51] *See* Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 620 (Richard R. Nelson ed.,1962).

[52] *See, e.g.*, Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith & Peter Howitt, *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 702 (2005).

[53] *See, generally*, INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann, & J. Fred Weston eds., 1974), and *see* especially Harold Demsetz, *Two Systems of Belief About Monopoly*, in *id*. at 164-184. *See also* Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. & ECON. 229 (1977); Yale Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L.J. 826 (1978).

[54] *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007) ("The literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role.").

[55] Dirk Auer, *Structuralist Innovation: A Shaky Legal Presumption in Need of an Overhaul*, CPI ANTITRUST CHRONICLE (Dec. 1, 2018).

> functionalities, integrity measures, and user experiences to attract and retain users); and consumer choice…[56]

Unfortunately, the Structuralist Innovation Presumption is a misguided heuristic that antitrust authorities around the globe would do well to avoid, as it is at odds with the mainstream economics of innovation.[57]

There is a vast empirical literature examining the relationship between market structure and innovation. While a comprehensive survey of the literature is beyond the scope of our comments, the top-level findings clearly suggest that the relationship between market structure and innovation is not monotonic, and that it depends on several other parameters. For instance, surveying the econometric literature concerning the effect of industry structure on innovation, Richard Gilbert concludes that it is indeterminate:

> Table 6.1 summarizes the conclusions from these interindustry studies for the effects of competition and industry structure on innovation. Unfortunately, these studies do not reach a consensus, other than to note that innovation effects can differ dramatically for firms that are at different levels of technological sophistication. Although some studies find a positive relationship between measures of innovation and competition (alternatively, a negative relationship between innovation and industry concentration), others find that the relationship exhibits an inverted-U, with the largest effects at moderate levels of industry concentration or competition, and at least one study reports a negative relationship between competition (measured by Chinese import penetration) and innovation (measured by citation-weighted patents and R&D investment. One consistent finding is that an increase in competition has less of a beneficial effect, and may have a negative effect, on innovation incentives for firms that are far behind the industry technological frontier.[58]

Along similar lines, high-profile studies reach opposite conclusions. For instance, looking at the semiconductor industry, Ronald Goettler and Brett Gordon find that concentrated market structures lead to higher innovation:

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[56] Amended complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. filed Aug. 19, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf, at 73.

[57] This is not to say that some economists do not believe that more competitive market structures generally lead to more innovation. But rather that these writings have (i) not garnered a wide consensus among the economics profession, and (ii) often rest on narrow assumptions that reduce their application to specific settings. *See, e.g.*, Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 400 (Josh Lerner & Scott Stern eds., 2011). *See also* Ilya Segal & Michael D. Whinston, *Antitrust in Innovative Industries*, 97 AM. ECON. REV. 1712 (2007). For instance, both above papers conclude that exclusivity, though it may increase innovator's *ex-post* profits, is unlikely to increase incentives to innovate because it prevents entry by more innovative rivals. To reach this conclusion, the authors notably assume that consumers that are bound by exclusivity contracts never find it profitable to purchase the innovation of a second firm (they assume that the innovation costs more to produce than the value to consumers of its incremental improvement). There is no reason to believe that this is, or is not, a good reflection of reality.

[58] Richard J. Gilbert, INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY, 116 (2020)

> The rate of innovation in product quality would be 4.2 percent higher without AMD present, though higher prices would reduce consumer surplus by $12 billion per year. Comparative statics illustrate the role of product durability and provide implications of the model for other industries.[59]

Mitsuru Igami reaches the opposite conclusion while studying the hard-disk-drive industry:

> The results suggest that despite strong preemptive motives and a substantial cost advantage over entrants, cannibalization makes incumbents reluctant to innovate, which can explain at least 57 percent of the incumbent-entrant innovation gap.[60]

Looking at the hospital industry, Elena Patel & Nathan Seegert find a negative relationship between competition and *investment*:

> In particular, hospitals in concentrated markets increased investment by 5.1 percent ($2.5 million) more than firms in competitive markets in response to tax incentives. Further, firms' investment responses monotonically increased with market concentration.[61]

Finally, some of the most universally recognized articles in this field stem from the empirical research of Aghion and coauthors.[62] Their work famously found that the relationship between product-market competition and innovation had an inverted-U shape. Stated differently, increased product-market competition is associated with higher innovative output, up to a point of diminishing returns.[63] According to some, this strand of research warrants a policy of greater antitrust enforcement, relying upon patents to generate *ex post* profits for innovators.[64]

This conclusion appears somewhat misguided, as Aghion et al.'s seminal paper paints a far more nuanced picture. The authors' main finding is that product-market concentration has an ambiguous effect on innovation—on average.[65] This last qualification is often omitted in policy discussions. As a result, what is true for the economy as a whole does not necessarily hold on a case-by-case basis. Some comparatively concentrated industries may score highly in terms of innovation, while some moderately concentrated ones do not.[66] In other words, there are several endogenous factors that

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[59] Ronald L. Goettler & Brett R. Gordon, *Does AMD Spur Intel to Innovate More?*, 119 J. POL. ECON. 1141, 1141 (2011)

[60] Mitsuru Igami, *Estimating the Innovator's Dilemma: Structural Analysis of Creative Destruction in the Hard Disk Drive Industry, 1981–1998*, 125 J. POL. ECON. 798, 798 (2017)

[61] Elena Patel & Nathan Seegert, *Does Market Power Encourage or Discourage Investment? Evidence From the Hospital Market*, 63 J.L. ECON. 667, 667 (2020).

[62] *See* Aghion, *et al.*, *supra* note 52, 701-28 (2005). The theoretical aspects of this paper are a refinement of previous seminal research by some of these authors, which found that increased product market competition had a negative effect on innovation. *See* P. Aghion & P. Howitt, *A Model of Growth Through Creative Destruction*, 60 ECONOMETRICA 323 (1992).

[63] *Id.* at 707.

[64] *See, e.g.,* FEDERICO ETRO, COMPETITION, INNOVATION, AND ANTITRUST: A THEORY OF MARKET LEADERS AND ITS POLICY IMPLICATIONS (2007) at 163-64.

[65] *See* Aghion, *et al.*, *supra* note 526262, at 714.

[66] *Id.* at 706.

affect how increased product-market competition will influence innovation in a given case. For example, the authors show that greater product-market competition is more likely to have a positive effect on innovation in industries where firms are technologically "neck and neck" before an innovation takes places (as opposed to those industries where "laggard" firms can innovate to overtake incumbents).[67] In the first case, more competition mostly decreases pre-innovation rents, while in the second case it has a larger effect on post-innovation rents (this is because increased competition would have little to no effect on laggard firms' pre-innovation rents, which are likely to be small). [68]

The upshot is that empirical economics do not paint a clear or consistent picture of the relationship between market structure and innovation. Antitrust authorities and courts should thus avoid the presumption that more concentrated-market structures hinder innovation to the detriment of consumers.

6. *Market structure and investment: lessons from telecom*

As the previous section explained, mergers may lead to diverging price and innovation effect—as increased concentration might sometimes (though certainly not always) increase both market power and innovation output. This is not the only area where price and "non-price" effects may cut in opposite directions. Price competition and investments can also be inversely correlated.

Mergers among mobile-wireless providers provide a rich source of information to evaluate these effects. In a recent paper, ICLE scholars reviewed the sizable empirical literature on this topic, with much of the research focused on so-called "4-to-3" mergers that reduce the number of large, national carriers from four firms to three (though some have also persuasively argued that such a characterization may not be accurate).[69]

Of the 18 studies ICLE reviewed, eight analyzed changes in market concentration across multiple jurisdictions between 2000 and 2015, while 10 analyzed specific mergers. ICLE's paper also reviewed a more recent study that considered the effects of U.S. market concentration in spectrum ownership on measures of quality.

Of the 10 studies that looked at specific mergers, about half found that short-term prices decreased following a merger, whereas half found that short-term prices increased. Even different studies of the *same* merger found wildly different effects on short-term prices, ranging from significant price

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[67] *Id.* at 702.

[68] *Id.*

[69] Eric Fruits, Justin (Gus) Hurwitz, Geoffrey A. Manne, Julian Morris & Alec Stapp, *Static and Dynamic Effects of Mergers: A Review of the Empirical Evidence in the Wireless Telecommunications Industry*, OECD Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition. DAF/COMP/GF(2019)13 (Sep. 4, 2020), *available at* https://one.oecd.org/document/DAF/COMP/GF(2019)13/en/pdf.

decreases to significant price increases. Thus, looking at these price effects alone, the studies are, collectively, inconclusive.

The ICLE paper identified several reasons for these apparently divergent results, including:

1. a lack of common measures of prices and price effects across studies;
2. differences in the time period chosen; and
3. difficulties accounting for variations in geography, demography, and regulatory regimes among jurisdictions (the latter also creates a potential for endogeneity bias).

Of those studies that considered the effect on long-term investment of such mergers, *all* found that capital expenditures—a proxy for investment and, presumably, long-term dynamic welfare—increased post-merger.

Indeed, several recent studies that looked more broadly at the effects of market concentration in the mobile-telecommunications industry suggest that increased concentration is correlated with increased investment and may therefore be correlated with greater dynamic benefits. These studies indicate that the highest levels of long-term country-wide investment occurred in markets with three facilities-based operators (though total investment was not significantly lower in markets with four facilities-based operators). In addition, a recent analysis found that U.S. markets with higher concentration of spectrum ownership had faster, more reliable cellular service (reflecting an increase in dynamic welfare effects).

Studies of investment also found that markets with three facilities-based operators had significantly higher levels of investment by individual firms. The implication is that, in such markets, individual firms have stronger incentives to make capital investments that enable long-term competition through expanded infrastructure and technological innovation, which affect the range, quality, and quantity of services provided to consumers. Studies also suggest this effect may be strengthened when the merger results in a more symmetrical market structure (i.e., the various facilities-based providers become more equal in market share). It is argued that increases in the number of competitors in asymmetric markets leads to disproportionately lower levels of investment by smaller firms. Thus, a merger between two smaller firms that results in greater market symmetry could result in higher levels of investment by the merged firms relative to the unmerged entities.

The results of ICLE's review indicate that a merger that involves products or firms that compete along a variety of dimensions, in addition to price, must evaluate the effects of the merger across these dimensions, as well. In addition, relying on past empirical research to evaluate a current merger may overlook economic, technological, or regulatory changes that diminish the reliability of past experience to inform current events. This review of mobile-wireless-provider mergers reveals a number of factors that should be considered when seeking to understand the likely welfare effects of a given merger. These include:

1. Whether the effects to be evaluated are limited to static price effects or also include qualitative measures, such as capital expenditures and other investment in quality of service, suggesting dynamic innovation effects;
2. The timeframe over which the effects are evaluated;
3. The effects on different tiers of service, especially those measured by hypothetical consumption profiles (known as "baskets" in mobile-wireless-provider mergers);
4. The extent to which the effects of previous mergers may confound projected effects of the merger at hand; and
5. Whether a transaction occurs during, or even as part of, a transition between different generations of technology (e.g., during an upgrade from 3G to 4G networks).

Further, it is well-known that process and product innovation does not arise solely from new entry; incumbent firms frequently are important sources of innovation, as well as of increased market competitiveness.[70] Dynamic analysis takes entry seriously, but it is much more sensitive to potential entry as a constraint on incumbents than a structuralist view would permit. Thus, for example, an incumbent mobile-wireless provider that offers wide coverage of 4G service must consider the potential capabilities of an existing competitor that currently has only sparse 4G coverage; it must incorporate potential threats from that competitor in its decision matrix when evaluating whether to upgrade its network to 5G in order to retain its customer base. An incumbent's dominant position can quickly erode thanks to imperfect in-market substitutes, as well as from out-of-market firms that may decide to enter in the future.[71]

When evaluating the merits of a merger, authorities are charged with identifying the effects on the welfare of consumers. Crucially, this analysis must consider not only short-term price effects, but also long-term and dynamic effects, particularly in markets (like mobile telecommunications) in which competition occurs over both price and innovation. Based on the studies that we reviewed, 4-to-3 mergers appear to generate net long-term benefits to consumer welfare in the form of increased investment (presumably—although not conclusively, based on these studies—resulting in increased innovation), while the short-term effects on price are resolutely inconclusive.

II. Guideline 2: Mergers Should Not Eliminate Substantial Competition Between Firms

While it is reasonable to consolidate the horizontal and vertical merger guidelines into one document, the draft essentially writes away the distinction between them. Footnote 30 suggests that Guideline 2 is about horizontal unilateral effects. If so, the application of the guideline to horizontal mergers specifically should be made explicit. Otherwise, readers are left with the impression that the

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[70] *See, generally,* Nicolai J. Foss & Peter G. Klein, ORGANIZING ENTREPRENEURIAL JUDGMENT (2012).

[71] *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009).

Draft Guidelines intentionally avoid specificity, perhaps hoping to enhance the agencies' prosecutorial discretion. That would be problematic, notwithstanding the possibility of line-blurring cases. In brief, a significant body of economic literature and judicial precedent recognizes the competitive importance of the distinction, and requires that the agencies treat horizontal and vertical mergers differently.

As Aviv Nevo and colleagues summarized, the distinction is especially important when thinking about efficiencies and other potential merger benefits:

> Applying the same sort of skepticism about efficiencies in a vertical merger as in a horizontal merger can amount to assuming away a portion of the economics that is at the heart of the vertical investigation.
>
> One clear example of this dual nature of vertical theories is the model of linear pricing, which generates a raising rivals' cost incentive and also generates a potential procompetitive incentive in the form of elimination of double marginalization ("EDM"). Not every merger will present facts that fit this particular model. But, if that model is the basis of an investigation, its full range of implications should be considered.[72]

By rejecting—or implying a rejection of—a general distinction between horizontal and vertical mergers, the Draft Guidelines effectively enact a "horizontalization" of merger enforcement. The following subsection explains the importance of explicitly delineating horizontal and vertical mergers at certain points in the Draft Guidelines.

A. Horizontal Mergers Are Different Than Vertical Mergers

Antitrust merger enforcement has long relied on a fundamental distinction between horizontal and vertical mergers (or horizontal and vertical theories of harm, to be more precise). Policymakers widely assume the former are more likely to cause problems for consumers than the latter. However, this distinction increasingly has been challenged by some antitrust scholars and enforcers. In recent years, antitrust authorities on both sides of the Atlantic—and several high-profile scholars—have put forward theories of harm that obscure the traditional distinctions among horizontal, vertical, and conglomerate mergers. This is epitomized by an alarmist 2020 article by Cristina Caffarra and co-authors that portrays nearly all tech mergers as horizontal, based on the supposition that, but for the acquisition, one of the merging firms likely would launch its own competing vertical product..[73] But the claim seems manifestly implausible, and the paper offers no evidence on its behalf. Of course, in a given case, under specific facts and circumstances, a large, diversified tech firm might consider or

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[72] Asker, *et al.*, *supra* note 3, at 34.

[73] Cristina Caffarra, Gregory S. Crawford & Tommaso Valletti, "*How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions*, ANTITRUST CHRONICLE (May, 26, 2020) ("Large digital platforms in particular have exceptional abilities to pursue organic expansion but also opportunities to 'roll up' (willing) startups to 'get there faster', 'buying' instead of expending effort in rival innovation. Foregoing such effort is never good for consumers and society as a whole: while innovative effort is costly, it will often yield multiple providers and differentiated services, with socially desirable properties.").

achieve entry into a vertical market. But a possibility under some facts and circumstances is a far cry from a general likelihood. The implication of this (and other) research is that mergers between firms that are either vertically related or active in unrelated markets routinely or typically have significant horizontal effects.[74] This *can* be the case, either when merging firms are *potential* competitors or when they compete in innovation markets (i.e., they have overlapping R&D pipelines, or may have them in the future).[75]

These concerns are compounded in the digital economy, where ostensibly non-competing firms may become competitors on one side of their platforms. For instance, it has been argued that Giphy, which offers a library of gif files, may ultimately compete with Facebook in ad markets.[76] Similarly, it has been claimed that Google's acquisition of Fitbit—a producer of wearable health-monitoring devices—raises horizontal theories of harm, because Google would otherwise have developed its own wearable devices.[77] Such hypotheticals are sometimes deemed to be "reverse killer acquisitions," on grounds that acquiring a rival enables the incumbent to *not* produce a good itself. Endorsing this approach to merger review wholeheartedly would have profound policy ramifications. Indeed, should authorities assume the counterfactual to a merger is that the acquirer will compete with the target directly, then every merger effectively becomes a horizontal one.

The influence of this research can be seen in the FTC's loss in blocking Meta's acquisition of Within Unlimited and the ongoing case against Meta, which centers on the company's acquisitions of WhatsApp and Instagram.[78] For the Within case, the FTC wanted to turn a vertical merger (software and hardware) into a horizontal merger between potential competitors. The court was unwilling to accept the claim that, if the Within deal were blocked, Meta would likely develop its own VR fitness app to compete against Supernatural. Meta had no such product poised to enter the market, or even in late-stage development. The contingent probability of timely, competitively significant entry—inherent in a potential competition case—was simply too small or speculative to conclude that Meta was a potential competitor, and was further undermined by internal emails suggesting that they

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[74] *See, e.g.*, Steven C. Salop, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*, Working Paper (Apr. 28, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839631. *See also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2019).

[75] *See, e.g.*, Salop, *id*. *See also* Giulio Federico, Gregor Langus & Tommaso Valletti, *Horizontal Mergers and Product Innovation*, 59 INT'L J. INDUS. ORG. 1 (2018).

[76] CMA, *Completed Acquisition by Facebook, Inc (now Meta Platforms, Inc.) of Giphy, Inc., Final Report* (Nov. 30, 2021) at 223 ("We consider this evidence supports the view that GIPHY was an important player in a potentially growing segment of the display advertising market, and as such (taking account of the economic context, in particular the expected closeness of competition between Facebook and GIPHY) an important part of a dynamic competitive process with Facebook and others.").

[77] *See* Caffarra, *et al.*, *supra* note 73. ("What seems to be more frequent are cases where the acquisition may effectively extinguish the standalone effort of the buyer to expand in a particular space because the target immediately provides it with those capabilities. This covers a broader set of possibilities as platforms continue to expand into adjacent fields by buying functionalities, capabilities, even whole businesses (see the recent example of Google/Fitbit).").

[78] *FTC v. Meta Platforms Inc.*, U.S. Dist. LEXIS 29832 (2023); Complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. filed Jan. 13, 2021).

should partner with Peloton—an idea that got so little traction that they never even ran it past Peloton.

At the time of the WhatsApp and Instagram acquisitions, competition authorities around the world tended to analyze them (and the potential theories of harm they might give rise to) primarily as vertical. For instance, looking at Facebook's purchase of WhatsApp, the European Commission concluded that "while consumer communications apps like Facebook Messenger and WhatsApp offer certain elements which are typical of a social networking service, in particular sharing of messages and photos, there are important differences between WhatsApp and social network services." This suggested the merging firms were likely active in separate markets.[79] The FTC's clearance of that deal suggests that the agency largely adhered to the view that the merging entities were not close competitors.[80] Similarly, when the UK CMA reviewed Facebook's acquisition of Instagram, it concluded that the two firms exercised only weak competitive constraints on each other:

> To conclude, there are several relatively strong competitors to Instagram in the supply of camera and photo editing apps, and those competitors appear at present to be a stronger constraint on Instagram than Facebook's new app.[81]

Reevaluating these deals almost a decade later, the FTC reached a diametrically opposite conclusion. In its *Facebook* complaint, the agency concluded that:

> Failing to compete on business talent, Facebook developed a plan to maintain its dominant position by acquiring companies that could emerge as or aid competitive threats. By buying up these companies, Facebook eliminated the possibility that rivals might harness the power of the mobile internet to challenge Facebook's dominance....
>
> ...As Instagram soared, Facebook's leaders began to focus on the prospect of acquiring Instagram rather than competing with it....
>
> ...In sum, Facebook's acquisition and control of WhatsApp represents the neutralization of a significant threat to Facebook Blue's personal social networking monopoly, and the unlawful maintenance of that monopoly by means other than competition on the merits.[82]

While this change of heart could be characterized as the agency updating its position in light of new evidence concerning the nature of competition between the merging firms, there is also a clear sense that times have changed. Indeed, both antitrust agencies and scholars appear more willing to assume

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[79] Case No COMP/M.7217—*Facebook / WhatsApp* (Oct. 3, 2014), at 61.

[80] Jessica L Recih, *Letter Reminding Both Firms That WhatsApp Must Continue To Honor Its Promises To Consumers With Respect to the Limited Nature of the Data It Collects, Maintains, and Shares With Third Parties* (Apr. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

[81] CMA Case ME/5525/12—*Anticipated acquisition by Facebook Inc of Instagram Inc* (Aug. 22, 2012).

[82] Amended complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. filed Aug. 19, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf, at 26-41.

(i) that firms could become competitors absent a merger, and (ii) that mergers between them are likely to reflect efforts by the acquirer to anticompetitively maintain its market position. We address both these claims in the subsequent sections.

The most important difference between a horizontal merger and a vertical merger is the merging parties' relationships with each other. A *horizontal* merger is between firms that compete in the same product and geographic market. A *vertical* merger is between firms with an upstream-downstream (e.g., seller-buyer) relationship. These distinctions are well-known and widely accepted. There has been no economic trend that would justify a redefinition of these distinctions.

Drawing on an example provided by Steve Salop, consider a hypothetical orange-juice market with firms that manufacture and engage in the wholesale distribution of orange juice, as well as firms that own the orchards that supply the oranges to be juiced.[83] A merger between manufacturer/wholesalers would be a horizontal merger; a manufacturer/wholesaler's purchase of a firm owning orchards would be a vertical merger.

A horizontal merger removes a competing firm from the market and thereby eliminates *substitute* products or firms that produce the products.[84,85] By definition, horizontal mergers reduce competition, but the attendant harm to consumers may be large, small, or infra-marginal, depending on the facts and circumstances of a given merger; and any consumer harms may be offset by benefits, such as economies of scale and other efficiencies.[86]

In contrast, in most cases, a vertical merger does not eliminate a competing firm from the market and does not involve substitutes.[87] In fact, vertical mergers typically involve *complements*, such as a product plus distribution or a critical input to a complex device.[88] In Salop's orange-juice hypothetical, the manufacturer juices oranges, cans the juice, and operates a wholesaling operation to sell the canned juice to retailers. In this example, the wholesaling operations is a complement to the manufacturing process.

Although not necessarily "by definition," in most cases, vertical mergers are undertaken to achieve efficiencies and reduce costs. For example, through the elimination of double marginalization and

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[83] Steven C. Salop, *A Suggested Revision of the 2020 Vertical Merger Guidelines*, Georgetown Law Faculty Publications and Other Works No. 2381 (Dec. 2021), https://scholarship.law.georgetown.edu/facpub/2381.

[84] D. Bruce Hoffman, ACTING DIR., BUREAU OF COMPETITION, FED. TRADE COMM'N, *Remarks at the Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC* 4 (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

[85] Although in some cases, such as a failing firm, the competing firm may have exited the market even if the merger did not occur.

[86] Hoffman, *supra* note 84.

[87] *Id.*

[88] *Id.*

the resulting downward pressure on prices, vertical mergers present a stronger likelihood of improving competition than horizontal mergers.[89]

In a statement during the 2018 FTC hearings, FTC Commissioner Christine Wilson concluded that "we know that competitive harm is less likely to occur in a vertical merger than in a horizontal one," and echoed some of Hoffman's points:[90]

> [I]n contrast to horizontal guidelines, the economics in vertical mergers indicate efficiencies are much more likely. Professor Shapiro went so far as to call them "inherently" likely at our hearing. Given this dynamic, it may be appropriate to presume that certain vertical efficiencies are verifiable and substantial in the absence of strong evidence to the contrary, even if we would not do so in a horizontal merger case.[91]

The economics of horizontal mergers comprises a long, well-established literature of theoretical models and empirical research. In contrast, there are fewer quantitative theoretical models that can be used to predict outcomes in vertical mergers. Moreover, those models that do exist have a far shorter track record than those used to assess horizontal mergers.[92]

Naturally, the real world is much more complicated. For example, Salop points out that some mergers involve firms that are already vertically integrated prior to the merger.[93] In these cases, the merger would involve both vertical and horizontal elements. Such mergers may lead to horizontal and vertical efficiencies that reinforce each other. They also may lead to horizontal and vertical harms that reinforce each other. Or they may lead to mix of horizontal and vertical efficiencies and harms that counteract each other. That may explain why empirical research on vertical mergers, discussed below, can yield sometimes wildly different results—even when using seemingly similar sets of data.

To be sure, there are no economic trends that would lead one to revisit the distinction between horizontal and vertical mergers. Nevertheless, there have been advances in economic theory that have led some to conclude that vertical mergers may not be as beneficial as once thought or that they may lead to anticompetitive consumer harm.

Some critics of the current state of vertical-merger enforcement assert a vertical merger can effectively become a horizontal merger—or have horizontal effects. If that is the case, then it is argued that vertical mergers should be evaluated in the same way as horizontal mergers. According to Salop, "[f]or the type of markets that are normally analyzed in antitrust, *the competitive harms from vertical*

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[89] *Id.*

[90] Christine S. Wilson, COMM'R, FED. TRADE COMM'N, *Keynote Address at the GCR Live 8th Annual Antitrust Law Leaders Forum: Vertical Merger Policy: What Do We Know and Where Do We Go?* (Feb. 1, 2019) at 4 & 9, *available at* https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf.

[91] *Id.*

[92] Hoffman, *supra* note 84.

[93] Salop, *supra* note 89.

mergers are just as intrinsic as are harms from horizontal mergers."[94] Thus, a vertically integrated firm faces an "intrinsic *incentive*"[95] to foreclose downstream competition "by *raising the input price it charges to the rivals* of its downstream merger partner" in the same way that horizontal firms face "inherent upward pricing pressure from horizontal mergers in differentiated products markets, *even without coordination*."[96]

In an implicit acknowledgement of the distinction between horizontal and vertical mergers, Salop describes the competition between an upstream firm and a downstream partner as *indirect*: "the upstream merging firm that supplies a downstream firm is inherently an '*indirect competitor*' of the future downstream merging firm. That indirect competition is eliminated by merger. This unilateral effect is exactly parallel to the unilateral effect from a horizontal merger."[97]

But the two are not "exactly parallel," of course, because indirect competition is different from direct competition—Salop himself make the distinction. Even in Salop's telling, the mechanism by which his vertical-leads-to-horizontal theory operates requires that (1) the upstream firm has market power and (2) post-merger, the merged firm forecloses supply or raises costs to the downstream firm's horizontal rivals. While this is possible, it is not a necessary consequence of the transaction; and the risk of competitive harm, at the very least, must be a function of both the likelihood and degree of foreclosure. The presence of downstream horizontal competitors operates as an immediate and present constraint on the vertically integrated merged firm.

It may be helpful to explain using Salop's orange-juice hypothetical:

> Company A is a manufacturer and wholesale supplier of orange juice to retailers. It seeks to acquire Company B, an owner of orange orchards.... The merged firm may find it profitable to raise the price or cease supplying oranges to one or more rival orange juice suppliers.... This input foreclosure may lessen competition in the wholesale orange juice market, for example, by raising the price or reducing the quality of some or all types of orange juice.[98]

This is an excellent example because it highlights how complex even a straightforward hypothetical of raising rivals' costs can get. Under the standard formulation, the vertically integrated firm would

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[94] *Competition and Consumer Protection in the 21st Century; FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law; Before the FTC*, Presentation Slides at 15 (Nov. 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf [hereinafter "Salop, Vertical Merger Slides"] (emphasis added). *See also* Serge Moresi & Steven C. Salop, *When Vertical is Horizontal: How Vertical Mergers Lead to Increases in "Effective Concentration,"* 59 R. IND. ORG. 177 (2021) ("there in an inherent loss of an indirect competitor that supported the non-merging competitors in the pre-merger world, which leads to reduced competition when there is an input foreclosure concern").

[95] *Id.* (emphasis added).

[96] *Id.* (emphasis added).

[97] *Id.* (emphasis added).

[98] Salop, *supra* note 89.

produce oranges at the orchard's marginal cost—in theory, the price it pays for oranges would be the same both pre- and post-merger. Under this theory, if the vertically integrated orchard does not sell its oranges to the non-integrated manufacturer/wholesalers, then the other non-vertically integrated orchards will be able to charge a price greater than their marginal cost of production and greater than the pre-merger market price for oranges. The higher price of oranges used by non-integrated manufacturer/wholesalers will then be reflected in higher prices for orange juice sold by the manufacturer/wholesalers.

The merged firm's juice prices will be higher post-merger because its unintegrated rivals' juice prices will be higher, thus increasing the merged firm's profits. The merged firm and unintegrated orchards would be the "winners;" unintegrated manufacturer/wholesalers and consumers would be the "losers." Under a consumer welfare standard, the result could be deemed anticompetitive. Under a total welfare standard, anything goes.

But this classic example of raising rivals' costs is based on some strong assumptions. It assumes that, pre-merger, all upstream firms price at marginal cost, which means there is no double marginalization. It assumes all the upstream firm's products are perfectly identical. It assumes unintegrated firms do not respond by integrating themselves. If one or more of these assumptions is not correct, more complex models—with additional (potentially unprovable) assumptions—must be employed. What begins as a seemingly straightforward theoretical example is now a model-selection problem: which economic models best fit the facts and best predict the likely outcome.

In Salop's example, it is assumed the merged firm would raise the price or refuse to sell oranges to rival downstream wholesalers. However, if rival orchards charge a sufficiently high price, the merged firm would profit from undercutting its rivals' orange prices, while still charging a price greater than its own marginal cost. Thus, it is not obvious that the merged firm has an incentive to cut off supply to downstream competitors or charge a higher price. The extent of the pricing pressure on the merged firm to cheat on itself is an empirical matter that depends on how upstream and downstream firms will or might react. Depending on how other manufacturer/wholesalers and orchard firms react, the merged firm's attempt at foreclosure may have no effect and there would be no harm to competition.

The hypothetical also assumes that commercial juicing is the only use for oranges and that juice oranges are the only thing that can be produced by citrus groves. It is possible that, rather than raising prices or foreclosing competitors, the merged firm would divert some or all of its juice oranges to a "secondary" market, such as the retail market for those who juice at home. They also could convert groves used to grow juice oranges to the production of strains of oranges and other citrus fruits that are sold as fresh produce. Indeed, fresh citrus fruits currently account for 10% of Florida's

crop and 75% of California's.[99] This diversion would lead to a decline in the supply of juice oranges and the price of this key input would rise.

This strategy would raise the merged firm's costs along with its rivals. Moreover, rival orchards can respond to this strategy by diverting their own groves from the production of fresh produce citrus to the juice market, in which case there may be no significant effect on the price of juice oranges. What begins as a seemingly straightforward theoretical example is now a complicated empirical matter and raises the antitrust question of whether selling into a "secondary" market constitutes anticompetitive conduct.

Moreover, the merged firm may have legitimate business reasons for the merger and legitimate business reasons for reducing the supply of oranges to juice wholesalers. For example, "citrus greening," an incurable bacterial disease, has caused severe damage to Florida's citrus industry, significantly reducing crop yields.[100] A vertical merger could be one way to reduce supply risks. On the demand side, an increase in the demand for fresh oranges would guide firms to shift from juice and processed markets to the fresh market. What some would see as anticompetitive conduct, others would see as a natural and expected response to price signals.

Furthermore, it is not actually the case that the incentive to foreclose downstream rivals is "intrinsic," nor is it the case that the effect is necessarily deleterious. In fact, as we discuss below, even when foreclosure can be shown, empirical evidence indicates that the consumer benefits from efficiencies tend to be greater than the harms from foreclosure.

A key difference between horizontal and vertical mergers is that any efficiency gains from a horizontal merger are not automatic and must be established. On the other hand, the realization of certain vertical-merger efficiencies, at least from the elimination of double marginalization, *is* automatic.[101] And, of course, additional merger benefits may be established for any given vertical merger.

The logic is simple: Potentially welfare-reducing vertical mergers are those that involve an upstream firm with market power. Thus, pre-merger, all downstream firms bear presumptively higher input costs. To realize their own profits, they must increase final-product prices to consumers by even

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[99] USDA, *Citrus Fruits 2021 Summary* (Sep. 2021), *available at* https://downloads.usda.library.cornell.edu/usda-esmis/files/j9602060k/kp78hg05n/1544cn77s/cfrt0921.pdf.

[100] Chad Miles, *After Troubling New Forecast, Florida Citrus Advocate Says Industry Is "At A Crossroads,"* WFTS (Jan. 24, 2022), https://www.abcactionnews.com/news/region-polk/after-troubling-new-forecast-florida-citrus-advocate-says-industry-is-at-a-crossroads.

[101] David Reiffen & Michael Vita, *Comment: Is There New Thinking on Vertical Mergers?* 63 ANTITRUST L. J. 917, 920 (1995) ("Some horizontal mergers do not create efficiencies; they are profitable only because of the post-merger anticompetitive conduct made possible by the transaction. By contrast, the primary lesson of both the older literature on vertical integration, as well as the newer 'post-Chicago' literature, is that this trade-off invariably exists for all vertical transactions that threaten to reduce consumer welfare."). *See also* Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950); Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 219 (1978); Richard A. Posner, ANTITRUST LAW 228 (1976).

more.[102] But after the merger, the merged downstream entity no longer pays the markup. As a result, it "enjoys lower input costs and thus increases its output, thereby increasing welfare."[103] At the same time, of course, non-merged downstream firms bear a higher input price, and it is an empirical question whether the net consumer welfare effect will be positive or negative. But it is *never* a question that the two effects operate simultaneously, and that the reduction of double marginalization necessarily occurs. Indeed, it is most likely to arise *and* to lead to net consumer-welfare benefits precisely where there is the greatest potential for anticompetitive price increases to downstream rivals.[104]

All else being equal, the effect of removing a horizontal competitor by merger is automatic: less competition. That isn't necessarily bad. It may be offset, and it may also enable innovation, more competition, or other results that benefit consumers. *But* in the first instance, former head-to-head competitors that merge are no longer competing. With vertical mergers, however, the effect is not to *automatically* reduce competition (indirect, potential, or otherwise). A vertically integrated firm might (or might not) choose to hurt unaffiliated downstream competitors by more than it benefits its integrated downstream firm—that might (or might not) be feasible and advantageous--but nothing is automatic. Assessing the competitive effect of such a merger necessarily means incorporating an added layer of uncertainty, complexity, and distance between cause and effect. In the absence of a few particular, tenuous, and stylized circumstances, "[i]n this model, vertical integration is unambiguously good for consumers."[105]

In response, proponents of invigorated vertical-merger enforcement argue, in part, that:

> [T]he claim that vertical mergers are inherently unlikely to raise horizontal concerns fails to recognize that all theories of harm from vertical mergers posit a horizontal interaction that is the ultimate source of harm. Vertical mergers create an inherent exclusionary *incentive* as well as the *potential* for coordinated effects similar to those that occur in horizontal mergers.[106]

But this fails to resolve anything. Moreover, the "analogy with horizontal mergers is misleading."[107] It is uncontroversial (and far from "[un]recognized") that "all theories of harm from vertical mergers

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[102] *See, e.g.*, Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988).

[103] Reiffen & Vita, *supra* note 101, at 921.

[104] *Id.* ("High price-cost margins increase the size of gain to the integrated firm as well as the potential for anticompetitive input price increases.... [And] the post-Chicago literature suggests that vertical mergers that occur in the presence of high premerger concentration are likely to result in lower prices to consumers.").

[105] Cooper, *et al.*, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**, at 645.

[106] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, Georgetown Law Faculty Pub. and Other Works, Working Paper No. 2148 (2019), at 8 https://scholarship.law.georgetown.edu/facpub/2148 (emphasis added).

[107] Reiffen & Vita, *supra* note 101, at 920.

posit a horizontal interaction that is the ultimate source of harm."[108] All this says is that there could be harm of the sort that horizontal mergers might cause. But it does not acknowledge that the likelihood and extent of that harm are different in the vertical and horizontal contexts. Moreover, it does not note that the *mechanism* by which harm might arise is different and more complex in the vertical case. All in all, the probability of that outcome is lower in the case of a vertical merger, where it is dependent on an additional step that may or may not arrive and that may or may not cause harm.

III. Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market

The wording of the guideline should be changed to reflect the fact that we are dealing with probabilities, as the body of the guideline makes clear. "Mergers should not eliminate a potential entrant with probable future entry in a concentrated market" would more closely match the body of the guideline.

The distinction between 4.A and 4.B should be eliminated. The only way for a potential entrant to exert competitive pressure is if the current competitors *perceive* the potential entrant to be a threat. Are the agencies claiming otherwise? Are there firms that no current competitors think about yet somehow still exert competitive pressure on the market? If the agencies mean as much, it should be explicit.

One difficulty with treating all potential competitors like actual competitors is that it assumes that all vertically related (or even non-related) firms *could* eventually threaten the acquiring incumbent. In other words, potential competition from a particular firm is probabilistic, with the likelihood varying according to the facts and circumstances of the individual case. This forces agencies to make complex assessments regarding the potential future evolution of competition. Beyond the scale that "for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern," the guidelines do not offer guidance about how the relevant probabilities will be assessed.

A. Potential Competition Is Inherently Probabilistic

The uncertainty involved in any merger involving a potential competitor has important ramifications for policymaking. Anticompetitive mergers are, by definition, possible (under the above theories) only when the acquired rival could effectively challenge the incumbent.[109] But these are, of course,

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[108] *See, e.g.*, Cooper, *et al.*, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**, at 642-45 (assessing the vast majority of post-Chicago theories of vertical harm under the heading "softening horizontal competition").

[109] *See, generally,* Salop, *supra* note 74.

only potential challengers; there is no guarantee that any one of them could or would mount a viable competitive threat.[110]

A first important consequence is that, while potential competitors are important constraints on existing markets, they do not generally offer the same degree of constraint as actual competitors.[111] As such, any analysis of a merger involving a potential competitor would have to assess and incorporate the probability of competition.[112] High-quality analysis of the effects of potential competition are few and far between but, according to at least one literature review, a potential competitor may have between one-eighth to one-third the effect on competition as an actual competitor. [113] Likelihoods may vary by industry, product category, and the specific facts and circumstances of the product market and firms at issue. The strength of this competitive constraint also depends on the firms' perceptions: If both the incumbent and the rival heavily discount the probability of entry, then potential competition is unlikely to affect their behavior.[114]

This leads to a second important issue. Because the loss of a potential competitor will, in expectation, lead to less harm than that of an actual competitor, it is crucial that agencies tailor their responses accordingly. While the traditional remedies for anticompetitive horizontal mergers include divestments or outright prohibition, these remedies may no longer be appropriate in the face of potential competition theories of harm (although such remedies might sometimes remain necessary to fully remove potential anticompetitive harm). Decisionmakers should look at mergers from a cost/benefit standpoint, which, in turn, counsels weighing anticompetitive harms against procompetitive benefits. Because one would expect anticompetitive harms in potential-competition cases to be only a fraction of those in actual-competition cases, there is—all else being equal—a higher likelihood in the former that efficiencies will outweigh harms.

It is not clear how this can be addressed in terms of remedies: neither divestures nor prohibitions can realistically be made probabilistic or conditioned on future market outcomes, as firms could easily game this. At the very least, this probably means judges should set a high evidentiary bar for

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[110] *Id.*

[111] *Id.*

[112] *See* Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, FTC File No. 131-0058 (Sep. 20, 2013), at note 3 ("Nevertheless, competitive effects in actual potential competition cases still are more difficult, on balance, to assess than typical merger cases because the agency must predict whether a party is likely to enter the relevant market absent the merger. It is because of this uncertainty and the potential for conjecture that the courts and agencies have cabined the actual potential competition doctrine by, for instance, applying a heightened standard of proof for showing a firm likely would enter the market absent the merger.") (*citing* B.A.T. Indus., 104 F.T.C. 852, 926-28 (1984) (applying a "clear proof" standard)).

[113] *See Mergers That Eliminate Potential Competition*, RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAWS 111 (Einer Elhauge, ed. 2012) ("All twelve studies [of airline markets] find that potential competition results in lower prices by incumbent carriers, in ten cases by statistically significant amounts. Except as noted below, the amounts range between one quarter of one percent to about two percent, and in all cases are less than the amount of the price decline from one additional actual competitor, specifically, from one eighth to one third as large.").

[114] *Id.*

claims that a merger will reduce *potential* competition, and agencies should, at the margin, focus more heavily on traditional theories that involve more tangible risks of consumer harm.

This restrained approach to enforcement is—perhaps surprisingly, given the agency's generally interventionist track record in digital markets—encapsulated by the European Commission's stance in the *Google /Fitbit* merger, which many sought to frame as a potential competition case. Instead, the commission found that:

> As regards Fitbit's ability to compete in innovation with regard to smartwatches, the Commission notes that [Fitbit's product strategy], there are also no competitive relationships that would lead to the Transaction reducing Google's incentives to innovate in the future. Based on the Notifying Party's submission, the Commission considers that there is no possible market assessed in this Decision where Fitbit is the only or main source of pressure on Google to innovate. For these reasons, the Commission considers that the Transaction would not unduly restrict competition in… innovation as regards the supply of smartwatches. This issue will, therefore, not be further discussed in this Decision.[115]

Review of mergers that involve potential competitors require agencies to make speculative assessments as to how competition will likely play out in a given market. Absent the ability to condition remedies on these future evolutions, error-cost considerations will often dictate that authorities clear mergers, despite a limited risk of future competitive harm.[116] Failing this, agencies and courts should, at the very least, set a high evidentiary bar for plaintiffs to bring forward such claims, or else numerous mergers will wrongly be prohibited as anticompetitive, to the detriment of consumers.

B. Buying Up Every Potential Competitor Is Unlikely to Be a Successful Business Strategy

One cannot simply assume that mergers involving potential competitors are harmful. It is becoming a common theory of harm regarding non-horizontal acquisitions that they are, in fact, horizontal acquisitions in disguise. This is a form of the "horizontalization" discussed above. The acquired party may not be a direct competitor today but may become one in the future. Therefore, the theory goes,

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[115] Case No M.9660—*Google/Fitbit*, C (2020) 9105 final (Dec. 12, 2020), at 398.

[116] Geoffrey A. Manne, Sam Bowman & Dirk Auer, *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047 (2021). This is because the availability of mergers as an exit strategy have been shown to increase investments by firms. Regarding the effect of mergers on investment, *see, e.g.*, Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity Around the World*, NBER, Working Paper No. 24082 (Nov. 2017), https://ssrn.com/abstract=3082265 ("We examine the relation between venture capital (VC) investments and mergers and acquisitions (M&A) activity around the world. We find evidence of a strong positive association between VC investments and lagged M&A activity, consistent with the hypothesis that an active M&A market provides viable exit opportunities for VC companies and therefore incentivizes them to engage in more deals."). And increased M&A activity in the pharmaceutical sector has not led to decreases in product approvals; rather, quite the opposite has happened. *See, e.g.*, Barak Richman, *et al.*, *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOYOLA U. CHI. L. J. 787, 799 (2017) ("Our review of data measuring pharmaceutical innovation, however, tells a different story. First, even as merger activity in the United States increased over the past ten years, there has been a steady upward trend of FDA approvals of new molecular entities ("NMEs") and new biological products ("BLAs"). Hence, the industry has been highly successful in bringing new products to the market.").

to reduce the competitive pressure they would otherwise face in the future, the incumbent will acquire a company that does not appear to be a competitor.

This argument to strengthen enforcement against mergers involving potential competitors is intuitive but it involves restrictive assumptions that weaken its applicability. The argument is laid out most completely by Steven Salop in his paper, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*.[117] In it, he argues that:

> Acquisitions of potential or nascent competitors by a dominant firm raise inherent anticompetitive concerns. By eliminating the procompetitive impact of the entry, an acquisition can allow the dominant firm to continue to exercise monopoly power and earn monopoly profits. The dominant firm also can neutralize the potential innovation competition that the entrant would provide.

Under the model that Salop puts forward, there should, in fact, be a presumption against any acquisition, since any firm is a potential competitor with a sufficiently small probability.[118] Given that a model like Salop's animates lots of skepticism toward mergers with potential entrants, it is important to examine the model's assumptions, including that, because monopoly profits exceed duopoly profits, incumbents have an incentive to eliminate potential competition for anticompetitive reasons.

The notion that monopoly profits exceed joint duopoly profits rests upon two restrictive assumptions that hinder the simple application of Salop's model to antitrust in general and to the merger guidelines, in particular.

First, even in a simple model, it is not always true that monopolists have both the ability and incentive to eliminate any potential entrant simply because monopoly profits exceed duopoly profits. For the simplest complication, suppose there are two possible entrants, rather than the common assumption of just one entrant at a time. The monopolist must now pay each of the entrants enough to prevent entry. But how much? If the incumbent has already paid one potential entrant not to enter, the second could then enter the market as a duopolist, rather than as one of three oligopolists. Therefore, the incumbent must pay the second entrant an amount sufficient to compensate a duopolist, not their share of a three-firm oligopoly profit. The same is true for buying the first entrant. To remain a monopolist, the incumbent would have to pay each possible competitor duopoly profits.

Because monopoly profits exceed duopoly profits, it is profitable to pay a single entrant half of the duopoly profit to prevent entry. It is not, however, necessarily profitable for the incumbent to pay both potential entrants half of the duopoly profit to avoid entry by either.[119] With enough potential

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[117] *See* Salop, *supra* note 74.

[118] In this section, we focus on Salop's comments because they represent a common perspective. As Salop himself points out "I do not think that any of the analysis in the article is new. I expect that all the points have been made elsewhere by others and myself."

[119] For a simple example, consider a Cournot oligopoly model with an industry inverse demand curve of P(Q)=1-Q and

entrants, the monopolist in any market will not want to buy any of them out. In that case, the outcome involves no acquisitions.

If we observe an acquisition in a market with many potential entrants, which any given market may or may not have, there must be another reason for that deal besides monopoly maintenance. The presence of multiple potential entrants overturns the antitrust implications of the truism that monopoly profits exceed duopoly profits. The question turns instead to empirical analysis of the merger and market in question as to whether it would be profitable to acquire *all* potential entrants.

The second simplifying assumption that restricts applicability of Salop's baseline model is that the incumbent has the lowest cost of production. He rules out the possibility of lower-cost entrants in Footnote 2: "Monopoly profits are not always higher. The entrant may have much lower costs or a better or highly differentiated product. But higher monopoly profits are more usually the case." If one allows the possibility that an entrant may have lower costs (even if those lower costs won't be achieved until the future, when the entrant gets to scale), it does not follow that monopoly profits (under the current higher-cost monopolist) necessarily exceed duopoly profits (with a lower-cost producer involved).

One cannot simply assume that all firms have the same costs or that the incumbent is always the lowest-cost producer. This is not just a modeling choice but has implications for how we think about mergers. As Manne, Bowman, & Auer argue:

> Although it is convenient in theoretical modeling to assume that similarly situated firms have equivalent capacities to realize profits, in reality firms vary greatly in their capabilities, and their investment and other business decisions are dependent on the firm's managers' expectations about their idiosyncratic abilities to recognize profit opportunities and take advantage of them—in short, they rest on the firm managers' ability to be entrepreneurial.[120]

Given the assumptions that all firms have identical costs and there is only one potential entrant, Salop's framework would find that all possible mergers are anticompetitive and that there are no possible efficiency gains from any merger. Since the acquired firm cannot, by assumption, have lower costs of production, it cannot improve the incumbent's costs of production. But, in fact, whether a merger is efficiency-reducing and bad for competition and consumers needs to be proven, not assumed.

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constant marginal costs that are normalized to zero. In a market with N symmetric sellers, each seller earns $\frac{1}{(N+1)^2}$ in profits. A monopolist makes a profit of 1/4. A duopolist can expect to earn a profit of 1/9. If there are 3 potential entrants plus the incumbent, the monopolist must pay each the duopoly profit 3*1/9=1/3, which exceeds the monopoly profits of 1/4. In the Nash/Cournot equilibrium, the incumbent will not acquire any of the competitors since it is too costly to keep them all out.

[120] Manne, Bowman, & Auer, *supra* note 116, at 1080.

If we take Salop's acquisition model literally, every industry would have just one firm. Every incumbent would acquire every possible competitor, no matter how small—after all, monopoly profits are higher than duopoly profits, and so the incumbent both wants to and can preserve its monopoly profits. The model gives us no way to disentangle when mergers would stop. The merger, again by assumption, does not affect the production side of the economy but exists only to gain market power to manipulate the price. Since the model offers no downside to the incumbent of acquiring a competitor, it would acquire every last potential competitor, no matter how small, unless prevented by law.

Once we allow for the possibility that firms differ in productivity, however, it is no longer true that monopoly profits are greater than industry duopoly profits. We can see this most clearly in situations where there is "competition for the market" and the market is winner-take-all. If the entrant to such a market has lower costs, the profit under entry (when one firms wins the whole market) can be greater than the original monopoly profits. In such cases, monopoly maintenance alone cannot explain an entrant's decision to sell. An acquisition could therefore be procompetitive and increase consumer welfare. For example, the acquisition could allow the lower-cost entrant to get to scale quicker. The acquisition of Instagram by Facebook, for example, brought the photo-editing technology that Instagram had developed to a much larger market of Facebook users and provided it with a powerful monetization mechanism that was otherwise unavailable to Instagram.

In short, the notion that incumbents can systematically and profitably maintain their market position by acquiring potential competitors rests on assumptions that, in practice, will regularly and consistently fail to materialize. It is thus improper to assume that most of these acquisitions reflect efforts by an incumbent to anticompetitively maintain its market position.

IV. Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete

The word "may" in this context is much too open, appearing to include products that no firm would imagine using to compete—but may use—and products that have close substitutes that constrain competition. A better wording would be "likely use to compete" or, at least, "plausibly use to compete." Alternatively, the guideline could use the language from the body of the guideline "have the ability and incentive," since the incentive to restrict products and services that competitors use is what matters for predicting whether the merged party will restrict products and services.

The guideline should not use the phrase "make it harder for rivals to compete," since that will include many pro-competitive mergers. If the merged firm is more productive and can outbid competitors for inputs, that merger makes it harder for rivals to compete. Would the agencies challenge such a merger? A better phrase would be that the "merged firm would have the ability and incentive to restrict access and thereby harm competition" or "merged firm would have the ability and incentive to weaken or exclude rivals and thereby harm competition."

A. Vertical Mergers Often Create Efficiencies That Make It Harder for Rivals to Compete

The language of "make it harder for rivals to compete" is especially problematic in vertical mergers, which guideline 5 is about, without saying as much. The reason is that vertical mergers often have pro-competitive effects that make it harder for rivals to compete. Most of the time, vertical mergers are benign or beneficial, often leading to cost reductions, synergies, new or improved products, and lower prices for consumers.[121] Again, as Aviv Nevo and colleagues summarized:

> Applying the same sort of skepticism about efficiencies in a vertical merger as in a horizontal merger can amount to assuming away a portion of the economics that is at the heart of the vertical investigation.[122]

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[121] For vertical mergers the welfare-enhancing effects are well-established. *See*, *e.g.*, Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 677 (2007) ("In spite of the lack of unified theory, over all a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong."). *See also*, Global Antitrust Institute, *Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century*, Vertical Merger, GEO. MASON LAW & ECON. RESEARCH PAPER No. 18-27, 8–9 (2018), https://ssrn.com/abstract=3245940 ("In sum, these papers from 2009-2018 continue to support the conclusions from Lafontaine & Slade (2007) and Cooper *et al.* (2005) that consumers mostly benefit from vertical integration. While vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets. The results continue to suggest that the modern antitrust approach to vertical mergers 9 should reflect the empirical reality that vertical relationships are generally procompetitive."). Along similar lines, empirical research casts doubt on the notion that antitrust merger enforcement (in marginal cases) raises consumer welfare. The effects of horizontal mergers are, empirically, less well documented. *See*, *e.g.*, Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 20 (2003) ("We can only conclude that efforts by antitrust authorities to block particular mergers or affect a merger's outcome by allowing it only if certain conditions are met under a consent decree have not been found to increase consumer welfare in any systematic way, and in some instances the intervention may even have reduced consumer welfare."). While there is some evidence that horizontal mergers can reduce consumer welfare, at least in the short run, *see*, *e.g.*, Gregory J. Werden, *et al.*, *The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry*, 12 MGMT. DECIS. ECON. 341 (1991), the long-run effects appear to be strongly positive. See, *e.g.*, Dario Focarelli & Fabio Panetta, *Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits*, 93 AM. ECON. REV. 1152, 1152 (2003) ("We find strong evidence that, although consolidation does generate adverse price changes, these are temporary. In the long run, efficiency gains dominate over the market power effect, leading to more favorable prices for consumers."). *See*, *generally*, Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. ECON. PERSP. 21 (1988). Some related literature similarly finds that horizontal merger enforcement has harmed consumers. *See* B. Espen Eckbo & Peggy Wier, *Antimerger Policy Under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis*, 28 J.L. & ECON. 119, 121 (1985) ("In sum, our results do not support the contention that enforcement of Section 7 has served the public interest. While it is possible that the government's merger policy has deterred some anticompetitive mergers, the results indicate that it has also protected rival producers from facing increased competition due to efficient mergers."); B. Espen Eckbo, *Mergers and the Value of Antitrust Deterrence*, 47 J. FINANCE 1005, 1027–28 (1992) (rejecting "the market concentration doctrine on samples of both U.S. and Canadian mergers. By implication, the results also reject the effective deterrence hypothesis. The evidence is, however, consistent with the alternative hypothesis that the horizontal mergers in either of the two countries were expected to generate productive efficiencies").

[122] Asker, *et al.*, *supra* note 3, at 34.

Critics of the "Chicago school orthodoxy" on vertical mergers pay special attention to "oligopoly" markets,[123] contending that "[a] stronger overarching procompetitive presumption for vertical mergers does not make sense in oligopoly markets where vertical merger enforcement would be focused."[124] But the critics are simply wrong that the empirical evidence supports greater condemnation of vertical mergers, even in oligopoly markets. At best, the evidence from oligopoly markets is mixed. Rather than a rush to condemnation, there is a need for further research before adopting any new policies based on such ambivalent (at best) evidence.

Emerging criticisms of the so-called "orthodoxy" must either ignore or dismiss the hundreds of econometric studies famously reviewed by Lafontaine and Slade.[125] Indeed, this longstanding work is criticized by some as irrelevant or insufficient.[126] But the reality is that these studies constitute the overwhelming majority of the evidence we have; many, if not most, of the studies are well-done, even by modern standards.[127] The upshot of these studies, as Lafontaine & Slade put it, is that:

> [C]onsistent with the large set of efficiency motives for vertical mergers that we have described so far, the evidence on the consequences of vertical mergers suggests that consumers mostly benefit from mergers that firms undertake voluntarily.[128]

Francine Lafontaine, while acknowledging the limitations of some of the evidence used for these studies, recently reiterated the relevance of the studies to vertical mergers, and restated the overall conclusions of the literature:

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[123] *See* Baker, *et al.*, *supra* note 106106106106, at 13 ("[Treating vertical mergers more permissively than horizontal mergers, even in concentrated markets] would be tantamount to presuming that vertical mergers benefit competition regardless of market structure. However, such a presumption is not warranted for vertical mergers in the oligopoly markets that typically prompt enforcement agency review."); *Competition and Consumer Protection in the 21st Century: FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law*; FTC Transcript 164 (Nov. 1, 2018) [hereinafter "*FTC Hearing #5*"] at 14-15 (statement of Steven Salop, Professor, Georgetown University Law Center). *See also* Cooper, *et al.*, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**, at 643-48 (discussing such "post-Chicago" scholarship).

[124] Salop, *Vertical Merger Slides*, *supra* note 94, at 14.

[125] *See* Lafontaine & Slade, *supra* note 121. *See also* Cooper, *et al.*, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**; Daniel O'Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Beyond the Possibility Theorems, in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 22, 36 (2008) ("[Table 1 in this paper] indicates that voluntarily adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of survival.").

[126] *See, e.g.*, Salop, *Vertical Merger Slides*, *supra* note 94, at 17 (dismissing Lafontaine & Slade and attempting to adduce a few newer studies as contradictory and dispositive).

[127] It is fair to point out that, indeed, many of the studies look at the effects of vertical restraints rather than vertical mergers, per se. But such studies remain instructive, given that the theories of harm arising from vertical mergers arise from precisely the sorts of conduct at issue in these studies. If perfect alignment of facts were required, no economic theory or evidence would *ever* be relevant.

[128] Lafontaine & Slade, *supra* note 121, at 663.

> We were clear that some of the early empirical evidence is less than ideal, in terms of data and methods.
>
> But we summarized by saying that the empirical literature reveals consistent evidence of efficiencies associated with the use of vertical restraints (when chosen by market participants) and, similarly, with vertical integration decisions.[129]

Margaret Slade reiterated this same conclusion in June 2019 at the OECD, where she noted that, even in light of further studies, "[t]he empirical evidence leads one to conclude that most vertical mergers are efficient."[130] Moreover, as Slade noted, forecasting likely effects from vertical mergers using more modern tools—such as assessment of vertical upward pricing pressure—is a fraught and unreliable endeavor.[131]

Nonetheless, critics forward the claim that many *newer* studies demonstrate harm from vertical mergers. The implication is that the balance of evidence taken from these studies tips the scales against a presumption of benefits from vertical mergers:

> Surveys of earlier economic studies, relied upon by commenters who propose a procompetitive presumption, reference studies of vertical mergers in which the researchers sometimes identified competitive harm and sometimes did not. However, recent empirical work using the most advanced empirical toolkit often finds evidence of anticompetitive effects.[132]

The implication is that the balance of evidence taken from these studies tips the scales against a presumption of benefits from vertical mergers. Yet the newer literature is no different than the old in finding widely procompetitive results overall, intermixed with relatively few seemingly harmful results. As scholars at the Global Antitrust Institute at George Mason Law School have noted in a thorough canvassing of the more-recent literature:

> In sum, these papers from 2009-2018 continue to support the conclusions from Lafontaine & Slade (2007) and Cooper et al. (2005) that consumers mostly benefit from vertical integration. While vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets.[133]

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[129] *FTC Hearing #5* (statement of Francine Lafontaine, Professor, Michigan-Ross), *supra* note 123, at 93.

[130] Margaret E. Slade, *Vertical Integration and Mergers: Empirical Evidence and Evaluation Methods*, OECD (Jun. 7, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)68/en/pdf.

[131] *Id.* at 10-12.

[132] Baker, *et al.*, *supra* note 106106106106, at 11.

[133] Global Antitrust Institute, *Comment at the Fed. Trade Comm'n Hearings on Competition and Consumer Protection in the 21st Century, The Consumer Welfare Standard in Antitrust Law* (Sep. 7, 2018).

Below, we briefly review the actual results of several of these recent studies—including, in particular, studies that were referenced at the recent 2018 FTC hearings to support claims that the "econometric evidence does not support a stronger procompetitive presumption."[134]

Fernando Luco and Guillermo Marshall examined Coca-Cola and PepsiCo's acquisitions of some of their downstream bottlers.[135] At the time, Dr Pepper Snapple Group remained independent in selling inputs to bottlers. Bottlers, even those that are vertically integrated with one of their upstream suppliers, purchased inputs from competing upstream suppliers. Based on their statistical analysis, the authors conclude that vertical integration in the carbonated-beverage industry was associated with price increases for Dr Pepper Snapple Group products and price decreases for both Coca-Cola and PepsiCo products bottled by vertically integrated bottlers. However, the market share of the products associated with higher prices was no more than 2%. Thus, the authors conclude: "vertical integration did not have a significant effect on quantity-weighted prices when considering the full set of products."[136] Overall, the effect on consumers was either an efficiency *gain* or no change. As Francine Lafontaine notes, "in total, consumers were better off given who was consuming how much of what."[137]

Justine Hastings and Richard Gilbert conclude that vertical integration is associated with statistically significant higher wholesale gasoline prices.[138] Using data from 1996-1998, their study examined the wholesale prices charged by a vertically integrated refiner/retailer and found the firm charged higher wholesale prices in cities where its retail outlets competed more with independent gas stations. Hastings and Gilbert conclude that their observations are consistent with a theory of raising rivals' costs.[139]

In subsequent research, Christopher Taylor, Nicolas Kreisle, and Paul Zimmerman examine retail gasoline prices following the 1997 acquisition of an independent gasoline retailer by a vertically integrated refiner/retailer.[140] They estimate the merger was associated with a price increase of 0.4 to 1.0 cents per-gallon—about 1% or less—and was economically insignificant.[141] These results were at

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[134] Salop, *Vertical Merger Slides*, *supra* note 96, at 25. For a more comprehensive assessment of the recent empirical scholarship (finding the same overall results that we do), see *id.*

[135] Fernando Luco & Guillermo Marshall, *Vertical Integration With Multiproduct Firms: When Eliminating Double Marginalization May Hurt Consumers* (Jan. 15, 2018), https://ssrn.com/abstract=3110038.

[136] *Id.* at 22.

[137] *FTC Hearing #5* (statement of Francine Lafontaine, Professor, Michigan-Ross), *supra* note 123, at 88.

[138] Justine S. Hastings & Richard J. Gilbert, *Market Power, Vertical Integration, and the Wholesale Price of Gasoline*, 33 J. INDUS. ECON. 469 (2005).

[139] *Id.* at 471.

[140] Christopher T. Taylor, Nicolas M. Kreisle, & Paul R. Zimmerman, *Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California: Comment*, 100 AM. ECON. REV. 1269 (2010).

[141] *Id.* at 1272-76.

odds with Hastings' earlier review of the same merger, which concluded that the replacement of independent retailers with branded vertically integrated retailers would result in higher prices.[142]

To explain the conflicting results between Hastings and Taylor *et al.*, Hastings[143] highlights the challenges of evaluating vertical mergers with incomplete data or using different sets of data—even seemingly similar data can yield wildly different results. Because of the wide range of reported results and their sensitivity to the data used, caution should be exercised before inferring any general conclusions from this line of research.

Other commonly cited studies for the proposition that the more recent evidence on vertical mergers shows a greater likelihood of harm fare no better.

Gregory Crawford, Robin Lee, Michael Whinston, & Ali Yurukoglu examine vertical mergers between cable-programming distributors (MVPDs) and regional sports networks (RSNs).[144] Margaret Slade characterizes the findings of the paper as "mixed," in that integration can be associated with both beneficial and harmful effects.[145] In a purely semantic sense, that is an accurate characterization. But the overall results in Crawford *et al.* overwhelmingly find procompetitive consumer-welfare effects:

> In counterfactual simulations that enforce program access rules, we find that vertical integration leads to significant gains in both consumer and aggregate welfare… Averaging results across channels, we find that integration of a single RSN with effective program access rules in place would reduce average cable prices by 1.2% ($0.67) per subscriber per month in markets served by the RSN, and increase overall carriage of the RSN by 9.4%. **Combined, these effects would yield, on average, a $0.43 increase in total welfare per household from all television services, representing approximately 17% of the average consumer willingness to pay for a single RSN. We also predict that consumer welfare would increase**….
>
> …**On net, we find that the overall effect of vertical integration in the absence of effective program access rules—allowing for both efficiency and foreclosure incentives—is to increase consumer and total welfare on average, resulting in (statistically significant) gains** of approximately $0.38–0.39 per household per month, representing 15–16% of the average consumer willingness to pay for an RSN….[146]

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[142] Justine Hastings, *Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California*, 94 AM. ECON. REV. 317 (2004).

[143] Justine Hastings, *Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California: Reply*, 100 AM. ECON. REV. 1227 (2010).

[144] Gregory S. Crawford, Robin S. Lee, Michael D. Whinston, & Ali Yurukoglu, *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86 ECONOMETRICA 891 (2018).

[145] Slade, *supra*, note 130, at 6.

[146] Crawford, *et al*, *supra* note 144, at 893-94 (emphasis added).

The implications of this well-designed and carefully executed study are clear. Indeed, Harvard economist Robin Lee, one of the study's authors, concluded that the findings demonstrate that the consumer benefits of efficiency gains outweighed any harms from foreclosure.[147]

Ayako Suzuki reviewed the vertical merger between Time Warner and Turner Broadcasting in programming and distribution in the cable-television market.[148] The paper examined the merger's effects on foreclosure, per-channel prices, basic-bundle product mix, and basic-bundle penetration.

The author found foreclosure following the merger in Time Warner markets for those rival channels that were not integrated with any cable distributors. After the merger, two independent channels, the Disney Channel and the Fox News Channel, were foreclosed from Time Warner markets. The paper notes that prior to the merger, two Turner channels (TBS and TCM) were foreclosed by Time Warner, but the foreclosure was ended after the merger: "Turner suffered from the low market shares of TBS and TCM in Time Warner markets, therefore it integrated itself with Time Warner in order to recover their market shares."[149]

Suzuki concludes that per-channel prices decreased more in Time Warner markets than they would have in the absence of the merger.[150] The paper suggests transaction-cost efficiencies lowered the implicit cost to the channels' distributor, causing input prices to shift downward, and in turn resulted in reduced cable prices to consumers.[151]

V. Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition

Guideline 6 appears to add additional structural presumptions that are not justified by the law or the economics. On the law, the guideline says "If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence…" However, the section of *Brown Shoe* immediately following the one cited states:

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[147] *Competition and Consumer Protection in the 21st Century: FTC Hearing #3: Multi-sided Platforms, Labor Markets, and Potential Competition*; FTC Transcript 101 (Oct. 17, 2018) (statement of Robin Lee, Professor, Harvard University), *available at* https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_3_10-17-18_0.pdf ("[O]ur key findings are that, on average, across channels and simulations, there is a net consumer welfare gain from integration. Don't get me wrong, there are significant foreclosure effects, and rival distributors are harmed, but these negative effects are oftentimes offset by sizeable efficiency gains. Of course, this is an average. It masks considerable heterogeneity. When complete exclusion occurs, which happens both in our simulations and in the data some of the times, consumer welfare is actually harmed.").

[148] Ayako Suzuki, *Market Foreclosure and Vertical Merger: A Case Study of the Vertical Merger Between Turner Broadcasting and Time Warner*, 27 INT'L J. OF INDUS. ORG. 532 (2009).

[149] *Id.* at 542.

[150] *Id.*

[151] *Id.*

> Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor de minimis proportions, the percentage of the market foreclosed by the vertical arrangement **cannot itself be decisive**.[152]

On the economics, guideline 6 shares all the issues of the structural presumptions discussed around guideline 1 and more. The "foreclosure share" is the amount the merged firm *could* foreclose. It does not require an incentive to foreclose. If guideline 6 remains, foreclosure share needs to include an incentive to foreclose. Otherwise, the agencies could challenge a merger of a firm with 51 percent of an upstream market and a firm with 0.001 percent of a downstream market since "the foreclosure share is above 50 percent, [and] that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition."

The courts have recently rejected such arguments, so it is surprising to see them in the Draft Guidelines. In the recent Microsoft-Activision merger, the Draft Guidelines would certainly flag it to be blocked since Microsoft *could* pull Call of Duty from the Sony PlayStation consoles. But the courts concluded that Microsoft would not have an incentive to pull Call of Duty, since Sony has the biggest market share.[153]

VI. Guideline 8: Mergers Should Not Further a Trend Toward Concentration

The agencies are well-justified to think about the dynamics of the market, not just the static snapshot. Unfortunately, guideline 8 maintains all the flaws of guideline 1 and adds a few more.

It is important to reiterate: concentration need not be harmful to consumers. In fact, the trade and industrial-organization literature that explicitly studies changes (or trends) in competition finds that *increased competition increases concentration*. As Chad Syverson summarizes:

> Many empirical studies in varied settings have found that greater *substitutability*/competition—resulting from, say, reductions in trade, transport, or search costs—shifts activity away from smaller, higher-cost producers and toward larger, lower-cost producers.. [We] demonstrate that search cost reductions reallocate market share toward lower-cost and larger sellers, increasing market concentration even as margins fall. It is not an exaggeration to say that there are scores, perhaps hundreds, of such studies.[154]

This literature does not imply that every increase in concentration is pro-competitive. Instead, it simply means that a previous trend toward concentration need not be anticompetitive in any way.

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[152] *Brown Shoe*, 370 U.S. at 329 ((emphasis added)

[153] *FTC v. Microsoft Corporation et al.*, No. 23-cv-02880-JSC (N.D. Cal. Jul. 10, 2023), *available at* https://s3.documentcloud.org/documents/23870711/ftc-v-microsoft-preliminary-injunction-opinion.pdf.

[154] Syverson, *supra* note 44, at 27.

If there is an industry that has become more concentrated through more competition, will the agencies block a merger that increases concentration but does not increase prices?

Guideline 8 is especially problematic when paired with the statement "efficiencies are not cognizable if they will accelerate a trend toward concentration."[155] Such a statement effectively negates any efficiency defense available to all but the very smallest firms. Efficiencies will almost always increase concentration—especially if those efficiencies come from economies of scale. If a merger creates efficiencies, the merged firm can lower costs, cut prices, and attract more customers. Attracting more customers with better products and prices will likely increase competition. The economic evidence is quite strong that efficiency increases concentration.

VII. Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers

Guideline 11 should be commended for mentioning lower wages as an anticompetitive harm. The other guidelines would benefit from focusing more on effects on prices, quality, and innovation, instead of structural presumptions.

Guideline 11 should, however, be restricted to the first two paragraphs: the first stating that merger analysis applies to buyer markets and the second (if there was any confusion) that labor markets are buyer markets. The rest of the guideline is a digression on the nature of labor markets that cites neither law nor economics. For example, the guidelines say, "labor markets are often relatively narrow."[156] What is the justification for this claim in the merger guidelines, of all documents?

If the agencies have demonstrated a loss of competition in the labor market, the guidelines make clear that the Clayton Act does not allow for the consideration of offsetting effects in output markets. In the standard monopsony models in economics, there is no offsetting effect, so the point is irrelevant. Harm to sellers of inputs (workers) hurts consumers as well. This was the case in the recent successful action to block Penguin-Random House from merging with Simon & Schuster.[157] The parties agreed that, if there was harm to the authors, there would be fewer books, harming consumers.[158] There was no need to think about offset harms.

The hard part is when the agencies have yet to prove loss of competition in the labor market, but that putative loss is being adjudicated. Thorny issues arise that make competition among buyers different from competition among sellers, but the guidelines do not offer any guidance here. For

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[155] Draft Merger Guidelines, at 34.

[156] *Id.* at 26.

[157] *United States v. Bertelsmann SE & Co. KGaA, No. CV* 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022)

[158] *Id.* ("The defendants do not dispute that if advances are significantly decreased, some authors will not be able to write, resulting in fewer books being published, less variety in the marketplace of ideas, and an inevitable loss of intellectual and creative output.")

example, will the agencies consider a reduction in wages to be evidence of harm in labor markets? A merger that increases efficiency but does not decrease competition could still end up reducing workers' wages if the efficiency gains require fewer workers. Perhaps the merger does not require fewer workers overall, but it does reduce employment of a subset of workers. Will the agencies regard that as a labor-market harm? The guidelines may not be the right place for these clarifications, but providing guidance on such tough issues would be more beneficial than making blanket statements about the nature of labor markets.

A. Monopsony Is More Than the Mirror Image of Monopoly

The application of antitrust to monopsony is significantly more complicated than it might seem. On the surface, it may appear that monopsony is simply the "mirror image" of monopoly."[159] There are, however, several important differences between monopoly and monopsony, and several complications raised by monopsony analysis that significantly distinguish the analysis required for each. Most fundamental among these, monopsony and monopoly markets do not sit at the same place in the supply chain.[160] This matters because all supply chains end with final consumers. Accordingly, from a policy standpoint, it is essential to decide whether antitrust ultimately seeks to maximize output and welfare at that (final) level of the distribution chain (albeit indirectly); whether intermediate levels of the distribution chain (e.g., an input market) should be analyzed in isolation; or whether effects in both must be somehow aggregated.

This has important ramifications for antitrust enforcement against monopsonies. As we explain below, competitive conditions of input markets have salient impacts on prices and output in product markets. Given this, any evaluation of monopsony must consider the "pass-through" to the final product market, while there is no such "mirror image" complication in the consideration of final-product monopoly markets. Along similar lines, treating the assessment of mergers in input markets as the simple mirror image of product-market mergers presents important problems for the way authorities address merger efficiencies, as traditional efficiencies and increased buyer power are often two sides of the same coin. Finally, it is unclear how authorities should think about market definition—a cornerstone of modern antitrust policy—in labor markets, in particular.

The upshot is that, while monopsony concerns are becoming more prevalent in academic and policy discussions, the agencies should be extremely hesitant as they move forward. Some have argued that "[m]mergers affecting the labor market require some rethinking of merger policy, although not any

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[159] *See, e.g.*, Roger G. Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L.J. 589, 589 (2005) ("[B]uyer power arises from monopsony (one buyer) or oligopsony (a few buyers), and is the mirror image of monopoly or oligopoly."); *Id.* at 591 ("Asymmetric treatment of monopoly and monopsony has no basis in economic analysis.").

[160] Of course, monopoly markets in intermediate products (i.e., products sold not to end users but to manufacturers who use them as inputs for products that are, in turn, sold to end users) may indeed sit in the same place in the supply chain as the typical monopsony market. Some, but not all, of the complications associated with monopsony analysis are relevant to these monopoly situations, as well.

altering of its fundamentals."[161] As we discuss below, however, while the economic "fundamentals" undergirding merger policy may not change for labor-market mergers, the "rethinking" required to properly assess such mergers does entail fundamental changes that have not yet been adequately studied or addressed. As many have pointed out, there is only a scant history of merger enforcement in input markets in general, and even less in labor markets.[162] It is premature to offer guidelines purporting to synthesize past practice and the state of knowledge when neither is well established.

1. Theoretical differences between monopoly and monopsony

Before getting to the practical differences of a monopoly case versus a monopsony case, consider the theoretical differences between identifying monopsony power versus monopoly power.[163] Suppose, for now, that a merger either generates efficiency gains or market power but not both. In a monopoly case, if there are efficiency gains from a merger, the quantity sold in the output market will increase. With sufficient data, the agencies will be able to see (or estimate) the efficiencies directly in the output market. Efficiency gains result in either greater output at lower unit cost or else product-quality improvements that increase consumer demand. In contrast, if the merger simply enhances monopoly power without efficiency gains, the quantity sold will decrease, either because the merging parties raise prices or quality declines. The empirical implication of the merger is seen directly in the market in question.

The monopsony case is more complicated, however. Ultimately, we can be certain of the effects of monopsony only by looking at the output market, not the input market where the monopsony power is claimed. To see this, consider again a merger that generates either efficiency gains or market (now monopsony) power. A merger that creates monopsony power will necessarily reduce the prices and quantity purchased of inputs like labor and materials. But this same effect (reduced prices and quantities for inputs) could be observed if the merger is efficiency-enhancing, as well. If there are efficiency gains, the merged parties may purchase fewer of one or more inputs. For example, if the efficiency gain arises from the elimination of redundancies in a hospital merger, the hospital will buy fewer inputs, hire fewer technicians, or purchase fewer medical supplies. This may even reduce the wages of technicians or the price of medical supplies, even if the newly merged hospitals are not exercising any market power to suppress wages.[164]

Decisionmakers cannot simply look at the quantity of inputs purchased in the monopsony case as the flip side of the quantity sold in the monopoly case, because the efficiency-enhancing merger can

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[161] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA L.J. 1031, 1034 (2019) ("While the use of section 7 to pursue mergers among buyers is well established, there is relatively little case law.")

[162] *Id.* at 1034.

[163] For purposes of this discussion, "monopoly" refers to any merger that would increase market power by a seller in a product market and "monopsony" refers to any merger that would increase market by the buyer in an input market.

[164] Some efficiency-enhancing mergers will be identifiable, of course. For example, if the merger raises quantities and prices for all inputs, that must be efficiency enhancing. The problem, as always, is with the hard cases.

look like the monopsony merger in terms of the level of inputs purchased. The court can differentiate a merger that generates monopsony power from a merger that increases productive efficiencies only by looking to the output market. Once we look at the output market, as in a monopoly case, if the merger is efficiency-enhancing, there will be an increase in the output-market quantity. If the merger increases monopsony power, the firm perceives its marginal cost as higher than before the merger and will reduce output.[165]

In short, the assumption that monopsony analysis is simply the mirror image of monopoly analysis does not hold.[166] In both types of mergers—those that possibly generate monopoly or monopsony—the agencies and courts cannot look to the input market to differentiate them from efficiency-enhancing mergers; they must look at the output market. Therefore, it is impossible to discuss monopsony power coherently without considering the output market.

2. *Monopsony and merger efficiencies*

In real world cases, mergers will not necessarily be either just efficiency-enhancing or just monopsony-generating, but a blend of the two. Any rigorous consideration of merger effects must account for both and make some tradeoff between them. The question of how guidelines should address monopsony power is inextricably tied to the consideration of merger efficiencies—particularly given the point above that identifying and evaluating monopsony power will often depend on its effects in downstream markets.

This reality raises some thorny problems for monopsony merger review that have not been well studied to date:

> Admitting the existence of efficiencies gives rise to a subsequent set of difficult questions central to which is "what counts as an efficiency?." A good example of why the economics of this is difficult is considering the case in which a horizontal merger leads to increased bargaining power with upstream suppliers. The merger may lead to the merging parties being able to extract necessary inputs at a lower price than they otherwise would be able to. If so, does this merger enhance competition in a possible upstream market? Perhaps not. However, to the extent that the ability to obtain inputs at a lower price leads to an increase in the total output of the industry, then downstream consumers may in fact benefit. Whether the possible increase in the total surplus created by such a scenario should be regarded as off-setting any perceived loss in competition in a more narrowly

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[165] *See* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).

[166] In theory, one could force a monopsony model to be identical to monopoly. The key difference is about the *standard* economic form of these models that economists use. The standard monopoly model looks at one output good at a time, while the standard factor demand model uses two inputs, which introduces a trade-off between, say, capital and labor. *See* SONIA JAFFE, ROBERT MINTON, CASEY B. MULLIGAN, AND KEVIN M. MURPHY, CHICAGO PRICE THEORY (2019) at Ch. 10. One could generate harm from an efficiency for monopoly (as we show for monopsony) by assuming the merging parties each produce two different outputs, apples and bananas. An efficiency gain could favor apple production and hurt banana consumers. While this sort of substitution among outputs is often realistic, it is not the standard economic way of modeling an output market.

> defined upstream market is a question that warrants more attention than it has attracted to date.[167]

With "monopoly" mergers, plaintiffs must show that a transaction will reduce competition, leading to an output reduction and increased prices to consumers. This finding can be rebutted by demonstrating cost-saving or quality-improving efficiencies that would lead to lower prices or other forms of increased consumer welfare. In evaluating such mergers, agencies and courts must weigh the upward pricing pressure from reduced competition against the downward pricing pressure associated with increased efficiencies and the potential for improved quality.

As we have explained above, this analysis becomes more complicated when a merger raises monopsony concerns. In a simple model of monopsony, the merger would increase market power in the input market (e.g., labor), leading to a lower price paid for the input and a smaller quantity used of the input relative to pre-merger levels. Assuming no change in market power in the final product market, these cost savings would result in lower prices paid by consumers. Should such efficiency effects "count" in evaluating mergers alleged to lessen competition in input markets? It is surely too facile a response to assert that such efficiency effects would be "out of market" and thus irrelevant. Indeed, if antitrust enforcement truly seeks to promote *consumer* welfare, any evaluation of a "monopsony" merger must weigh these effects against the effects in the input market.

Some would argue these are the types of efficiencies that merger policy is meant to encourage. Others may counter that policy should encourage technological efficiencies while discouraging efficiencies stemming from the exercise of monopsony power.

But this raises another complication: How do agencies and courts distinguish "good" efficiencies from "bad?" Is reducing the number of executives pro- or anticompetitive? Is shutting down a factory or healthcare facility made redundant post-merger pro- or anticompetitive? Trying to answer these questions places agencies and courts in the position of second guessing not just the effects of business decisions, but the *intent* of those decisions (to a first approximation, the observed outcomes are identical). Even worse, it can create a Catch-22 where an efficiencies *defense* in the product market is turned into an efficiencies *offense* in the input market—*e.g.*, a hyper-efficient merged entity may outcompete rivals in the product market, possibly leading to monopsony in the input market. In ambiguous cases this means the outcome may depend on whether it is challenged on the input or output side of the market, and it even implies that overcoming a challenge by successfully identifying efficiencies in one case creates the predicate for a challenge based on effects on the other side of the market.

A further complication arises when dynamic effects are considered, which may convert apparent harms even on only the seller side of an input market into benefits:

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[167] John Asker & Volker Nocke, *Collusion, Mergers, and Related Antitrust Issues*, NBER Working Paper 29175 (Aug. 2021), at 42, https://www.nber.org/papers/w29175.

> [T]he presence of larger buyers can make it more profitable for a supplier to reduce marginal cost (or, likewise, to increase quality). This result stands in stark contrast to an often expressed view whereby the exercise of buyer power would stifle suppliers' investment incentives. In a model with bilateral negotiations, a supplier can extract more of the profits from an investment if it faces more powerful buyers, though the supplier's total profits decline. Furthermore, the presence of more powerful buyers creates additional incentives to lower marginal cost as this reduces the value of buyers' alternative supply options.[168]

None of this is to say the creation of monopsony power should categorically be excluded from the scope of antitrust enforcement, of course. But it is quite apparent that this sort of enforcement raises extremely complicated tradeoffs that are elided over or underappreciated in the current discourse and under-explored in the law. It would be deeply problematic to attempt to enshrine a particular view of these tradeoffs into guidelines given the current state of knowledge and practice in this area. Perhaps worse, it would almost surely undermine the efficacy and authority of guidelines in general, as courts are unlikely to find such guidelines to be the helpful distillation of economic and legal principles that they are today.

3. *Determining the relevant market for labor*

In monopoly cases, agencies and courts face an enormous challenge in accurately identifying a relevant market. These challenges are multiplied in input markets—especially labor markets—in which monopsony is alleged. Many inputs are highly substitutable across a wide range of industries, firms, and geographies. For example, changes in technology, such as the development of PEX tubing and quick-connect fittings, allows for laborers and carpenters to perform work previously done exclusively by plumbers. Technological changes have also expanded the relevant market in skilled labor: Remote work during the COVID-19 pandemic, for example, demonstrates that many skilled workers are not bound by geography and compete in national—if not international—labor markets.

When Whole Foods attempted to acquire Wild Oats, the FTC defined the relevant market as "premium natural and organic supermarkets" as a way to exclude larger firms, such as Walmart and Kroger, from the relevant product market.[169] Yet even if one were to accept the FTC's product market definition, it is unlikely that anyone would consider *employment* at a "premium natural and organic supermarket" as a distinct input market. This is because the skill set needed to work at Whole Foods overlaps with the skill set demanded by myriad retailers and other employers—and *certainly* overlaps with the skillset needed to work at Kroger.

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[168] Roman Inderst & Christian Wey, *Countervailing Power and Dynamic Efficiency*, 9 J. EUR. ECON. ASS'N 702, 715 (2011).

[169] *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1063 (D.C. Cir. 2008). *See also* Geoffrey Manne, *Premium, Natural, and Organic Bullsh**t*, TRUTH ON THE MARKET (Jun. 6, 2007), https://truthonthemarket.com/2007/06/06/premium-natural-and-organic-bullst ("In other words, there is a serious risk of conflating a 'market' for business purposes with an actual antitrust-relevant market.").

Moreover, policies such as occupational licensing have the effect of arbitrarily defining the work that can be performed or the services provided by a wide range of workers. This raises the question whether firms should be scrutinized for exercising monopsony power when regulations may be limiting the scope of the relevant market and contributing to the monopsony conditions. A "whole-of-government" approach to competition,[170] in other words, would certainly work to reduce these artificial barriers to market scope before thwarting possibly efficiency enhancing mergers that appear monopsonistic only because of such government constraints.

Contrary to what some have claimed, applying the SSNIP test to input markets—in the form of a "small and significant but non-transitory reduction in wages" or "SSNRW"—would also raise significant difficulties.[171] For a start the necessary datapoints required to conduct a SSNRW test are much harder to obtain than is the case for the SSNIP. The SSNIP test asks whether a hypothetical monopolist could *profitably* raise prices 5-10% above the competitive baseline, whereas the SSNRW test questions whether a hypothetical monopsonist could *profitably* decrease wages by 5-10%. The former question is far more tractable than the latter. Indeed, under the SSNIP, profitability hinges on the quantity sold, as well as the difference between prices and costs—both of which are relatively amendable to measurement. This is less true of the SSNRW, which depends on the difference between prices paid for inputs and their "marginal revenue product." The second of these two factors would prove extremely challenging, perhaps impossible, to measure. This makes the SSNRW significantly harder to apply than the SSNIP. At the same time, "wages" in many labor contexts consist of a complicated mix of factors, including some (e.g., "work environment") that defy easy quantification. While there are, of course, issues with measuring quality changes in product markets, the problems are significantly magnified in labor markets, and laborers' preferences are invariably more heterogenous across many more dimensions of the elements of labor's "price." Furthermore, the marginal revenue product of an input hinges on competitive conditions in the output market. This reinforces the sense that monopsony analysis inherently raises cross-market effects that are less prevalent in the monopoly case.

4. *Monopsony and the consumer welfare standard*

As discussed in the previous sections, using antitrust enforcement to thwart potential monopsony harms is a task full of evidentiary difficulties, as well as complex tradeoffs. Perhaps more problematically, it is also unclear whether (and, if so, how) such an endeavor is consistent with the consumer

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[170] Executive Order 14036 on Promoting Competition in the American Economy, § 2(g) (Jul. 9, 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy ("This order recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy."

[171] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA L.J. 1031, 1050 (2019). ("The analogous question for considering monopsony in the labor market would be to identify the smallest labor market for which a hypothetical monopsonist in that market would find profitable to implement a "small and significant but non-transitory reduction in wages" (SSNRW)").

welfare standard—the lodestar of antitrust enforcement—at least as it is currently understood and implemented by courts.

Marinescu & Hovenkamp assert that:

> Properly defined, the consumer welfare standard applies in exactly the same way to monopsony. Its goal is high output, which comes from the elimination of monopoly power in the purchasing market.... [W]hen consumer welfare is properly defined as targeting monopolistic restrictions on output, it is well suited to address anticompetitive consequences on both the selling and the buying side of markets, and those that affect labor as well as the ones that affect products. In cases where output does not decrease, the anticompetitive harm to trading partners can also be invoked."[172]

But this is far from self-evident. There are at least two problems with this reasoning.

For a start, the assertion that harm to input providers that does not result in reduced product output is actionable is based on a tenuous assertion that a mere pecuniary transfer is sufficient to establish anticompetitive harm.[173] This is problematic because such harms may actually *benefit* consumers. In the extreme example, all of the benefits of a better negotiating position are passed on to consumers.[174] The main justification for ignoring these cross-market effects (as with all market-definition exercises) is primarily a pragmatic one (though it is rather weakened in light of modern analytical methods).[175] Particularly in the context of inputs into a specific output market, these cross-market effects are inextricably linked and hardly beyond calculation. And as the enforcement agencies have previously recognized, "[i]nextricably linked out-of-market efficiencies, however, can cause the Agencies, in their discretion, not to challenge mergers that would be challenged absent the efficiencies."[176]

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[172] *Id.* 1062-63.

[173] As Marinescu & Hovenkamp note (attributing the point to Hemphill & Rose), "[i]n this case, there is merely a transfer away from workers and towards the merging firms. Yet. . . such a transfer is a harm for antitrust law as it results from a reduction in competition." *Id.* at 1062 (citing Hemphill & Rose, *supra* note 165, at 2104-05).

[174] *See, e.g.*, *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984). *See also* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 342 (2010) ("However, Judge Breyer treated Blue Cross essentially as an agent for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums.").

[175] *See* Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, in WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE VOL. II (2014) at *10, *SSRN version available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270) ("Despite the incorporation of efficiencies analysis into modern merger evaluation, and the advances in economics that allow efficiencies to be identified and calculated more accurately than at the time of *Philadelphia National Bank*, antitrust doctrine in the United States still supports a regime that fails to take into account efficiencies arising outside of the relevant market.").

[176] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm. *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992, rev. 1997) § 4 at n.36 ("In some cases, merger efficiencies are "not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).").

The assertion that pecuniary transfers are actionable is also inconsistent with the fundamental basis for antitrust enforcement, which seeks to mitigate *deadweight loss*, but not mere pecuniary transfers that do not result in *anticompetitive* effects.[177]

Second, it is unclear whether the consumer welfare standard applies to input markets. At its heart, the consumer welfare standard focuses on the effects that a(n) (incipient) monopolist's behavior may have on *consumers*. And courts have, arguably, extended this welfare calculation to all direct purchasers affected by anticompetitive behavior. Much less clear is whether courts have extended (or would extend) this notion of anticompetitive harm to input markets. This goes to the very heart of the consumer welfare standard.

As we explain above, lower wages could be consistent with both efficiency and monopsony.[178] Somewhat more problematically, these lower wages may also be accompanied by lower prices passed through to consumers (or at least the monopsonist's direct purchasers, downstream).

> Larger buyers may also be able to reduce their purchasing costs at the expense of suppliers.... The concept of buyer power as an efficiency defence rests squarely on such a presumption. What is more, the argument also posits that the exercise of buyer power will not only have distributional consequences, but also increase welfare and consumer surplus by reducing deadweight loss. As we spell out in detail below, welfare gains may arise both at the upstream level, i.e., in the transactions between the more powerful merged firm and its suppliers, as well as at the downstream level, where the creation of buyer power may translate into increased rivalry and lower prices. *The extent to which final consumers ultimately benefit is of particular importance if antitrust authorities rely more on a consumer standard when assessing mergers. If total welfare is the standard, however, distributional issues are not directly relevant and any pass-on to consumers is thus only relevant in as much as it contributes to total welfare.*[179]

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[177] *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) ("Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects."). *See also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (2021) at 110 ("Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers collectively, does not take this income effect into account.").

[178] Hemphill & Rose distinguish monopsony power from increased buyer leverage, which does not result in a deadweight loss but is simply a redistribution from sellers to buyers. Leverage will be partially passed through to consumers as lower prices. Standard monopsony increases in bargaining power will not generate lower prices, since "[a]n increase in monopsony power increases the firm's perceived marginal cost and reduces output. Far from lowering output prices, the increased monopsony power raises price in output markets (if the firm faces downward sloping demand for its output) or else leaves it unchanged." Hemphill & Rose, *supra* note 165, at 2106.

[179] Roman Inderst & Greg Shaffer, *Buyer Power in Merger Control*, in ABA ANTITRUST SECTION HANDBOOK, ISSUES IN COMPETITION LAW AND POLICY (Wayne Dale Collins, ed. 2008) at 1611, 1612-13 (emphasis added).

This raises an obvious question: can the consumer welfare standard (and thus antitrust authorities and courts) reach a finding of anticompetitive harm if *consumers* (at least in the narrow market under investigation) are ultimately being charged lower prices? As the FTC summarized in closing the investigation of a merger between two pharmacy benefit managers, "[a]s a general matter, transactions that allow firms to reduce the costs of input products have a high likelihood of benefitting consumers, since lower costs create incentives to lower prices."[180]

Consider Judge Breyer's *Kartell* opinion. As Steve Salop explains:[181]

> The famous *Kartell* opinion written by Judge (now Justice) Stephen Breyer provides an analysis of a buyer-side "cartel" (comprised of final consumers and their "agent" insurance provider, Blue Cross) that also is consistent with the true consumer welfare standard.... Buyer-side cartels generally are inefficient and reduce aggregate economic welfare because they reduce output below the competitive level.... However, a buyer-side cartel. comprised of *final consumers* generally would raise true consumer welfare (i.e., consumer surplus) because gains accrued from the lower prices would outweigh the losses from the associated output reduction, even though the conduct inherently reduces total welfare (i.e., total surplus)....
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> ...Judge Breyer treated Blue Cross essentially as an *agent* for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums....
>
> ...In permitting Blue Cross to achieve and exercise monopsony power by aggregating the underlying consumer demands for medical care—i.e., permitting Blue Cross to act as the agent for final consumers—the *Kartell* court implicitly opted for the true consumer welfare standard. Blue Cross's assumed monopsony conduct on behalf of its subscribers would thus lead to higher welfare for its subscribers despite reduced efficiency and lower aggregate economic welfare. Thus, this result represents a clear (if only implicit) judicial preference for the true consumer welfare standard rather than the aggregate economic welfare standard.

By this logic, it seems, the relevant "consumer" welfare in antitrust analysis—including mergers that increase *either* monopoly or monopsony power—is that of the *literal* consumer: the end-user of the final product. But this contrasts quite sharply with the standard mode of analysis in monopsony

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[180] Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210, at 7 (Apr. 2, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf.

[181] Salop, *supra* note 174174, at 342 ("Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits pass through to consumers so that consumers (i.e., the buyers) would directly benefit on balance from the conduct.")

cases as the mirror image of monopoly, in which the merging parties' "trading partner" (whether upstream or downstream) is the relevant locus of the welfare analysis.

Indeed, extended to more current potential cases, this mode of analysis raises a distinct problem for the agencies. Consider, for example, a hypothetical case against Kroger surrounding practices that exploit its buyer power.[182] Should such a challenge fail regardless of the effect on input providers because Kroger can be considered "an *agent* for the customers it [sells to]"? There is, as Salop seems to suggest,[183] some merit in such an approach, but it is certainly not how similar cases have been evaluated in the past.

There is no easy answer to the difficulty of assessing harm in upstream markets when downstream markets benefit. At first blush, excluding deadweight losses that stem from monopsony power (or at least forcing plaintiffs to show that downstream purchasers are also harmed) seems like legalistic reasoning that is largely incompatible with the welfarist ancestry of the consumer welfare standard.[184] Indeed, the consumer welfare standard is largely premised on the assumption that increased output is desirable, and deadweight losses are harmful to society, regardless of their second-order effects. It seems odd to depart from this reasoning just because a supplier, rather than a consumer, is being harmed. Not to mention that, from a welfare standpoint, inefficient switching, caused by a deadweight loss, is no less harmful in the monopsony context than the monopoly one.

But at least when it comes to law and antitrust practice, things are more complicated than that. Faced with what may potentially be intractable economic questions, antitrust courts have often decided to limit antitrust analysis to what economics generally refer to as partial equilibrium analysis. This likely explains why only direct purchasers can claim antitrust damages,[185] and why the *Amex* court chose to overlook potential harm to cash purchasers (as they were deemed to lie outside of the relevant market).[186] The upshot is that, with some notable exceptions (such as the case of two-sided

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[182] The same analysis can be applied to a hypothetical merger between, say, Kroger and Trader Joe's in which we assume for the sake of argument there is no increase in seller power, but there is an increase in buyer power.

[183] It is worth noting that, although the analogy between Blue Cross and Kroger here seems quite apt and powerful, there can be little doubt that Salop would not condone this mode of analysis in a such a case against Kroger. Whether (if correct) that is a function of one person's idiosyncratic preferences or an expression of the complication inherent in assessing consumer welfare in monopsony cases is uncertain.

[184] *See, e.g.*, Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 735 (2007). ("Predatory pricing that excludes competitors and results in monopsony is condemned by the Sherman Act, just as the Act condemns predatory pricing that excludes competitors and obtains a monopoly.... Protecting consumer welfare is the principal goal of the Sherman Act, but it is only a goal: The Sherman Act protects the people by protecting the competitive process. The competitive process could not be under mined any more clearly than it is when competing buyers conspire to eliminate the competition among themselves, and it matters not one whit under the Sherman Act whether the conspiracy threatens the welfare of conspirators' customers or the welfare of end users. It is enough that the conspiracy threatens the welfare of the trading partners exploited by the conspiracy. Harm to them implies harm to people protected by the Sherman Act.").

[185] *See, Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[186] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

markets in *Amex*), antitrust courts have been reluctant to analyze competitive effects in adjacent markets.

What might seem like an arbitrary decision appears more reasonable when one considers the sheer complexity of the task at hand. Economic behavior will often have second-order effects that run in an opposite direction to its first-order or "partial equilibrium" ones. A charcoal monopoly may cause buyers to opt for cleaner energy sources; a conservation cartel may maximize the long-term value of scarce resources.[187]

The question is whether antitrust law has a comparative advantage in dealing with these more "systemic" issues, or whether other legal frameworks are better adapted. Put differently, antitrust law's main strength might be that it is mostly a consumer-oriented body of law that focuses on a single tractable problem: the prices consumers and other direct purchasers pay for goods. If that is true, then maybe other bodies of law (such as, *e.g.*, labor and environmental laws) may be better suited to deal with broader harms. Indeed, in the case of each of these fields there exists a massive regulatory apparatus specifically designed to implement government standards. And, under the law as it stands, where antitrust law and a regulatory regime conflict, antitrust must give way.[188]

We do not purport to have a satisfactory answer to this complicated question. In fact, it is probably fair to say one does not exist. Antitrust law can either depart from its welfarist underpinnings—a large loss for its economic consistency—or it can follow those principles towards potentially intractable problems that may ultimately undermine its administrability and thus its usefulness as a policy tool. At this juncture, it is not clear there is a compromise that might enable enforcers to thread the needle to solve this complex conundrum. And if such a solution exists, it has yet to be articulated in a convincing manner that may lead to actionable insights for enforcers or courts.

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[187] *See* Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV 3 (2004) ("The purported aim of antitrust law is to improve consumer welfare by proscribing actions and arrangements that reduce output and increase prices. Conservation aims to improve human welfare by maximizing the long-term productive use of natural resources, an aim that often requires limiting consumption to sustainable levels. While such conservation measures might increase prices in the short-run, when successful they enhance consumer welfare by increasing long-term production and ensuring the availability of valued resources over time.").

[188] *See, Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, *19-*20, *1-*2 (2007) (holding that where "(1) an area of conduct [is] squarely within the heartland of… regulations; (2) [there is] clear and adequate… authority to regulate; (3) [there is] active and ongoing agency regulation; and (4) [there is] a serious conflict between the antitrust and regulatory regimes. . . , [such] laws are 'clearly incompatible' with the application of the antitrust laws…[,]" thus "implicitly precluding the application of the antitrust laws to the conduct alleged"). See also *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 398-74 (1963) (Harlan, J. *dissenting*) ("Sweeping aside the 'design fashioned in the Bank Merger Act' as 'predicated upon uncertainty as to the scope of § 7 of the Clayton Act' (*ante*, p. 349), the Court today holds § 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.").

Given all of this, the FTC and DOJ's desire to adopt merger guidelines that address monopsony harms, while clearly important, seems premature compared to the state of the economic literature, and potentially unactionable under the consumer welfare standard. This is not to say the antitrust policy world should suddenly ignore monopsony harms, but rather that more research, discussion, and case law is needed before definitive guidelines can be written. And, ultimately, it may well be that legislative change is needed before any such guidelines will be enforceable before the courts.

VIII. Market Definition

The difficulties discussed above should serve as a good reminder that market definition is but a means to an end. As William Landes, Richard Posner, and Louis Kaplow have all observed, market definition is merely a proxy for market power, which in turn enables policymakers to infer whether consumer harm (the underlying question to be answered) is likely in a given case.[189]

Given the difficulties inherent in properly defining markets, policymakers should redouble their efforts to precisely measure both potential barriers to entry (the obstacles that may lead to market power) or anticompetitive effects (the potentially undesirable effect of market power), under a case-by-case analysis that looks at both sides of a platform.

Unfortunately, this is not how the FTC has proceeded in recent cases or the current Draft Guidelines. The FTC's *Facebook* complaint, to cite but one example, merely assumes the existence of network effects (a potential barrier to entry) with no effort to quantify their magnitude.[190] Likewise, the agency's assessment of consumer harm is just two pages long and includes superficial conclusions that appear plucked from thin air:

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[189] *See* William M Landes & Richard A Posner, Market Power in Antitrust Cases, 94 HARV. L. REV. 937 (1981) at 938 ("The standard method of proving market power in antitrust cases involves first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough to support an inference of the required degree of market power."); Louis Kaplow, *Why (ever) Define Markets?*, 124 HARV. L. REV. 437, 515 (2010) ("The market definition / market share paradigm plays a prominent role in competition law regimes. Its central justification is that it offers a useful means of making inferences about market power, indeed one that is easier or more reliable than other means of market power determination. Upon analysis, however, it appears that this widely accepted view is always false….").

[190] Complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. filed Jan. 13, 2021), at 19. Consider the following passage from the FTC's complaint: "Direct network effects are a significant barrier to entry into personal social networking. Specifically, because a core purpose of personal social networking is to connect and engage with personal connections, it is very difficult for a new entrant to displace an established personal social network in which users' friends and family already participate. A potential entrant in personal social networking services also would have to overcome users' reluctance to incur high switching costs." This analysis fails to examine whether users can and do coordinate among themselves to join rival networks. For a detailed discussion of these considerations, *see, e.g.*, Daniel F Spulber, *Consumer Coordination in the Small and in the Large: Implications for Antitrust in Markets With Network Effects*, 4 J. COMPETITION L. & ECON. 207 (2008). *See also*, Dirk Auer, *What Zoom Can Tell Us About Network Effects and Competition Policy in Digital Markets*, TRUTH ON THE MARKET (Apr. 14, 2019), https://truthonthemarket.com/2019/04/24/what-zoom-can-tell-us-about-network-effects-and-competition-policy-in-digital-markets.

> The benefits to users of additional competition include some or all of the following: additional innovation…; quality improvements…; and/or consumer choice…. In addition, by monopolizing the U.S. market for personal social networking, Facebook also harmed, and continues to harm, competition for the sale of advertising in the United States.[191]

Not one of these assertions is based on anything that could remotely be construed as empirical or even anecdotal evidence. Instead, the FTC's claims are presented as self-evident. Given the difficulties surrounding market definition in digital markets, this superficial analysis of anticompetitive harm is simply untenable.

In short, discussions around attention markets emphasize the important role of case-by-case analysis underpinned by the consumer welfare standard. Indeed, the fact that some of antitrust enforcement's usual benchmarks are unreliable in digital markets reinforces the conclusion that an empirically grounded analysis of barriers to entry and actual anticompetitive effects must remain the cornerstones of sound antitrust policy. Or, put differently, uncertainty surrounding certain aspects of a case is no excuse for arbitrary speculation. Instead, authorities must meet such uncertainty with an even more vigilant commitment to thoroughness.

IX. Rebuttal Evidence Showing That No Substantial Lessening of Competition Is Threatened by the Merger

Starting at page 39, we discussed how vertical mergers often are pro-competitive and introduce efficiencies. Even in the case of horizontal mergers, however, the best recent empirical work finds that efficiencies in many mergers.[192] While procompetitive efficiencies could be oversold by the merging parties, they cannot be assumed away, and the Draft Guidelines raise the burden on any efficiency defense beyond what is justified by the law or the economics. For example, the Draft Guidelines require that cognizable efficiencies "could not be achieved without the merger under review."[193] First, "could not" is too high of a burden. Second, what if there were many similar mergers available that offered efficiencies, all of which were pro-competitive? The wording of draft guideline would not recognize those efficiencies, since they were not unique to the merger being considered. The wording of the 2010 HMGs is better: "The Agencies credit only those efficiencies *likely* to be

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[191] Complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, *id.* at 48.

[192] Vivek Bhattacharya, Gaston Illanes & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from U.S. Retail*, NBER, Working Paper 31123 (2023), *available at* https://www.nber.org/papers/w31123; Mert Demirer & Omer Karaduman, *Do Mergers and Acquisitions Improve Efficiency: Evidence from Power Plants, available at* https://gsb-faculty.stanford.edu/omer-karaduman/files/2022/12/Draft.pdf; Celine Bonnet & Jan Philip Schain, *An Empirical Analysis of Mergers: Efficiency Gains and Impact on Consumer Prices,* 16 J. COMP. LAW & ECON 1 (2020).

[193] Draft Guidelines, at 33.

accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger *or another means having comparable anticompetitive effects*" (emphasis added).[194]

The most extreme version of "raising the burden of proof" is the statement: "efficiencies are not cognizable if they will accelerate a trend toward concentration (see Guideline 8) or vertical integration (see Guideline 6)."[195] Until that is removed, there effectively is no rebuttal, since most efficiencies will accelerate a trend toward concentration or involve vertical integration. As such, the above statement should be removed.

X. Avoiding Damage to the Credibility of the Merger Guidelines

Conceptually, the role of guidelines is to codify the accepted knowledge in a particular area of antitrust for the sake of legal certainty, and *not* to drive the law toward a particular unsettled frontier of the discipline. It is highly doubtful, however, whether some of the issues raised in the Draft Guidelines enjoy anywhere near the level of consensus needed to justify being codified into guidelines. The problem with pretending that they do is that it risks turning "guidelines" into an opportunity for agencies to advocate for new antitrust law and set new antitrust policy, rather than offer a useful, albeit comparatively modest, tool for legal interpretation.

Relatedly, it is somewhat puzzling that the agencies feel compelled and empowered to issue new merger guidelines now. Typically, guidelines are issued in the face of new learnings or new jurisprudence with the potential to overhaul an area of antitrust law. Adoption of the 1982 guidelines, for instance, was preceded by a series of Supreme Court opinions that indicated a marked embrace of economic analysis in the Court's antitrust analysis.[196] Nothing of this sort has, to our knowledge, preceded the agencies' current proposals. If new economic or legal learning is not guiding the new guidelines, then what is? It is not cited in the Draft Guidelines. The most plausible explanation is that it is politics. This idea is further reinforced by the limited public debate surrounding the current process for adopting new guidelines, and the pervasiveness of certain contentious assumptions which indicate a clear political bias and preordained political intent.

Not that there isn't precedent for this sort of approach. But the last time merger guidelines were (arguably) employed to advance a contentious political objective was more than 40 years ago.[197] By virtually any measure, subsequent updates to the guidelines have been aimed at attempting to incorporate relatively new-but-well-established learning and to synthesize updates to longstanding agency practice aimed at "getting it right," particularly with respect to basic and ever-evolving procedural

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[194] 2010 HMGs, at 30.

[195] Draft Guidelines, at 34.

[196] *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *United States v. General Dynamics*, 415 U.S. 486 (1974).

[197] *See, e.g.*, Matt Stoller, *The Secret Plot to Unleash Corporate Power*, BIG (Apr. 8, 2022), https://mattstoller.substack.com/p/the-secret-plot-to-unleash-corporate?s=r.

issues, like the use of thresholds. There has been, in other words, an overarching humility to the process, which has lent it a crucial authority in both courts and among practitioners and economic actors.

> The 2010 [HMGs] are noteworthy because, although the agencies' views are not binding on the judiciary, courts adjudicating merger challenges routinely cite them as persuasive. The Guidelines derive their persuasive value from laying out a consensus view on the framework that the FTC and DOJ have developed, over decades of experience, to analyze the effects of mergers. Reflecting precedent from courts and the agencies, and based on accepted economic principles, they garnered support at adoption and in case after case, serving as the touchstone for merging parties, enforcers, and judges alike.[198]

Indeed, where previous guidelines have strayed perhaps a bit too far into novelty, their influence on the courts has been minimal. Perhaps the best example of this has been the reception by courts of the 2010 Horizontal Merger Guidelines ("2010 HMGs"), particularly the intended diminishment of the role of technical analysis of market definition and the heightened reliance on relatively novel methods of direct evidence of competitive effects.[199] Although the 2010 HMGs have generally proved to be significantly influential,[200] courts' have been decidedly reluctant to replace consideration of market definition with measures like the gross upward pricing pressure index ("GUPPI") to assess unilateral effects.[201] Indeed, reliance on market shares to determine case outcomes has arguably increased.[202]

By contrast, the FTC's recent rejection of the 2020 Vertical Merger Guidelines ("2020 VMGs") was grounded in an obvious distaste for the specific outcomes it might have engendered.[203] Although

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[198] Noah Joshua Phillips & Christine S. Wilson, COMM'RS, FED. TRADE COMM'N, *Statement Regarding the Request for Information on Merger Enforcement* (Jan. 18, 2022) at 1-2, *available at* http://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

[199] *See* U.S. Dep't of Justice & F.T.C., *Horizontal Merger Guidelines* (2010), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [hereinafter "2010 HMGs"].

[200] Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51 (2021).

[201] Jan M. Rybnicek & Laura C. Onken, *A Hedgehog in Fox's Clothing: The Misapplication of GUPPI Analysis*, 23 GEO. MASON L. REV. 1187, 1190 (2016). ("This paper argues that the GUPPI regularly fails to live up to its promise for two principal reasons: (1) the GUPPI all too often is based on inaccurate or incomplete data and (2) there is insufficient guidance to allow the business community and the antitrust bar to draw reliable conclusions about how the GUPPI will be incorporated into the agencies' enforcement decisions.").

[202] Adam Di Vincenzo, Brian Ryoo, & Joshua Wade, *Refining, Not Redefining, Market Definition: A Decade Under the 2010 Horizontal Merger Guidelines*, ANTITRUST SOURCE (Aug. 2020) at 11, *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/august-2020/aug20_divincenzo_8_18f.pdf ("Market definition has retained a central and often outcome-determinative role in courts' merger analysis beyond the presumption of anticompetitive effects; in this respect, market definition is as important today as it was prior to the 2010 Guidelines.").

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

nominally justified by a claimed lack of scholarly support,[204] that rhetoric was transparently faulty, particularly given the process by which the withdrawal was accomplished.[205] Indeed, as Carl Shapiro and Herbert Hovenkamp put it: "The Federal Trade Commission's recent withdrawal of its 2020 vertical merger guidelines is flatly incorrect as a matter of microeconomic theory and is contrary to an extensive economic literature about vertical integration."[206] To be sure, there was (and always will be) disagreement at the margins over best practices in merger analysis and enforcement. But nothing in the 2020 VMGs was unsupported by longstanding scholarship and practice (except, ironically, to the extent they may have gone too far at times *toward* repudiating the FTC majority's preferences).[207]

And the same preference for simply stronger—not necessarily better—enforcement seems to be animating the agencies' "very tendentious" (in the words of Doug Melamed) effort to produce new merger guidelines now.[208] Indeed, in the press release announcing the guidelines-revision process, FTC Chair Khan and AAG Kanter declare at the outset that they have "launched a joint public inquiry aimed at *strengthening* enforcement against illegal mergers."[209]

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[204] *Id.* ("The guidance documents… include unsound economic theories that are unsupported by the law or market realities.").

[205] As the dissent from the withdrawal of the 2020 VMGs by Commissioners Philips and Wilson notes, "the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware .., with the minimum notice required by law, virtually no public input, and no analysis or guidance." Noah Joshua Phillips & Christine S. Wilson, COMM'RS, FED. TRADE COMM'N, *Dissenting Statement Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement* (Sep. 15, 2021) at 1, https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions. *See also, id.* at 6 ("The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities.").

[206] Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sep. 23, 2021), https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp. Other choice words used by Shapiro & Hovenkamp in their extremely short essay to describe the FTC majority's asserted basis for withdrawing the 2020 Guidelines include: "baffling," "reli[ant] on specious economic arguments," "demonstrably false," "ignor[ing] relevant expertise," "contrary to a broad consensus among economists going back at least to. . . 1968," "flatly inconsistent with the Horizontal Merger Guidelines," and "likely to cause real harm." *Id.*

[207] *See, generally,* Geoffrey A. Manne, Kristian Stout & Eric Fruits, *The Fatal Economic Flaws of the Contemporary Campaign Against Vertical Integration*, 68 KANSAS L. REV. 923 (2020).

[208] Doug Melamed, in *Antitrust Policy and Its Different Perspectives: Where Do the Antitrust Professionals Agree and Disagree?* (interview by Alden Abbott with Doug Melamed and Joshua Wright), THE BRIDGE PODCAST (Apr. 19, 2022), *transcript available at* https://www.mercatus.org/bridge/podcasts/04192022/antitrust-policy-and-its-different-perspectives ("I will say I think the request for information that the agencies put out is a little worrisome because I think it's very tendentious. At the outset, they say, 'We're interested in information that will help us strengthen merger enforcement.' I would have thought the appropriate question would be information that would help us improve merger enforcement. They ask for information about false negatives, they don't ask for information about false positives.").

[209] 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 (emphasis added).

The Draft Guidelines are overwhelmingly concerned with the presumed dangers of underenforcement, but inexplicably pays almost no heed to the possibility, let alone the cost, of overenforcement. Leaving aside the fact that—in merger enforcement, as in antitrust law more generally—a sound error-cost framework takes a holistic view of the likelihood and cost of errors, underpinning the agencies' slanted view are two popular, albeit unjustified, narratives that dissolve upon closer examination.

Ultimately, both these narratives appear designed to bolster the case for the type of politically motivated overhaul of the merger guidelines that the agencies have pre-committed themselves to, rather than to fulfill what is—and should remain—the primary purpose of merger guidelines: i.e., to codify state-of-the-art knowledge and practice in one area of antitrust law as a means to increase legal certainty.

Before the FTC and DOJ consider what recommendations should be incorporated into a new set of merger guidelines, it would be appropriate to briefly consider what the current review process should aim to achieve. This raises two critical questions: What is the ultimate aim of merger guidelines, and what should the process leading up to them look like?

A. The Role of Merger Guidelines

Merger guidelines attempt to provide an authoritative and practical guide for enforcement and adjudication by explicating two important inputs into those processes. First, guidelines attempt to coalesce established agency thinking and practice to inform potential merging parties—effectively seeking to improve legal certainty by prefiguring how agencies are likely to respond to given situations. They also describe the "accepted wisdom" of merger analysis (especially that which stems from jurisprudence). "To be as effective and persuasive as possible, the Guidelines should reflect our best thinking about the competitive effects of mergers and appropriate merger enforcement policy."[210] Updating merger guidelines may thus be necessary when the consensus—the economic and legal "best thinking" or the underlying jurisprudence—surrounding certain practices has evolved. "Indeed, many commentators regard the guidelines' credibility arising from this collected institutional wisdom as a foundational principle of any further revisions to the Guidelines. This caution doubtlessly preserves consumer welfare by reducing the costs associated with uncertain antitrust enforcement."[211]

As the Antitrust Modernization Commission ("AMC") described them:

> There is general consensus that the Merger Guidelines have acted as the "blueprint for the architecture" of merger analysis and, overall, provide a guide that "functions well." The Guidelines have had a significant influence on judicial development of merger law,

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[210] Christine A. Varney, ASSISTANT ATT'Y GEN., ANTITRUST DIV., U.S. DEPT. OF JUSTICE, *An Update on the Review of the Horizontal Merger Guidelines* (Jan. 26, 2010) at 4, *available at* http://www.justice.gov/atr/public/speeches/254577.pdf.

[211] Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 152 (2011).

> which is reflected in their widespread acceptance by the courts as the relevant framework for analyzing merger cases.... The Guidelines have also provided useful guidance and transparency to the business community and antitrust bar. Finally, the Guidelines have helped to influence the development of merger policy by jurisdictions outside the United States.[212]

Given these twin goals—providing legal certainty and "codifying" the accepted knowledge concerning certain antitrust situations—guidelines are not the place to set out a novel, activist agenda or push the boundaries of knowledge and practice.

This is no small detail. There is a vast difference between what may fairly be described as new *learning* (i.e., a new consensus gleaned from extensive scholarship and rigorous debate), on the one hand, and new *interrogations* (i.e., unresolved questions that pique the interest of some scholars), on the other. As the rest of our comment suggests, many of the questions currently contemplated by the agencies fall squarely within the latter category. Accordingly, while they arguably constitute an interesting research agenda for scholars, there is virtually no sense in which they justify drafting guidelines that seek to settle these unresolved issues and that, in doing so, lead to a significant departure from existing practice.

Our assertion here is further supported by the fact that guidelines do not have binding authority, either on enforcers or courts. Courts are under no obligation to adhere to antitrust guidelines, and they will be far less likely to look to them even for guidance if they espouse politicized, un-rigorous concepts. Accordingly, by importing novel and unresolved enforcement concepts (as well as approaches to merger enforcement) into their guidelines, the agencies may render them of little use both to the public and to the courts. As Tim Muris & Bilal Sayyed put it, "the Merger Guidelines have succeeded in significant part because they do not try to do too much."[213] In short, there is a risk that the resulting updated guidelines will not describe the "state of the art" of the economic and legal understanding. As a result, they would no longer shed light on either agency practice or likely litigation outcomes. The guidelines would thus be devoid of any tangible purpose.

This would be a real loss for consumers, as non-specialist courts currently *do* often look to guidelines in order to appropriately resolve complex merger issues. "The Guidelines accrued substantial institutional credibility and capital with courts due to their economic sophistication and consistency in application."[214] As Christine Varney, assistant attorney general of the DOJ Antitrust Division in the Obama administration and a member of the Federal Trade Commission in the Clinton administration, put it: "many courts indicate that they consider the Guidelines in assessing mergers under the

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[212] REPORT AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION (Apr. 2007) at 54-55.

[213] Timothy J. Muris & Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE (Apr. 2010) at 3.

[214] Stone & Wright, *supra* note 211, at 157.

antitrust laws, some finding them more useful than others."[215] Numerous scholars and practitioners echo this view and applaud the role of the HMGs in bringing focus and consensus to merger enforcement.[216] Given the speculative and politicized nature of the draft guidelines, there is good reason to doubt that many courts will find the resulting guidelines to fall on the "more useful" end of the scale.

B. How Guidelines Are Adopted

The process the DOJ and FTC are following to produce their updated guidelines is also problematic. Indeed, if guidelines are released without real opportunity for input and without clear indication that that input has been considered in their formulation, they will be of little use.

It is not inherently problematic to revisit and revise the guidelines, of course; the agencies have done so on a somewhat regular basis since the first guidelines were issued in 1968. In all previous instances (and in the case of the agencies' other guidelines), revisions were preceded by significant public input, debate, and consideration, leading to identification of an overarching consensus. To take one example, the FTC and DOJ ran an extensive series of workshops and consultations when they updated the HMGs in 2009-2010.[217] In a joint press release announcing the workshops, the agencies explained the goal of this process: "The goal of the workshops will be to determine whether the Horizontal Merger Guidelines accurately reflect the current practice of merger review at the Department and the FTC as well as to take into account legal and economic developments that have occurred since the last significant Guidelines revision in 1992."[218] And as Christine Varney later elaborated on the agencies' process and what they expected to glean from it:

> In addition to inviting comments, [five] workshops have been held over the past two months.... Our nearly 100 panelists have included leading practitioners, economists, consumer advocates, industry executives, and academics. We have been fortunate to have both former and current government enforcers from the United States and around the world share their perspectives with us.... We've learned a lot from the workshops and

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[215] Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, *Merger Guidelines Workshops* (Sep. 22, 2009) at 4-5, *available at* http://www.justice.gov/atr/public/speeches/250238.pdf.

[216] *See, e.g.,* Dennis Carlton, *Revising the Horizontal Merger Guidelines*, 6 J. COMP. L. & ECON. 1, 2 (2010) ("The Guidelines have proven to be a valuable and durable guide to antitrust practitioners and the courts"); William E. Kovacic, *The Modern Evolution of Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 435 ("The Guidelines not only changed the way the U.S. courts and enforcement agencies examine mergers, but they also supplied an influential focal point for foreign competition authorities in the formulation of their own merger control regimes."); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 703 (2010) ("One cannot help but marvel at how far merger enforcement has moved over the past forty years, with no change in the substantive provisions of the Clayton Act and very little new guidance on horizontal mergers from the Supreme Court").

[217] Press Release, *Department of Justice and Federal Trade Commission to Hold Workshops Concerning Horizontal Merger Guidelines* (Sep. 22, 2009), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-hold-workshops-concerning-horizontal-merger.

[218] *Id.*

> the comments received so far, and this morning I would like to offer some views about what we've heard during this process and *where I believe areas of consensus are emerging*."[219]

This is quite different from the perfunctory process seemingly contemplated, at least thus far, by those same agencies today.

One response may be that the substantial process used to develop the 2010 HMGs was itself unnecessary. Rather, the agencies are approaching the current revisions using the notice-and-comment procedures required by the Administrative Procedure Act ("APA").[220] The problem with this view is that the APA only applies agency rulemaking authorized by Congress—and, even then, it sets the procedural floor. Congress has not authorized the antitrust agencies to develop legally binding merger guidelines. This does not mean that it is impermissible for them to develop such guidelines as informal policy statement. It does mean, however, that such guidelines carry no force of law beyond their ability to persuade courts of their approach. On this account, adopting a minimal notice-and-comment approach offers minimal support for the proposed changes when compared to past guidelines—especially when normalized relative to the extent of the proposed changes. Modest changes might be supported by more modest procedure; substantial changes should be supported by more robust procedure.

To make matters worse, it is difficult to escape the sense that, whatever nominal process is employed by the agencies, the current guidelines-reform effort is intended to effect a predetermined, political outcome, irrespective of any actual consensus (or lack thereof) that emerges. We cannot know precisely how this process will unfold, of course, but there is considerable basis for concern. In particular, the FTC majority's seriousness about engaging in apolitical, rigorous analysis must be called into question based on the inescapable pattern that has emerged from its recent conduct. In brief, the current FTC majority has undertaken a series of actions and adopted a series of governance policies that reveal an agency focused myopically on advancing a radical revision of antitrust law, as far as possible from the strictures of judicial review and without consultation from the antitrust community.[221]

This sense that politics, rather than evidence, is driving the current review process is further reinforced by the contents of the Draft Guidelines. Many of the claims therein demonstrate substantial bias and heavy reliance on contentious and unsupported assumptions. Indeed, the Draft Guidelines operate from the apparent assumptions (among others) that more enforcement is inherently better,

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[219] Christine A. Varney, ASSISTANT ATT'Y GEN., ANTITRUST DIV., U.S. DEPT. OF JUSTICE, *An Update on the Review of the Horizontal Merger Guidelines* (Jan. 26, 2010) at 3, *available at* http://www.justice.gov/atr/public/speeches/254577.pdf (emphasis added).

[220] 5 U.S.C. 553.

[221] We need not recount the entire series of actions here, but they include, *inter alia*: withdrawing the 2020 VMGs; rescinding the 2015 UMC Policy Statement; eviscerating HSR process by, among other things, suspending HSR early terminations and lowering merger-challenge thresholds; reinstating and expanding the use of prior-approval provisions; conducting business using "zombie votes"; and moving forward with competition rulemakings.

that merger efficiencies are inconsistent with Section 7, and that distributional concerns should factor into merger review. The Draft Guidelines are overwhelmingly concerned with how the status quo may lead to false acquittals; the notions that authorities may err in the other direction, and that excessive enforcement may chill beneficial business activity, are conspicuously absent. Further, the inquiries of those questions often rely on cases that are woefully outdated and not reflective of a massive amount of subsequent economic learning and case law. Citations to cases throughout the draft guidelines are often one-sided and omit or ignore contrary authority.[222] This is notably the case of the guidelines' repeated citations to *Brown Shoe*[223] (15 citations), *Philadelphia National Bank*[224] (eight citations), and *Procter and Gamble*[225] (six citations)—three mid-20th century cases that are widely decried as being out of tune with modern economics and social science.[226] In short, in their pursuit of strong merger enforcement, the agencies are seemingly looking to reverse time and return to an old set of learnings from which courts, enforcers, and mainstream antitrust scholars have all steered away.

The net effect of these problems is to undermine confidence in the agency. That effect that will carry over to the courts as they are confronted with the resulting guidelines, all the more so if the sanitizing effect of legitimate process is not applied going forward. Such undermining of confidence is a serious problem for effective guidelines, so much so that the FTC's unremitting willingness to maneuver outside the bounds of established antitrust law and economics reveals perhaps a fundamental disdain for the opinion of the courts.

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[222] There are myriad examples throughout the guidelines. To consider only a couple of examples, *see, e.g.,* Draft Merger Guidelines fn 41 (citing *Marine Bancorp* for the proposition that "If the merging firm had a reasonable probability of entering the concentrated relevant market, the Agencies will usually presume that the resulting deconcentration and other benefits that would have resulted from its entry would be competitively significant" – *Marine Bancorp* speaks to the opposite circumstance, rejecting consideration of potential entry where state law prohibits such entry to occur at a meaningful scale); fn 53 (citing *Brown Shoe* at 328 for the proposition that, in the context of vertical mergers, "If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence." – *Brown Shoe* at 329 further clarifies that "in which the foreclosure is neither of monopoly nor de minimis proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive."). Additionally, as other commentors note, the guidelines simply ignore decades of circuit and district court caselaw. In instances where they do cite to recent circuit court opinions, they do so improperly. *See, e.g.,* Draft Merger Guidelines at fn 13 (citing *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) for the proposition that "Mergers Should not Substantially Lessen Competition by Creating a Firm that Controls Products or Services That Its Rivals May Use to Compete" – this was the government's theory of harm in the case, not the court's holding); fn 48 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) for the proposition that "the Agencies are unlikely to credit claims of commitments to protect or otherwise avoid harming their rivals that do not align with the firm's incentives" – in the cited case the court was concern with "mere speculation and promises" that would protect rivals not "claims or commitments.")..

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

[224] *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).

[225] *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

[226] *See, e.g.,* Douglas H Ginsburg & Joshua D Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).