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New DOJ-FTC Merger Guidelines: Opportunities and Strategies for Merging Parties

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By Jeremy A. Sandford & Koren W. Wong-Ervin[1]

On December 18, 2023, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly released the final version of the Merger Guidelines.[2] While the contours of the Guidelines largely follow the prior draft version, continuing to represent an expanded and more aggressive approach, the final document contains notable improvements relative to the draft. Despite the significant challenges posed by the Guidelines' more interventionist approach, at various places the Agencies signal an openness to factual and economic evidence. This creates a number of opportunities and strategies for merging parties.

The most significant improvements from the draft — as described by the DOJ and FTC Chief Economists — include:

- Deleting the prior categorical presumption of illegality for vertical mergers involving a firm with greater than 50% share of an input used by rivals, instead "explicitly" tying "the use of market structure in the analysis of foreclosure . . . to 'monopoly power'"[3] and adding a requirement that the input is "competitively significant" (although stating in a footnote that the Agencies "will generally infer" monopoly power at shares greater than 50%[4]);
- Replacing "the former 30% market-share threshold ... with an explicit reference to 'durable market power' as the trigger for an entrenchment concern,"[5] which suggests the importance of barriers to entry in addition to shares of at least greater than 30% for an inference of a "dominant position";
- Eliminating a "trend towards" concentration or vertical integration as a standalone basis to block a transaction, moving it instead to a "'plus factor' when analytically appropriate, and not a basis for a challenge on its own or a separate structural presumption;"[6]
- Striking the prior "prohibition on considering … competitive benefits that supported a trend toward concentration" or vertical integration[7] (as would be the case with many or even most merger efficiencies); and
- Explicitly recognizing the role of elimination of double marginalization in vertical merger analysis.

The final Guidelines also soften the prior categorical statement that "Congress and the courts have indicated their preference for internal efficiencies and organic growth," instead limiting the asserted preference to concentrated markets.

Overall, despite the Agencies' expansive view of the law and heavy reliance on older cases, many of the economic principles set forth in the Guidelines are to a large extent carried over from prior guidelines, even if diluted by troubling

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[2] U.S. Dept. of Justice & the Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf [hereinafter "Guidelines"].

[3] Susan Athey & Aviv Nevo, *DOJ and FTC Chief Economists Explain the Changes to the 2023 Merger Guidelines* (Dec. 19, 2023), https://www-promarket-org.cdn.ampproject.org/c/s/www.promarket.org/2023/12/19/doj-and-ftc-chief-economists-explain-the-changes-to-the-2023-merger-guidelines/?amp [hereinafter "Athey & Nevo"].

[4] Guidelines, *supra* n.2, at 16 n.30.

[5] Athey & Nevo, *supra* n.3.

[6] *Id.*

[7] *Id.*

legal commentary. In our experience both as enforcers (former FTC economist and attorney, respectively) and working with merging parties, we have seen engagement on economics and the facts that underpin economic models move the needle on enforcement, including under current leadership. And, for matters reaching litigation, this work is still necessary given the high likelihood that courts will continue to look to economic principles in deciding cases.

To be sure, the Guidelines' approach creates significant challenges for merging parties and represents a significant departure from prior Agency guidelines, including a greater reliance on structural screens, novel labor market theories, and a return to long-ago abandoned conglomerate theories. Both challenges and opportunities are discussed below, with the focus on suggestions for the types of economic analysis and other evidence most likely to resonate with the Agencies. For certain topics for which the Agencies are highly unlikely to be persuaded (e.g., the consideration of cross-group effects or "out-of-market" efficiencies), we offer arguments geared towards litigation. While courts have looked to prior iterations of the merger guidelines as helpful tools, their persuasiveness came in part because they reflected recent caselaw and mainstream economic thinking. The reasoning of these court decisions, combined with several losses by the Agencies, suggests that courts are less likely to give the new Guidelines deference where they depart from modern judicial precedents and economic learnings. And, at least with respect to the Guidelines' lower thresholds for horizontal merger presumptions, it is worth noting that three years into this Administration, the Agencies have yet to bring a case based upon these lower thresholds.

The remainder of this Article is organized as follows: Section I covers the role of market structure, Section II addresses expanded potential competition theories, Section III covers enhanced scrutiny of vertical transactions and a return to conglomerate theories rejected by the Agencies in modern times, Section IV covers efficiencies and cross-group effects, Section V covers expanded labor market theories and the assumptions that appear to underlie such theories, Section VI briefly addresses the consideration of "roll up" strategies involving a series of acquisitions even if no single acquisition on its own would be unlawful, and Section VII concludes.[8]

I. The Role of Market Structure

The final Guidelines make explicit that market structure is relevant because it informs the assessment of whether a transaction is likely to result in unilateral and/or coordinated effects.[9] Clarifying that structural screens and presumptions derive relevance from being "indicators of a merger's risk" of harm restores some of the 2010 Horizontal Merger Guidelines' emphasis on effects over structure, and opens the door for rebuttal evidence such as documentary or economic evidence that anticompetitive effects would not be material.

Horizontal Merger Presumptions at Lower Market Shares and Concentration Levels

The Guidelines retain the presumptions of illegality for horizontal mergers based upon substantially lower thresholds than those set forth in the 2010 Horizontal Merger Guidelines. The presumption is triggered by either (1) a change in HHI of more than 100 points in a market with an HHI greater than 1,800 or (2) a combined share of greater than 30% and a change in HHI greater than 100. Under these lower thresholds, a firm with 30% share essentially cannot acquire any existing market participant without triggering the presumption. (For example, envision a merger combining firms with 30% and 2% market shares in a market in which the other competitors have shares of 20%, 15%, 15%, 6%, 6%, and 6%. This would result in a post-merger HHI of 1,862 and a delta of 120.) The lower thresholds also mean that the merging of two of seven equally-sized firms would trigger the presumption.

[8] The Guidelines also address theories based upon entrenching or extending a "dominant position" and involving partial ownership of or minority investments in a firm.

[9] Guidelines, *supra* note 2, at 6 ("When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the parties and may be to increase coordination among the remaining competitors.").

While lower thresholds implicate a greater number of mergers as a matter of arithmetic, past experience and the text of the Guidelines indicate that both the Agencies and courts are likely to continue to evaluate mergers based on their predicted competitive effects, in addition to purely structural factors. The 2010 Guidelines provide a relevant natural experiment; those guidelines increased concentration thresholds — a change now undone by the 2023 Guidelines — yet Shapiro and Shelanski (2021) find no impact of higher thresholds on market concentration levels alleged by agencies in litigated cases.[10] Indeed, those authors find that from 2000 to 2020 the Agencies rarely brought cases with alleged market concentrations close to the thresholds,[11] which suggests that 2010 thresholds were not binding constraints on enforcement. While it is possible the Agencies intend to leverage the new Guidelines to enforce against horizontal mergers with relatively low concentration levels, this would be a change from the first three years of the Biden administration.[12]

Moreover, the Guidelines signal that the Agencies are likely to continue to rely on economic tools to define markets and thus to determine shares and concentration levels. In particular, the hypothetical monopolist test ("HMT") is regularly implemented using econometric measurement of substitution patterns. If these measurements indicate sufficient substitution between firms in a candidate market, the market passes the test; if not, it must be broadened to include additional substitutes. As noted in the 2010 Guidelines, the economic tools used to implement the HMT are closely related to tools used to measure competitive effects of mergers; at bottom, both tools assess substitution between the merging firms and their closest substitutes. Absent material substitution between the merging parties, economic evidence is unlikely to support a narrow market in which the merging parties would have high shares and thus surpass the Guidelines' concentration thresholds unless it would also support an inference of material anticompetitive effects.

The 2023 Guidelines describe the economic tools used to implement both the HMT and competitive effects analyses in similar detail as prior Guidelines do. And, while the Draft Guidelines consigned these tools to an Appendix, the final document elevates their description to the main body, in Section 4. Thus, the final Guidelines signal that an economic approach to the HMT and market definition is likely to continue to influence Agency enforcement decisions.

More worryingly, the Guidelines state that *Brown Shoe* "practical indicia" can be used as an alternative to the HMT.[13] While courts often look to *Brown Shoe* factors to assess markets, they typically also look to HMT implementations when quantitative data on customer substitution is available. The Fifth Circuit's December 15, 2023, decision in Illumina-Grail is not inconsistent with this as the court merely stated that the FTC was not required to use the HMT when there were "no prices from which to build a data set [given that the market was a research-and-development one in which most products had yet to reach the consumer marketplace], and thus no way to run a hypothetical monopolist test."[14]

While the *Brown Shoe* indicia can at times be informative, particularly in matters in which econometric measurements of customer substitution are unavailable,[15] they can be

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[10] Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, Vol. 58, Issue 1, No. 4, REVIEW OF IND. ORG. (2021).

[11] *Id.*

[12] For instance, the Agencies challenged just 12 transactions in the fiscal year ending September 30, 2023. See Ryan Quillian, Law360 (Oct. 30, 2023), https://www.law360.com/articles/1737934/biden-admin-s-m-a-rhetoric-outpaces-enforcement-numbers.

[13] Guidelines, *supra* n.2, at Section 4.3, stating that "the Agencies may rely on any one or more" of four enumerated techniques for market definition, including the HMT and *Brown Shoe* indicia.

[14] *Illumina, Inc. v. FTC,* No. 23-60167, 2023 WL 8664628, at *6 n.8 (5th Cir. Dec. 15, 2023).

[15] For a fuller discussion of the relationship between the HMT and *Brown Shoe Factors* throughout various iterations of the guidelines and the relative utility of the HMT and the *Brown Shoe* indicia, see Jeremy Sandford *et al*., *Economics in the 2023 Merger Guidelines: Three Areas of Concern*, *US Merger Guidelines: A Review,* S. Sullivan (ed.), in collaboration with the CCIA, Concurrences (Forthcoming, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4678561.

impressionistic relative to the econometric framework of the HMT, which can make them difficult to effectively rebut. The prominence in the Guidelines of economic tools for implementing the HMT thus presents an opportunity to merging parties: careful econometric measurement of substitution patterns indicating that a purported *Brown Shoe* market would fail the HMT would be consistent with the Guidelines, and should be expected to be taken seriously by both Agencies and courts.

That said, as our experiences under the 2010 Guidelines indicates, the HMT sometimes leads to relatively narrow markets — in some cases, narrower than may be predicted by *Brown Shoe* factors alone — with relatively high shares for the merging firms. Moreover, even under the 2010 Guidelines, the Agencies became more likely to enforce mergers thought to result in relatively small price effects, particularly if the volume of commerce implicated by the merger was large. These trends may continue under the 2023 Guidelines. The potential for mergers with relatively low concentration thresholds and modeled price effects to be scrutinized heightens the importance of sound efficiency analysis, as we will describe in more detail in Section IV.

Vertical Mergers & Monopoly Power Inferences

While the elimination of the categorical presumption of illegality for vertical mergers involving a firm with greater than 50% share of any input used by rivals (regardless of whether the input is competitively significant) is a notable improvement, it remains troubling that the Guidelines still allow the Agencies to make a prima facie case based upon market structure without requiring a showing of not only ability but also incentives. Although the Fifth Circuit in Illumina-Grail stated that it "need not resolve" the issue of whether the *Brown Shoe* factors can serve as an alternative test to the "ability-and-incentive" standard, it only fully accepted that both ability and incentive mattered.[16]

Under the Guidelines, the Agencies can satisfy their prima facie case based on an inference of foreclosure from shares greater than 50% of a "competitively significant" input.[17] The revision creates opportunities for merging parties. The move away from a strict presumption may also be helpful to companies and their internal stakeholders in assessing the risks from a deal.

For example, the addition of the requirement that the input is "competitively significant" clarifies that the Agencies are unlikely to condemn mergers involving easily replaced inputs. Such a criterion may, in practice, tie vertical analyses back to an ability/incentive framework, even in cases in which a merger may appear to result in a high foreclosure share. Presumably, an input would not be competitively significant to a customer if the customer would switch away to alternatives following a worsening of terms. If enough customers switched in response, a worsening of terms would be unprofitable for the combined firm. Thus, to measure the competitive significance of an input, parties should assess the overall profitability to the combined firm of a change in terms for that input and should dispute the competitive significance of an input for which a worsening of terms would be unprofitable, even if the combined firm would have a high share of a given input.[18]

Another possible argument is that, by explicitly tying the use of market structure to monopoly power, the Guidelines open the door for arguments (based on caselaw) that high shares alone should not result in an inference of harm absent significant barriers to entry. As the D.C. Circuit explained in *United States v. Microsoft Corp*., "a firm cannot possess monopoly power in a market unless that market is also protected

[16] *Illumina, Inc.; Grail, Inc. v. FTC*, No. 23-6167, 2023 WL 8664628, at *7 (Fed. Cir Dec. 15 2023).

[17] Guidelines, *supra* n.2, at 16 n.30 ("If the share or other evidence show that the merged firm is approaching or has monopoly power over the related product, and the related product is competitively significant, those factors alone are a sufficient basis to demonstrate that the dependent firms do not have adequate substitutes and the merged firm has the ability to weaken or exclude them by limiting their access to the related product.")

[18] This is the approach taken by the parties in the Microsoft/Activision merger, as described in Preliminary Injunction Opinion, Redacted Version at 19, *FTC v. Microsoft*, No. 23-cv-02880-JSC (N.D. Cal. July 10, 2023), ECF 305.

by significant barriers to entry."[19] In addition to barriers to entry, courts generally require shares to be "significantly larger than 55%"[20] with "[t]he classic formulation being that 90% is certainly enough, 33% is certainly not, and 60–64% is close to the line."[21] The Fifth Circuit has observed that "monopolization is rarely found when the defendant's share of the relevant market is below 70%."[22] Even older decisions such as the Supreme Court's 1946 decision in *American Tobacco* endorsed Judge Hand's approach in *Alcoa* that for a finding of monopoly power "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not."[23]

Deletion of the 30% Market-Share Threshold for "Dominant Position"

Another improvement from the draft version is the elimination of the 30% market-share threshold, instead requiring a "showing" of "durable market power" for a finding of a "dominant position."[24] Explicitly linking "dominance" to "market power" suggests the importance of establishing barriers to entry in addition to evidence of market shares of at least 30%.[25]

II. Expanded Potential Competition Theories

While theories of harm based upon the elimination of a potential entrant are not new, the Guidelines take an expansive approach to what constitutes "reasonable probability of entry" (crediting more attenuated sources of potential competition) and the likely benefits from such entry.[26] The Guidelines reason that, "because concentrated markets often lack robust competition, the loss of even an attenuated source of competition such as a potential entrant may substantially lessen competition in such markets."[27] While the Guidelines do not explicitly refer to the caselaw requirement that the alleged potential entrant is one of only a few firms that could enter the market,[28] they do emphasize the competitive significance of the entrant, with the logical conclusion that if the target is one of many potential entrants, this consideration will not be met. Some courts, including the district court's 2023 decision in *FTC v. Meta Platforms, Inc.*,

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[19] *United States v. Microsoft Corp.,* 253 F.3d 34, 82 (D.C. Cir. 2001) (en banc) (per curiam); *see also Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) ("In a typical section 2 case, monopoly power is 'inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.'" (quoting *Microsoft,* 253 F.3d at 51)).

[20] *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

[21] Daniel Francis and Christopher Jon Springman, Antitrust - Principles, Cases, and Materials 332 (American Bar Association – Antitrust Division) (2023), https://antitrustcasebook.org/download/Antitrust%20-%20Principles,%20Cases,%20and%20Materials%20(launch%20version%205.10.2023).pdf.

[22] *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam).

[23] *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

[24] Guidelines, *supra* n.2, at 18.

[25] *See, e.g., Ryko Mfg. Co. v. Eden Serv.*, 823 F.2d 1215, 1232 (8th Cir. 1987), cert. denied, 484 U.S. 1026, 108 S.Ct. 751, 98 L.Ed.2d 763 (1988) ("Market power may be shown by a firm's percentage of sales in the market, especially where there is a strong consumer preference for the firm's product (which decreases the competitive impact of substitutes) and where there are significant barriers either to the entry of new firms or to increased output by existing firms."); *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984) (30% share alone not sufficient); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 818 (6th Cir. 1997) ("A thirty-percent share of the market, standing alone, provides an insufficient basis from which to infer market power."); *but see Park v. The Thomson Corp.*, No. 05 CIV. 2931 (WHP), 2007 WL 119461, at *8 (S.D.N.Y. Jan. 11, 2007) (a high share of 80-90% "might, standing alone, permit an inference of market power").

[26] Guidelines, *supra* n.2, at 11. Guideline 4 covers both perceived potential competition (present competitive effects based upon the threat of prospective entry) and actual potential competition (future competitive effects that would likely be felt from future entry). Under the actual potential competition doctrine, a plaintiff must establish that (1) the market is highly concentrated or "oligopolistic"; (2) absent the acquisition, the acquiring company would have entered the market in the near future through de novo entry or a toehold acquisition; and (3) there is substantial likelihood of procompetitive effects in the future due to entry. *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982); *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980); *Behrend v. Comcast Corp.*, 245 F.R.D. 195, 207 (E.D. Pa. 2007).

[27] Guidelines, *supra* n. 2, at p. 11.

[28] *Rep. of Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F.2d 1026, 1044 (5th Cir. 1981); *In the matter of B.A.T. Ind. and Appleton Papers, Inc.*, Docket No. 9135, 1984 WL 565384, at *8 & n.28 (collecting cases); Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction at 6, *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966. ("The acquisition of an actual potential competitor violates Section 7 if: . . . (4) there are few other firms that can enter effectively.").

have required a probability of entry "noticeably greater than fifty percent,"[29] while other courts (and the FTC under prior administrations) have applied a heightened standard of proof, requiring "clear proof " that the firm would have entered the market through means other than the challenged merger.[30]

One important (and highly concerning) point for merging parties to be aware of is the Guidelines' reliance on "[s]ubjective evidence that the company considered organic entry" as "generally suggest[ive] that, absent the merger, entry would be reasonably probable."[31] The Guidelines do not clearly distinguish between things like comments in a business plan versus an actual capital request to build a product coupled with an actionable plan to enter the market.[32] Companies should take care to clearly document an affirmative rejection of any contemplated entry plans for business reasons unrelated to the proposed acquisition (for example, the lack of key resources).

The Guidelines also address a potential tension: if the competition that can be lost from a merger is as expansive as envisioned in Guideline 4, that would imply in other cases that the competitive discipline imposed by the threat of entry (even "perceived" potential entry) can be very strong. In other words, defining competition more broadly to put more deals under scrutiny logically implies a broader set of potentially relevant competitive constraints. The Agencies seem aware of this tension, stating in the prior draft version that "[t]he existence of a perceived potential entrant ***does not*** override or counteract harm from mergers between companies that already participate in the relevant market."[33] That language is softened in the final Guidelines, replacing "does not override" with "***may not*** meet that standard when considering a merger between firms that already participate in the relevant market."[34]

III. Enhanced Scrutiny of Vertical Transactions and a Return to Long-Ago Abandoned Conglomerate Theories

The Guidelines represent a significant departure from the long-standing Agency positions that vertical mergers are less likely to present competitive issues than are horizontal mergers,[35] and that "the overwhelming majority of vertical mergers increase efficiency" with no clear relationship between market structure and likely competitive harm.[36] As the Guidelines acknowledge, vertical mergers can incentivize the combined firm to limit competitors' access to an input, if such an action would drive customers to switch to products made by the combined firm. However, vertical mergers commonly result in cost reductions and thus lower prices, because they allow the combined firm to insource inputs that were previously

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[29] *See, e.g.*, *FTC v. Meta Platforms Inc.*, 654 F.Supp. 3d 892, 927 (N.D. Cal. 2023) (requiring a probability of entry "noticeably greater than fifty percent").

[30] *See, e.g.*, *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 300 (4th Cir. 1977); *In re B.A.T. Indus., Ltd.*, No. 9135, 1984 WL 565384, at *10 (FTC Dec. 17, 1984). According to the FTC, "the Second and Fourth Circuits have adopted the 'clear proof' standard, the Fifth Circuit has adopted a variant of the 'reasonable probability' standard (i.e., 'persuasive rationale') which, in practice, is very close to the clear proof standard, and the Eighth Circuit has adopted the 'reasonable probability' standard." *In re B.A.T*., 1984 WL 565384, at *9. *But see* Reply Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Preliminary Injunction at 8-10, *FTC v. Steris Corp.*, No. 15-cv-01080-DAP, (N.D. Ohio 2015) (No. 1:15-CV-01080-DAP), ECF No. 70 (FTC arguing for a "probable" standard in its 2015 unsuccessful lawsuit to block the merger of Steris and Synergy).

[31] Guidelines, *supra* n.2, at 11.

[32] Koren W. Wong-Ervin & James Moore, *Acquisitions of potential competitors: The U.S. approach and calls for reform,* COMPETITION LAW & POLICY DEBATE, 6(2), 51-59, at 53 (Dec. 2020), https://www.elgaronline.com/view/journals/clpd/6-2/clpd.2020.02.07.xml.

[33] U.S. Dept. of Justice & the Fed. Trade Comm'n, Draft Merger Guidelines (July 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[34] Guidelines, *supra* n.2, at 12 (emphasis added)

[35] U.S. Dept. of Justice & the Fed. Trade Comm'n, Vertical Merger Guidelines at 2 (June 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf ("While the agencies more often encounter problematic horizontal mergers than problematic vertical mergers, vertical mergers are not invariably innocuous."); 1984 Merger Guidelines, Section 4.0 ("Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous.").

[36] "It is not necessarily the case that a vertical merger poses greater risk of competitive harm the greater is the market power of each merging party. This counsels that great care be taken when analyzing vertical mergers." *Vertical Mergers* 2007, OECD Policy Roundtables, DAF/COMP(2007)21, (Nov. 12, 2007), https://www.oecd.org/competition/mergers/39891031.pdf.

purchased from external sources at a markup. As economic theory indicates[37] and empirical results confirm,[38] the net effect of a vertical merger on price can be positive or negative, with no clear link between market structure and outcomes.

The Guidelines also more explicitly group conglomerate mergers and mergers involving complements with vertical mergers than do previous guidelines. As a matter of economics, mergers of complements present essentially the same issues as do vertical mergers. Like vertical mergers, mergers combining demand-side complements may result in an incentive to limit competitors' access to products (as the Guidelines describe) and may incentivize price decreases as the combined firm internalizes the effect of greater sales of one firm's product on those of the other merging firm.[39] The final Guidelines make this similarity more explicit by deleting draft Guideline 6, which proposed structural criteria that would have applied to vertical, but not to conglomerate mergers. That said, the Guidelines go further and revive the long-abandoned "entrenchment" theory that conglomerate mergers may be anticompetitive if they risk "entrench[ing] or extend[ing] a dominant position" — a theory the Agencies have long (and as recently as 2020) disavowed.[40]

With respect to both vertical and conglomerate mergers, the Guidelines helpfully clarify language in the Draft Guidelines by explicitly requiring the "competitive significance" of any product whose access may be limited as a result of the merger, as we described in Section I. Such language is much more consistent with textbook foreclosure theories.[41]

Explicit Discussion of the Elimination of Double Marginalization ("EDM")

While the draft version was silent on EDM, the final document explicitly discusses it (in footnote 31). This is a material improvement, despite the Guidelines' mischaracterization of EDM as an "efficiency." EDM should not be treated as an efficiency, but rather an implication of the change in incentives caused by the merger. EDM is often a result of the same change in incentives that can lead to raising rivals' costs ("RRC") effects: the combined firm internalizing the effect of upstream prices on downstream profits. Moreover, the same information is used to evaluate both effects. As a practical matter, EDM is also potentially easier to establish than cost-saving efficiencies, since much of the evidence needed depends on pre-merger information rather than post-merger integration plans, which are often necessarily best guesses. EDM is a potential benefit of a vertical merger if the downstream firm currently pays a markup over its suppliers' costs.

The explicit recognition of EDM is also helpful in light of the recent (troubling) position in the DOJ's JELD-WEN amicus brief that EDM is "not relevant" when its effects would be realized in a downstream (output) market and the harm is alleged in an upstream (input) market.[42] Such an approach would seem to open the door to ignoring EDM entirely by alleging vertical harms in an upstream, rather than a downstream market, despite the interconnectedness of upstream and downstream outcomes in vertical

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[37] Gloria Sheu & Charles Taragin, *Simulating mergers in a vertical supply chain with bargaining,* THE RAND J. OF ECON., 52(3), 596-632 (Fall 2021), https://onlinelibrary.wiley.com/doi/abs/10.1111/1756-2171.12385.

[38] For a summary of the empirical literature, see Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ABA ANTITRUST SOURCE (Feb. 2019), https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/archived/2019/february/antitrust-analysis-vertical-mergers.pdf.

[39] For a further discussion of the economics of vertical and conglomerate mergers, see Sandford *et al., supra* note 15.

[40] *Conglomerate effect of mergers – Note by the United States,* OECD (Organisation for Economic Co-Operation and Development), DAF/COMP/WE(2020)7 at 5 (June 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf ("Conglomerate mergers that raise neither vertical nor horizontal concerns are unlikely to be problematic under U.S. merger law.").

[41] *E.g.*, Michael A. Salinger, *Vertical Mergers and Market Foreclosure,* THE Q.J. OF ECONOMICS, 103(2), 345-356 (1988); Choi, Jay Pil, *Mergers with Bundling in Complementary Markets,* THE J. OF IND. ECON., 56(3), 553-577 (2008); Nicholas Economides & Steven C. Salop, *Competition and Integration Among Complements, and Network Market Structure,* THE J. OF IND. ECON., 40(1), 105-123, (1992).

[42] Statement of Interest of the United States, *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-Cv-00545-REP (E. D. Va. May 9, 2022), ECF No. 2265.

models. Such an approach would appear to be inconsistent with the DOJ's own approach in AT&T/Time Warner, in which the DOJ weighed forecasted downstream harm against EDM, rather than focusing only on upstream foreclosure. Principled antitrust analysis should not support ignoring consumer benefits on the technicality that they occur downstream of forecasted harms from foreclosure (Section IV, below, discusses the treatment of cross-group effects more generally).

Footnote 31 explains that the Agencies will "examine whether elimination of double marginalization satisfies the approach to evaluating procompetitive efficiencies in Section 3.3, including examining" the following three factors.

The first factor is "whether the merged firm will be more integrated as a result of the merger, for example because it increases the extent to which it uses internal production of an input when producing output for the relevant market." If, pre-merger, the downstream firm sources its inputs from the merging partner, then this prong should be easily satisfied. If sourced elsewhere, then it will be important to have evidence as to the substitutability in the downstream firm's processes of the merger partner's inputs for those of the current supplier.

The second factor is "whether contracts short of a merger have eliminated or could eliminate double marginalization such that it would not be merger-specific." Here, evidence on whether the downstream firm currently pays a markup will be important (and answerable using party data). If so, this is good evidence that contracting around EDM would be difficult enough as to be unlikely. It is also worth noting that "achieving EDM (and other efficiencies) through contracting presents challenges given the costly process of forming, administering, and enforcing contracts with independent suppliers."[43] As former Obama Administration FTC Chief Economist Francine Lafontaine has explained, evidence shows that alternative means of implementing EDM via contract (quantity forcing and two-part tariffs) "do not easily generate the same outcome as what a vertical merger could do because of demand uncertainty, risk aversion, information asymmetries, all sort of incentive problems."[44]

The third factor is "[w]hether the merged firm has the incentive to reduce price[] given that such a reduction would reduce sales by the merged firm's rivals." This relates to an observation, noted by Chen (2001),[45] that additional downstream sales (at zero upstream margin), may come at the expense of (positive margin) upstream sales to rival firms, which may mute the merged firm's incentives to lower its downstream price. This "opportunity cost" of downstream sales may incentivize the merged firm to increase the downstream price, thus muting the procompetitive effect of EDM. As Professor Steve Salop puts it, "such a price reduction would reduce the sales of the merged firm's rivals in the relevant market and thereby reduce the input profits of the upstream merging firm, ceteris paribus."[46] Salop also notes that Section 2.3 could be read to add an "additional impediment to pass-through from the merged firm anticipating price reductions by rivals in the downstream market in response to its own price reduction."[47]

The potential for the Chen effect to lessen the benefit of EDM is uncontroversial as a matter of economics, and indeed this mechanism appeared in the 2020 Draft Vertical Merger

[43] Koren W. Wong-Ervin, *U.S. Vertical Merger Guidelines: Recommendations and Thoughts on EDM and Merger Specificity,* Competition Policy Int'l (Jan. 22, 2020), https://www.pymnts.com/cpi_posts/u-s-vertical-merger-guidelines-recommendations-and-thoughts-on-edm-and-merger-specificity/.

[44] Transcript of "Competition and Consumer Protection in the 21st Century," Federal Trade Commission, Georgetown University School of Law, (Nov. 1, 2018), https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf. Note that both quantity forcing and two-part tariffs involve lump sum payments from buyers to sellers in exchange for a lower unit cost. In textbook economics models with full information and no contracting costs, such contracts can result in EDM.

[45] Yongmin Chen, *On Vertical Mergers and Their Competitive Effects*, THE RAND J. OF ECON., 32(4), 667, 668 (2001).

[46] Steven Salop, *Assessing the Advances Made on Vertical Mergers in the Final Merger Guidelines,* Promarket (Dec. 20, 2023), https://www.promarket.org/2023/12/20/assessing-the-advances-made-on-vertical-mergers-in-the-final-merger-guidelines/.

[47] *Id.*

Guidelines.[48] However, while the Chen effect can mute the price-reducing incentive of EDM, it should not be expected to eliminate it. For this reason, the Chen effect would typically only be important to weighing the net effect of EDM and RRC effects, and not to the cognizability of EDM as a procompetitive effect. Accounting for the Chen effect requires relatively sophisticated economic modeling. It is heartening that the agencies are explicitly calling for such modeling in the guidelines, as they would presumably not do so if uninterested in the answer.

As the Guidelines describe, EDM is not an inevitable consequence of a vertical merger, and it is appropriate for the Agencies to assess the significance of both price-decreasing EDM effects and price-increasing RRC effects on a case-by-case basis. This assessment should be guided by the overarching principle that merged firms will act so as to maximize firm-wide profits; at any rate, EDM and RRC likely require similar levels of firm-wide coordination, so if the coordination needed to implement EDM were thought to be prohibitively difficult, the likelihood that the coordination required to implement RRC could be achieved should be scrutinized.

Further, as explained by Wong-Ervin (2020), the economics literature finds that conditions likely to give rise to anticompetitive RRC effects are commonly those also likely to give rise to EDM; put simply, in mergers likely to result in EDM, significant RRC should be seen as making high EDM more likely, as "[t]he factors determining EDM also determine the extent of RRC."[49] Indeed, EDM arises from the same incentives as does RRC (internalizing the effect of upstream prices on downstream profits) and the same information is often used to evaluate both effects.[50] At bottom, "the effects on downstream prices cannot be predicted without also calculating the benefits from EDM."[51] In our view, given that EDM and RRC effects arise from the same change in incentives, EDM should not be analyzed as an efficiency, but rather as a competitive effect of the merger. As a further indication of the linkage between EDM and RRC, because EDM can depress demand for rivals' products and thus incentivize lower rival prices, the combined effect of EDM and RRC can cause rivals' prices to be higher or lower, depending on specific circumstances.

Some, including FTC Bureau of Economics Director Aviv Nevo, have expressed skepticism that EDM is likely to result from vertical mergers outside of the special case of linear pricing, i.e., units sold at a fixed per-unit price.[52] As a matter of economics, pre-merger nonlinear contracts—i.e., contracts that include lump-sum payments, quantity discounts, minimum quantities, or other variations in price—can eliminate some, none, or all of the double margin that results from the external purchase of inputs under linear pricing. Thus, a merger involving two firms who trade using nonlinear contracts should be scrutinized based on the specific features of the contracts to determine the likely extent of EDM. As Dennis Carlton et al. (2019) put it, "most vertical models," including the DOJ's in AT&T/Time Warner, automatically generate the efficiency

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[48] U.S. Dept. of Justice & the Fed. Trade Comm'n, Draft Vertical Merger Guidelines (Jan. 10, 2020), Section 6, https://www.justice.gov/opa/press-release/file/1233741/download (the final 2020 Vertical Merger Guidelines deleted the standalone EDM section and, with it, the language describing the Chen effect).

[49] Koren W. Wong-Ervin, *U.S. Vertical Merger Guidelines: Recommendations and Thoughts on EDM and Merger Specificity,* Competition Policy Int'l (Jan. 22, 2020), https://www.pymnts.com/cpi_posts/u-s-vertical-merger-guidelines-recommendations-and-thoughts-on-edm-and-merger-specificity/ [hereinafter "Wong-Ervin, VM Guidelines"].

[50] For an overview of the economics of EDM and RRC, see Sandford *et al*., *supra* note 15 at Section III.

[51] Wong-Ervin, VM Guidelines, *supra* note 49, at 2.

[52] Transcript of Aviv Nevo's remarks 10th Bill Kovacic Antitrust Salon, George Washington University, Concurrences Antitrust Publications and Events, (Sept. 12, 2022) at 32, https://www.concurrences.com/IMG/pdf/gwu_2022_-_transcript.pdf?101524/bde0a399effc366fae3f2b6e369f15ad35253d3332d5fcb755857f8edaf4fb06 (Nevo: "There is a model, a simple model, of linear posted pricing in which there is a built-in efficiency of eliminating double marginalization, but that's a particular model. If you go to other models that allow for nonlinear contracts, that efficiency disappears. You know what doesn't disappear? The potential harm of raising rivals' costs and foreclosure. That survives different models. The elimination of double marginalization does not always survive. So then it becomes fact-specific."); *see also* Kostis Hatzitaskos *et al.*, Comments on the January 2020 Draft Vertical Merger Guidelines, U.S. Dept. of Justice & the Fed. Trade Comm'n (Feb. 19, 2020), at 18, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg13_hatzitaskos_majure_mcdowall_nevo_comment.pdf.

effect of EDM when analyzing anticompetitive effects, i.e., EDM is inherent to the model.[53]

Further, it is uncommon for non-vertically integrated firms to fully align their incentives; the economics literature indicates that the contracting required to do so can be quite difficult.[54] A long literature demonstrates the limits of contracts and benefits of integration that are unavailable from contracts.[55] Put simply, non-linear pricing is insufficient to dismiss EDM. At any rate, linear pricing between vertically-separated firms is common, and the Agencies will appropriately be less skeptical of EDM when analyzing mergers involving firms under such contracts.

IV. Efficiencies & Cross-Group Effects

While the Agencies have been reluctant to acknowledge efficiencies under past guidelines,[56] the new Guidelines appear to set even higher standards with regard to both merger specificity and verifiability. The Agencies have long urged courts not to consider parties' claimed efficiencies in Section 7 cases, arguing that efficiencies are not explicitly recognized under the law as a proper defense to an otherwise unlawful transaction. While courts have not accepted those invitations, they generally require that claimed efficiencies be both merger-specific and verifiable.

Other changes in the Guidelines may increase the importance of efficiencies analyses. For instance, efficiencies evidence may be more likely to be pivotal in cases involving low concentration thresholds or projected harms. The Biden Agencies' greater reliance on market structure, coupled with their willingness to challenge mergers even when the alleged harm is less significant than in prior challenges means that even a small amount of cognizable efficiencies could be sufficient to demonstrate the lack of an overall anticompetitive effect.

Merger Specificity and Verifiability

First, while the 2010 Guidelines defined a "merger-specific" efficiency as "one likely to be accomplished with the proposed merger and unlikely to be accomplished" absent the merger, the new Guidelines consider only those efficiencies that could not be achieved without the merger, including by contract, by other mergers, or by organic growth. This is a very high standard. A fundamental result in economics is that contracts can implement any efficient outcome given low enough transaction costs and symmetric information.[57] Further, the Guidelines' language would appear to disqualify efficiencies resulting from a merger of Firm A with *either* Firms B or C, given that in either case there would exist a different merger that would result in the same efficiency.[58] Finally, "organic growth" could, in theory, accomplish virtually any outcome given a long enough time horizon.

Second, the Guidelines signal greater skepticism towards evidence verifying efficiencies than did prior Guidelines, stating that efficiencies "are often speculative" and "often are not realized."[59] As others have noted, the stringent criteria for verifiability of efficiencies may disincentivize some parties

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[53] Dennis W. Carlton *et al.*, *Lessons from AT&T/Time Warner*, ANTITRUST CHRONICLE, 1(2), 9-13, at 12 (July 11, 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/07/AC_July_2.pdf.

[54] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence,* J. OF ECON. LITERATURE, 45(3), (2007).

[55] For a summary of the literature, see Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ABA Antitrust Source at 8 (Feb. 2019), https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/archived/2019/february/antitrust-analysis-vertical-mergers.pdf; *see also* Roger D. Blair *et al.*, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 GEO MASON L. REV. 761, 773-782 (2020). The economics literature summarized here indicates there can be substantial procompetitive benefits from vertical integration aside from EDM. These other benefits come from the alignment of incentives resulting from a vertical merger and are analyzed under Section 3.3. of the Guidelines.

[56] Christine S. Wilson, Commissioner, Fed. Trade Comm'n, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, Bates White Antitrust Webinar "The Other Side of the Coin: Proper Evaluation of Efficiencies in Merger Analysis" (June 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf [hereinafter "Wilson Speech"].

[57] Ronald H. Coase, *The Problem of Social Cost,* THE J. OF LAW & ECON., 3, 1-44 (Oct. 1960).

[58] Mark A. Israel *et al.*, *Guidelines Lacking Guidance: Improving the FTC/DOJ Draft Merger Guidelines,* (Sept. 18, 2023).

[59] Guidelines, *supra* n.2, at 33.

from conducting effective efficiencies analyses.[60] This is unfortunate. Despite these stringent criteria for verifiability and merger specificity, there remain opportunities for merging parties to present credible evidence of efficiencies that would result from a transaction. From our experiences working for and against the Agencies, low-quality evidence on efficiencies is usually ignored by both courts and the Agencies, but careful analyses drawing on both parties' data are often taken seriously.

To verify efficiencies, the Agencies strongly prefer "bottom up" ordinary course evidence as to efficiencies, as opposed to "top down" analyses done as part of a pre-merger analysis or valuation. Unfortunately, such a "bottom up" analysis is often difficult as a practical matter; targets may not wish to (and frequently do not) provide granular information on costs, and concerns about gun-jumping may further limit the sharing of information between the merging parties. Thus, merging parties often present high-level analyses of potential efficiencies, often based on limited information from the target, such as aggregated profit and loss statements. Unfortunately, such analyses rarely meet the high standards of Agencies and courts.

Generating Persuasive Evidence of Efficiencies

To generate high-quality evidence verifying efficiencies, merging parties should establish a clean team with access to both parties' data, and with cumulative knowledge of both parties' business practices. Such a clean team will be able to identify complementarities in assets that, when combined, will result in lower marginal costs or additional innovation. Much—if not all—of these synergies (and the prospects for their resulting in reduced prices) will be found in ordinary course documents with the role of the clean team to spin out the details and add verifiable quantification. Additionally, it is often useful to have a separate efficiencies expert, in addition to an expert IO economist. While an IO economist will be able to explain the implications of efficiencies evidence for competition and consumer welfare, the efficiencies expert will typically have knowledge both of accounting and the specific industry in which the merging firms compete, and will be able to leverage the merging parties' data and documents to identify and explain the potential for the transaction to lower the combined firm's marginal costs. As with all experts, it is important to find an efficiencies expert that understands the level of detail needed in an expert report, which in our experiences greatly exceeds that of the high-level projections of management consulting firms that are sometimes used for initial deal evaluations.[61]

Both an efficiencies expert and an expert economist may also help to analyze the merger specificity of likely efficiencies. For instance, the economics literature emphasizes that, in practice, transaction costs can be quite large, limiting the efficiencies that can be achieved via contract alone.[62] Experts can interpret this literature and apply it to identified efficiencies to assess the likelihood that the efficiencies could be implemented via contract. Experts can also explain to Agencies and courts the limits of alternative mergers or of organic growth as means to realize tangible efficiencies likely to result from a given merger. Experts can also help to analyze any efficiencies realized following past transactions involving the merging parties; in our experience, evidence of the successful realization of past efficiencies is

[60] Wilson Speech, *supra* note 56.

[61] One recent decision to be aware of is the D.C. District Court's midtrial order in the Penguin Random House case in which the court excluded the merging parties' evidence of predicted cost savings, reasoning that the efficiencies projections forming the basis of the expert's opinion were not verifiable, emphasizing that none of the projections had been independently verified. While the decision is an outlier with most courts allowing the full presentation of efficiencies evidence at trial before determining credibility, it nonetheless underscores the importance of verifying the cognizability of cost savings that are meaningful compared with the alleged harm. Judgment in a Civil Action (ECF No. 193) and Order (ECF 191), *United States v. Bertelsmann SE & Co. KGaA.*, No. 1:21-cv-02886-FYP, (D.D.C. Nov. 2, 2021 (ECF 193) and Oct. 31, 2021 (ECF No. 191).

[62] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence,* J. of Econ. Literature 45(3), 629-685 (Sept. 2007), Ronald H. Coase, *The Nature of the Firm, in* Essential Readings in Economics, pp. 37-54 (Estrin, S., Marin, A. eds., 1995); Ronald H. Coase, *Economica, New Series, Vol. IV (1937), pp. 386–405, reprinted at* https://link.springer.com/chapter/10.1007/978-1-349-24002-9_3.

particularly likely to be persuasive to the Agencies.

To more productively engage the Agencies and courts in efficiency analyses, it is important to be mindful of the overall impact of efficiencies arguments, particularly when they mean loss of jobs. Although U.S. antitrust law does not allow for the consideration of these broader "public interest" effects, we have found that the optics of how efficiencies are presented, particularly with regard to their effect on employees and other individuals, can make a difference as to how they are received. Second, it is important to frame efficiencies as positive business rationales for a deal. The Agencies tend to characterize any statement regarding efficiencies as a "defense," which imposes higher burdens of proof on merging parties, and can tilt the litigation balance toward the government.

Changes from the Draft Merger Guidelines and From Previous Guidelines

Finally, some changes in the Guidelines, both relative to the Draft Guidelines and to previous Guidelines, may increase the salience of efficiencies analyses. The current DOJ and FTC leadership's heavy reliance on presumptions of harm, coupled with their apparent willingness to challenge mergers even when the alleged harm is less significant than in prior challenges, means that even a small amount of cognizable efficiencies could be sufficient to demonstrate the lack of an overall anticompetitive effect. Courts have explained that efficiencies are to be understood on a sliding scale with "[t]he magnitude of the efficiencies needed to overcome a prima facie case depend[ing] on the strength of the likely adverse competitive effects of a merger."[63] In mergers involving low concentration levels or forecasted harms, even a partial accounting of efficiencies may be more likely to suffice to overcome forecast price effects.

Further, relative to the Draft Guidelines, the final document makes two moderating changes. The final document removes a prohibition on efficiencies that "accelerate a trend toward concentration," which would have seemed to implicate *most* efficiencies (since, by definition, efficiencies involve merging firms becoming more effective competitors). This change makes it more likely that the Agencies will be receptive to arguments that consumers would benefit from a transaction, even if competitors were diminished. Further, the final document requires that any efficiencies be "not anticompetitive" as opposed to "procompetitive" with regard to markets for inputs, including labor.

Cross-Group Effects or "Out-of-Market" Efficiencies

The Guidelines state that the Agencies "will not credit . . . benefits outside the relevant market that would not prevent a lessening of competition in the relevant market."[64] While the Agencies are unlikely to be persuaded otherwise, one argument for litigation is to point to Supreme Court precedent under the Sherman Act explicitly allowing for the consideration of cross-group effects. Two such decisions relied upon in the Guidelines (although for different principles) are *NCAA v. Board of Regents of Univ. of Okla*.[65] and *NCAA v. Alston*.[66]

In *Board of Regents*, the Supreme Court established that cross-market comparisons vertically along the same supply chain are permissible. In *Alston*, the Court considered the NCAA's defense that its restriction on education-related benefits to student athletes was justified because it promoted downstream output demand since final consumers value a notion of "amateurism." While the Court ultimately rejected the defense as largely

[63] *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176-77 (3d Cir. 2022).

[64] Guidelines, *supra* n.2, at 32. This is a departure from prior guidelines, particularly the 2010 Horizontal Merger Guidelines, stating that "[i]n some case, … the Agencies, in their prosecutorial discretion will consider efficiencies 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)." U.S. Dept. of Justice & the Fed. Trade Comm'n, Horizontal Merger Guidelines at 30 n.14 (Aug. 19, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf; *see also* 1992 and 1997 Horizontal Merger Guidelines.

[65] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

[66] *Nat'l Collegiate Athletic Ass'n v. Shawne Alston, et al.*,141 S. Ct. 2141, 2147 (2021).

unquantifiable and likely marginal, the Court's consideration is in line with the relevant efficiencies approach since there are clear interdependencies between labor and output markets. This is important as a matter of economics given that conduct that may impact upstream labor markets can also impact downstream output markets. As such, the totality of the effects must examine both markets. Similarly, the Third Circuit in *Muko v. Southwestern Pennsylvania Building & Construction Trades Council*[67] and the First Circuit in *Sullivan v. NFL* [68] concluded that policies that impact upstream input markets (the use of unionized labor and NFL ownership, respectively) should be assessed jointly with the effects on the downstream output market (fast food restaurants and NFL games, respectively).

As former long-time FTC economist John Yun has explained, "[t]he point is not that these effects always matter or necessarily legitimize an illegitimate practice. Instead, the principle is that downstream effects may be material to understand the rationale for a practice. … Upstream and downstream markets are on the same supply chain, which is a classic example of interdependency."[69] The primary objective of antitrust inquiries is to understand, first and foremost, the nature and impact of business conduct on welfare. "Doctrinally eliminating all output market considerations when examining labor market concerns results in a fundamentally incomplete analysis."[70]

One additional point is that the Agencies' reliance on older cases to reject cross market effects ignores that "the practice of market delineation was quite different" at that time.[71] As former long-time DOJ economist Greg Werden has explained, prior to the 1970s, "all of the merging firms' products sharing a common production process often were placed in the same relevant market on the basis that they were good substitutes in supply. All procompetitive benefits from merger-related cost savings affecting that production process, then, arose in the relevant market."[72] In contrast, today, "products from a single production process typically are sorted into multiple relevant markets," such that "cost savings affecting the entire production process are viewed as generating competitive benefits in many distinct markets, with only a small portion in the relevant market."[73]

V. Expanded Labor Market Theories

Guideline 10 outlines factors considered in assessing whether a merger would reduce competition for labor, with potential effects including "lower wages or slow wage growth, worse[] benefits or working conditions, or []other degradations of workplace quality."[74] The Guidelines state that for mergers which harm sellers, the "loss of competition is not offset by purported benefits in a separate downstream product market."[75] The Guidelines also state that "[t]he level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets. In light of their characteristics, labor markets can be relatively narrow."[76]

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[67] 670 F.2d 421 (3d Cir. 1982).

[68] 34 F.3d 1091 (1st Cir. 1994).

[69] John M. Yun, *Reevaluating Out-of-Market Efficiencies in Antitrust* at 49 (Sept. 2022) (explaining a "crucial difference" between the Court's consideration of efficiencies in *Board of Regents* versus its 1963 decision in *Philadelphia National Bank* (PNB): "The cross-market comparison in PNB was horizontal—across final consumer groups, while the cross-market comparison in Board of Regents was vertical—across groups within the same supply chain. A possible take-away is that the out-of-market efficiencies principle from PNB is not strictly about different relevant markets per se but rather different relevant markets that ultimately impact a different set of final consumers. Disallowing cross-market comparisons along the same supply chain would render most vertical control analyses moot (e.g., resale price maintenance, tying, exclusivity)."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233360.

[70] *Id.* at 50.

[71] Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, THE J. OF CORP. LAW, 43(1), 119-141, 122 (2017).

[72] *Id.*

[73] *Id.*

[74] Guidelines, *supra* n.2, at 26.

[75] *Id.* at 27.

[76] *Id*.

Comparing and Contrasting Labor Market Harms With Product Market Harms

The Guidelines claim that labor markets are distinguished from product markets in that they "frequently have characteristics [such as high switching cost, search frictions, and geographic and work scope limitations] that can exacerbate the competitive effects of a merger between competing employers."[77] We are unaware of robust support in the economics literature for a claim that labor markets have greater frictions than do product markets, nor for a conclusion that labor markets are particularly likely to be harmed by mergers. For instance, while there is a growing recent literature on the relationship between labor market concentration and wages, data limitations limit the robustness of any causal link between labor market concentration and wages.[78]

While labor markets can be analyzed using the same tools and concepts as product markets, mergers implicating labor markets may present a different mix of antitrust issues than do those implicating product markets. For example, in many product markets, there may be relatively few alternatives on the buyer side, while many labor markets studies show substitution is incredibly diffuse. Employer data often shows no more than 5% of employees switching to any one firm, with some staying in the industry, others going to different industries, or even changing occupations.[79] Of course, this may depend upon geography—there are relevant empirical questions as to whether employees in small towns may have fewer options for employment as compared to those in large cities, or may face greater search frictions. Finally, it is possible that employees are subject to additional frictions which do not apply to product markets, if, for instance, employees are penalized for changing jobs frequently by employers who prioritize stability.

While increased bargaining power theories have been adopted on the sell-side, the cases that have gone forward are those in which bargaining is over linear prices, so that a higher price reduces output and creates deadweight loss. Some academics and commentators have also pointed to possible dynamic harms. For example, low wages for nurses may lead to fewer people going to nursing school, which could ultimately harm end consumers. This makes sense, yet also works the other way. The pursuit of profits from market power can stimulate investment, yet we don't credit that. And if we define the competitive price right, it includes the cost of capital, which means it builds in enough return to motivate investments (including investments of time such as attending nursing school). Regardless, the "buy and sell side are not entirely symmetric. If increased buyer bargaining power lowers the margin cost of production, that could result in both harm to workers and increased output and lower prices for consumers."[80]

Distinguishing Efficiencies From Labor Market Harms

Measuring labor market harms is complicated by the fact that efficiencies—which allow a firm to produce more output with fewer inputs—result in merging firms employing fewer individuals while producing greater output, thereby reducing the welfare of employees while increasing consumer welfare. In contrast, a merger that results in increased monopsony power (but no efficiencies) may result in fewer individuals employed and *lower* output, since with no change in productive efficiency a firm

[77] *Id.* For a discussion of whether labor markets are "special," see Transcript of Koren W. Wong-Ervin Remarks at the 7th edition of "Global Antitrust Economics Conference" organized by Concurrences and NYU Stern at 3-5 (Dec. 8, 2022), https://www.concurrences.com/en/events/global-antitrust-economics-108781 [hereinafter "Transcript of Wong-Ervin Remarks"].

[78] A few papers find that more concentrated labor markets are correlated with lower wages. *E.g.*, Efraim Benmelech *et al*., *Strong Employer and Weak Employees – How Does Employer Concentration Effect Wages?,* J. OF HUMAN RESOURCES, 57(5), S200-S250, (Apr. 1, 2022); José Azar *et al.*, *Concentration in US labor markets: Evidence from online vacancy data,* LABOUR ECON., (66), (Oct. 2020). While such a finding is well worth further study, these papers by themselves form an insufficient basis to materially reallocate antitrust resources toward labor market harms (for instance, data limitations require them to depend on crudely constructed local labor "markets."

[79] *See, e.g.,* Rakesh Kochhar *et al*., *Majority of U.S. Workers Changing Jobs Are Seeing Real Wage Gains,* Pew Research Center, (July 28, 2022), https://www.pewresearch.org/social-trends/2022/07/28/majority-of-u-s-workers-changing-jobs-are-seeing-real-wage-gains/. We note that for some occupations (e.g., nurses), large employers may account for a higher share of job switches.

[80] Transcript of Wong-Ervin Remarks, *supra* n.77, at 12.

using fewer inputs will produce fewer outputs.[81] For this reason, empirically distinguishing between labor market harms resulting from efficiencies and those resulting from monopsony power is fraught, since both reduce employment. To analyze the effects of a merger that combines buyers (including employers), merging parties should analyze the likely *output* effects of a merger; if output is likely to increase, a reduction in employment is likely efficient, while the opposite is true if output is likely to decrease.

When prices of inputs (including labor) are set via bargaining, analysis of mergers that confer greater buyer-side market power is further complicated because such mergers may not affect output at all; instead, they may transfer surplus from sellers to buyers, with no change in the quantity of inputs used or output produced. If such a transfer results from sellers having fewer options, the Guidelines describe it as an anticompetitive harm. As Carlton and Israel (2011) explain, mergers of buyers can also, as a matter of economic theory, transfer surplus from sellers to buyers for procompetitive reasons.[82]

Assessing the Risk of Labor Market Harms in Future Deals

Going forward, mergers are most likely to implicate labor market theories when they involve firms that both employ workers with specialized skills (such as authors, doctors, nurses, or engineers) in the same geographic location. To assess the risk from such theories, merging parties should investigate the extent to which they overlap in the hiring of such workers. Such an assessment could include ordinary course data and documents tracking employee hiring, departures, and matched offers. Theories involving labor markets are likely to be viable only in the (presumably rare) circumstances in which one firm accounts for a significant share of the other's hires or departures.

As a practical matter, Agency Second Requests have included labor market specifications for years, yet the agencies have brought relatively few merger cases alleging labor market harms. This is most likely either because most labor markets are relatively unconcentrated, or because labor market harms are most likely to arise in cases with product market harms, in which case a labor market theory of harm offers little apparent incremental value.[83]

VI. "Roll Up" Strategies Involving a Series of Acquisitions

Guideline 8 states that, when "an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of a pattern or strategy" (even if no single transaction on its own would be unlawful).[84] Such conduct may violate Section 7 of the Clayton Act, as well as Section 2 of the Sherman Act, and Section 5 of the FTC Act.

This is another area in which the Agencies are unlikely to be persuaded otherwise yet strong arguments remain for litigation. The D.C. Circuit in *State of NY et al. v. Meta Platforms* recently rejected the States' argument that the Instagram and WhatsApp acquisitions remain "subject to challenge now" because they are part of a "course of conduct [that] remains ongoing," endorsing the district court's reasoning.[85] While the holding related to statute-of-limitations arguments, both the D.C. Circuit and lower court decisions rely on an article by Judge Douglas Ginsburg & Koren Wong-Ervin in which the authors explain that: "relying upon a course of conduct theory to say that two innocuous

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[81] *See* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2087 (2018).

[82] Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, REV. OF IND. ORG., 39(1/2), 127-136, (Aug. 2011) (considering mergers that allow the combined firm, but not either merging firm individually, to negotiate an optimal non-linear pricing schedule).

[83] For instance, Nancy Rose observed that mergers found to materially increase the concentration of employers for nurses were also those likely to result in large increases in product market concentration, so "we don't need to allege labor market harm if we're blocking a merger because of product market harm, which courts are more familiar with." Transcript of "Competition and Consumer Protection in the 21st Century," Fed. Trade Comm'n, Georgetown University School of Law at 56 (Oct. 16, 2018), https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18_1.pdf.

[84] Guidelines, *supra* n.2, at 3.

[85] *State of N.Y. v. Meta Platforms, Inc.*, 66 F.4th 288, 300 n.13 (D.C. Cir. 2023).

mergers add to one problematic merger is, at best, a misuse of the theory …. A proper enforcement action would seek to block—or, if consummated, to undo—the last merger in the series that tipped the market into undue monopoly power."[86] A number of other circuits have also "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act."[87]

The economics literature does offer some support for industry roll-ups resulting in harm to consumers (e.g., Wollmann, 2020),[88] and it may be appropriate for the Agencies to investigate such roll-ups, particularly if they combine *de minimis* harmful effects from individual mergers to result in material aggregate harm. However, the circumstances in which past acquisitions are relevant to the analysis of a current acquisition are presumably rare and, in general, 0+0 should not equal 1, meaning that the legality of a transaction should not typically depend on whether or not the parties have acquired other firms in the past (outside of perhaps acquiring all the stock of a company's sole rival one share at a time), or on whether those past transactions did not result in harm to consumers. Indeed, evidence as to the price effects and efficiencies that resulted from past mergers involving the merging parties or their market rivals can be particularly persuasive in assessing current mergers, and such evidence should be presented to the Agencies when available.

VII. Concluding Thoughts

While many of the approaches taken in the Guidelines create significant challenges for merging parties, they do indicate that engagement with Agency staff and leadership about relevant factual, legal, and economic principles is likely to continue to be worthwhile. Even if the Agencies take a more expansive view of the law, many of the economic principles are to a large extent carried over from prior guidelines, despite being diluted with legal commentary. To the extent that the Guidelines summarize core economic principles, courts may continue to look to them as helpful tools. That said, the Guidelines' heavy reliance on older caselaw and assertions that lack support from the economics literature may undermine judicial acceptance of the entire document. Courts have long stated that they owe "no particular deference"[89] to Agency guidelines, instead noting the prior guidelines' consistency with modern caselaw and "mainstream economic thinking."[90] This suggests a lower likelihood that courts will adopt approaches (such as lower market structure thresholds) that depart from modern judicial precedent, particularly in the absence of robust economic evidence to justify the change in approach.

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[86] Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2* at 7, Competition Policy Int'l (May 25, 2020), https://www.pymnts.com/cpi_posts/challenging-consummated-mergers-under-section-2-2/ (citing Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663-664, 663 (2010)); *see also generally* Andrew I. Gavil *et al*., Antitrust Law In Perspective: Cases, Concepts And Problems In Competition Policy 648 (3d ed. 2017).

[87] *Intergraph Corp. v. Intel Corp.,* 195 F.3d 1346, 1367 (Fed. Cir. 1999); *see also City of Groton v. Conn. Light & Power,* 662 F.2d 921, 928 (2nd Cir. 1981) ("Even though many of the issues the [plaintiffs] raise are interrelated and interdependent, however, we must . . . analyze the various issues individually.").

[88] Thomas G. Wollmann, *How to Get Away with Merger: Stealth Consolidation and its Effects on US Healthcare,* Nat'l Bureau Econ. Research, Working Paper 27274, (Issue Date May 2020, Revision Date July 2021), https://www.nber.org/papers/w27274.

[89] *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) ("Although . . . the court is not bound by, and owes no particular deference to, the [Merger] Guidelines, this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent").

[90] *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 n.6 (W.D. Ark. 1995) ("It is well-recognized that the Merger Guidelines do not have the force of law, but many courts still cite them, and the expert testimony in this case shows that they represent mainstream economic thinking."); *FTC v. H.J. Heinz Corp.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) (noting that "most economists consider the [Merger Guidelines' HHI] measure superior to such cruder measures"); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.C. Cir. 1998) ("While the Guidelines are not binding, they constitute the agencies' informed judgment on the area of their expertise. Accordingly, the courts turn to the Guidelines for assistance and over the years have come to accept the HHI as the most prominent and accurate method of measuring market concentration.").