The 2023 U.S. Merger Guidelines

A Review

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The Evolution (and Devolution) of Market Structure Reasoning

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I. Introduction

429. "The language of a nation," wrote F.L. Lucas, "like the land it lives by, needs constant cultivation and weeding."[1] Untended evolution was as likely to degrade language, in Lucas's experience, as it was to improve it. Lucas was specifically concerned with linguistic style, here, but his warning about the frailty of accomplishment was more general. "Such indeed is the common law of life," he groaned, "It is only too easy to go downhill. Oysters and barnacles once had heads."[2]

430. We may quibble whether crustacea really need our pity, but Lucas's broader point finds powerful application in decisional law, where clarity and grace are always as fleeting as a fact pattern, and where the downhill slide of one clumsily reasoned decision or policy statement can corrupt in an instant what took years of labor to develop. Untended evolution is particularly fraught for merger law, complex and fact specific as it is, and even more so for this law's reliance on market structure reasoning. Little in merger law can boast the tenure or pedigree of structural reasoning. And nothing is in greater need of weeding.

431. Since the late 1960s, U.S. federal antitrust agencies have enjoyed the opportunity, and tacit approval, to gently guide merger law along its evolutionary path in the form of published merger guidelines, statements, and revisions. The Agencies have contributed much to merger law in this way but have often trembled to prune it. As market structure reasoning has been allowed to grow more of less untended since 1968, decades of growth, overgrowth, and decay are now on display in the variety of structural inferences in the 2023 Merger Guidelines.[3] This chapter surveys the evolution and devolution of market structure reasoning in the Merger Guidelines, starting in 1968 and ending with the insights and errors of the 2023 update.

II. Four Evaluative Criteria

432. Because market structure reasoning spans seven decades and nearly as many schools of thought in the Merger Guidelines, we might start with some criteria that can be used to evaluate the quality of this reasoning over time. The following four propositions are dryly descriptive accounts of antitrust law, economics, and logical reasoning. They should not be contentious. They are, however, for various reasons, frequently forgotten and ignored.

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1 Frank L. Lucas, The Art of Writing Well 24 (3rd ed. 2012).

2 *Id.*; *see also* Frank L. Lucas, *Party of One*, Holiday, Mar. 1960, at 11 ("Languages evolve like species. They can degenerate; just as oysters and barnacles have lost their heads.").

3 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines* (2023) ("2023 Guidelines").

433. First, aside from the structural consequence of a merger itself – reallocating ownership of competitive assets from one firm to another – market structure and concentration information should not be treated as having direct significance in U.S. merger law. This follows from the plain language of the statutory standard. Section 7 of the Clayton Act proscribes mergers for their effects on competition, not their effects on concentration.[4] Changes in numbers of competitors, in market shares, and in concentration can all be relevant and important considerations – but only to the extent that they help us understand the competitive effects of mergers – not as ultimate objectives themselves.

434. The legal record on this point is not interestingly varied. True, some Warren Court opinions included strong language about market concentration. *Brown Shoe* embellished the text of Section 7 with the gloss that Congress hoped the statute would help maintain "fragmented industries and markets."[5] In *Von's Grocery*, the Court extended this embellishment to the Sherman Act,[6] and in *Philadelphia National Bank* it invoked "Congress' design in § 7 to prevent undue concentration"[7] as justifying heavy reliance on market structure evidence.[8] But these statements are outliers against decades of prior and subsequent statements, in both merger law and broader antitrust law, that show how market structure informs competitive effects, rather than constitutes it. Examples include the statement that markets should be defined in ways that help evaluate effects on competition,[9] that market shares should be assigned in ways that help predict effects on competition,[10] that market shares should be used to predict competitive dynamics and market power,[11] and that effects

4 Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2022)) (prohibiting mergers, "the effect [of which] may be substantially to lessen competition, or to tend to create a monopoly").

5 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

6 United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) ("Like the Sherman Act in 1890 … the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.").

7 United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

8 Conflation of concentration and competition was also a frequent occurrence. *E.g.*, United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966) ("Congress, in passing s 7 and in amending it … was concerned with arresting concentration in the American economy, whatever its cause."); United States v. Cont'l Can Co., 378 U.S. 441, 458 (1964) ("Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration.").

9 FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986) ("[T]he purpose of … inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition.")

10 United States v. Gen. Dynamics Corp., 415 U.S. 486, 503 (1974) (instructing that market shares should be computed to reflect firms' "probable future ability to compete"); *id.* at 510 (affirming the lower court's discretion to reject competitive effects inferences drawn from market share that were not "proper indicators of future ability to compete").

11 United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) ("The existence of [power to control prices or exclude competition] ordinarily *may be inferred* from the predominant share of the market." (emphasis added)); United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 (D.C. Cir. 1990) (treating market structure evidence as the basis of a burden shifting presumption that could be rebutted in many ways).

on competition, not formalistic line drawing, are the measure of illegality.[12] Even the Warren Court cases that exalted market structure considerations were quick to tether this reliance to economic consensus that increased concentration meant decreased competition.[13] In short, treating market structure as a predictor of competitive effects – not an end concern itself – reconciles merger practice with both the statutory standard and the broader corpus of antitrust law.

435. Second, market structure should not be treated as having economic or legal significance outside the context of a particular method of defining markets. This follows from the inescapable logic that the competitive effects of a merger are a consequence *of the merger*, not of the markets that happen to be used to evaluate the merger. A problematic merger is not rendered innocuous by an over-broad market; an innocuous merger is not made problematic by an excessively narrow market. Because the legal significance of market structure derives from its ability to predict the economic consequences of a merger, and because the predictive value of market structure evidence derives from the way that markets are defined,[14] market structure evidence cannot be interpreted independently of the way that markets are defined.

436. The logic of this proposition may be inescapable, but the lesson escapes many during times of strong and stable market definition practices. For the past forty years, relevant markets in merger cases have been defined using the Hypothetical Monopolist Test (HMT).[15] By construction, a HMT market identifies a scope of trade in which anticompetitive harm could occur as a result of extreme market concentration; this is the very definition of a valid HMT market.[16] Market shares in HMT markets thus have reliable economic and legal significance. But nothing prevents relevant markets from being defined by other tests, like *Brown Shoe*'s practical indicia test.[17] And when markets are defined by methods as vacuous as

12 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010) ("[W]e have long … eschewed … formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than … upon formalistic line drawing."); *see also* Lynn Diamond, *The US Supreme Court applies a functional test to determine whether joint venture activity triggers antitrust liability (American Needle/National Football League)*, e-Competitions May 2010, art. No. 32779.

13 *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 333 (1962) ("The market share which companies may control by merging is one of the most important factors to be considered *when determining the probable effects of the combination* on effective competition in the relevant market." (emphasis added)); United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) (defending reliance on market structure evidence as "fully consonant with economic theory" and asserting that the underlying structural inference was both "common ground among most economists" and "undoubtedly a premise of congressional reasoning about the antimerger statute").

14 *See* Sean P. Sullivan, *Modular Market Definition*, 55 UC Davis L. Rev. 1091, 1117–29 (2021) (describing the different purposes served by different ways of defining markets).

15 *See generally* David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 Antitrust L.J. 293 (2020); Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 Marq. L. Rev. 123 (1992).

16 *See infra* note 50 and accompanying text.

17 *Brown Shoe*, 370 U.S. at 325.

lists of practical indicia, nothing guarantees that market shares will have economic significance as predictors of market power or competitive effects.

437. Third, market structure evidence should be treated as having different significance for evaluating different competitive concerns – what David Glasner and I have referred to as the theory-dependence of market-based inferences.[18] It is convenient shorthand to say that merger law tries to prevent acquisitions from enhancing market power.[19] But market power takes different forms and arises from different sources. The relevance of market structure evidence is not that it tells us how a merger influences some platonic account called "market power." The relevance of market structure evidence is that it tells us specific things about each of several specific ways that a merger might allow firms to exercise certain types of market power.

438. As an example, take a merger of clothing stores in a city center. If competing clothing stores had previously been on the cusp of tacitly colluding on changes in price or terms of service, then the merger could be the thing that tips this market into collusion. Market structure can help to gauge the severity of this risk, since it is easier for a few independent competitors to tacitly collude than it is for many. But the same merger could raise other concerns. If the merging firms were two of three high-end clothing stores, then the merged firm might unilaterally raise its prices to exploit captive customers of the merging firms. Market shares in a high-end clothing market might give some guidance on how closely the merging firms compete, and thus how great this unilateral incentive might be. The important point is that the unilateral effects inference is different than the coordination inference – these are different types of market power in different relevant markets and are informed in different ways by different aspects of market structure.

439. Fourth, market structure evidence should not be treated as a reliable proxy, presumption, or safe harbor for evaluating competitive effects without theoretical or empirical justification for believing that it is probative of the effects in question. This requirement follows directly from the effects-based mandate of the statutory standard.[20] It is not excused by aspirations to reduce the costs or increase the predictability of merger review.[21] Ease and predictability are nothing to treasure if the easy and predictable results are also consistently wrong.

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18 Glasner & Sullivan, *supra* note 15, at 324–26.

19 *E.g.*, Fed. Trade Comm'n and U.S. Dep't. of Justice, *Horizontal Merger Guidelines* § 1 para. 5 (2010) ("2010 Guidelines") ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.").

20 *See supra* note 4 and accompanying text.

21 *E.g.*, 2023 Guidelines, *supra* note 3, at § 2.1 para. 2 ("In the Agencies' experience, [presuming harm from market structure] provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition."); Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines* § 2 para. 1 (1968) ("1968 Guidelines") (stating that restricting enforcement policy to "a limited number of structural factors … facilitates both enforcement decision-making and business planning").

440. This is not a demand for certainty in proof of effects or for precise quantification of predicted harm to competition. Merger law is still law and reasonable inferences can and should be drawn on less than sterling demonstrations of cause and effect. But even in the rough and tumble of litigation, *something* must be available to provide foundation for suggested structural inferences. Euphemistic retreat to unpublished agency "experience" is not enough.[22]

III. Evolution and Devolution

441. With these four evaluative criteria in mind, we can move efficiently through the development of market structure reasoning in the Merger Guidelines. There is no point in trying to tackle the difficult subject of structural reasoning in vertical merger analysis in this review. Even in the comparatively simple area of horizontal merger analysis, it soon becomes apparent that market structure reasoning is still wobbling about on unsure legs.

1. 1968 Merger Guidelines

442. The first Merger Guidelines staked a strong but not unfair position on the use of market structure in merger review. True, the weight these guidelines placed on market structure and changes in concentration is unmatched in any of the subsequent revisions. An opening statement aptly captures this focus: "the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition."[23] But the 1968 Guidelines were less interventionist and perhaps even less structural than they might have been. Then-prevalent economic thinking and recent merger decisions would have justified extreme deference to market structure and hostility to even small increases in market concentration. Measured by this context, the 1968 Guidelines roamed safely within the boundaries of what surrounding circumstances allowed.[24]

443. Starting with the economic context, the structuralism of the 1968 Merger Guidelines was supported by widespread acceptance of the (now maligned) Structure–Conduct–Performance (SCP) paradigm. In the typical modern recounting, the SCP paradigm drew a strong and simplistic inverse relationship between market concentration and economic performance.[25]

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22 *E.g.*, 2023 Guidelines, *supra* note 3, at § 2.1 para. 2; *id.* at para. 4 n.14; 2010 Guidelines, *supra* note 19, at § 5.3 para. 6.

23 1968 Guidelines, *supra* note 21, at § 2 para. 1; *see also id.* at § 4 para. 1 ("[E]nforcement activity … has the following interrelated purposes: … (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.").

24 *See* Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law*, 60 Tex. L. Rev. 705, 711–12 and n.30 (1982) (observing that tighter concentration thresholds would have been justified by caselaw); *see also* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 434 (2003) (discussing how the 1968 Guidelines declined to take some economically unsupported enforcement opportunities).

25 *E.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 377, 382–84 (2015).

Markets consisting of a few large competitors performed poorly; markets comprised of thousands of atomic competitors performed well.[26] The modern recounting is perhaps unfair to the SCP program, whose members included respected economists with ideas more nuanced than this lifeless summary suggests.[27]

444. But, in broad strokes, the modern recounting is accurate. The SCP thesis of a strong, causal link between market structure and performance was widely accepted, with a combined share of as little as 20% taken to be evidence of a merger's likely anticompetitive effect.[28] And the thesis *was* simplistic in the sense that it offered no theory to explain the connection between market structure and performance. Models existed to lend tentative support, like Stigler's use of market concentration to predict collusion,[29] or applications of Cournot's models of oligopoly to reason from concentration to market power.[30] But the broadly accepted thesis was defended more on intuition and a perceived empirical link between concentration and price or profits than on any specific, logical explanation of the causal link between market concentration and market power.[31]

445. On the legal front, things were much the same. Warren Court opinions of the 1960s embraced structural reasoning as previously noted. In *Philadelphia National Bank*, the Court held that a merger resulting in a combined share of at least 30% of the relevant market was presumptively illegal,[32] and endorsed reliance on concentration statistics as a general shortcut to establishing the illegality of horizontal mergers,[33] again, on the support

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26 Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 Calif. L. Rev. 311, 315 (1983) ("[M]erger policy during the 1960's tended to flow from a simple equation: increases in concentration lead to less efficient performance.").

27 *See* Joe S. Bain, *Structure versus Conduct as Indicators of Market Performance: The Chicago-School Attempts Revisited*, 18 Antitrust L. & Econ. Rev. 17, 21 (1986) (describing a step-function relationship between concentration and performance, possibly tied to a critical point at which competitors become aware of their interdependence); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104, 1105 (1979) (identifying specific SCP predictions: "(1) that concentration will facilitate collusion, whether tacit or explicit, and (2) that as barriers to entry rise, the optimal price-cost margin of the leading firm or firms likewise will increase"); *see generally* Matthew T. Panhans, *The Rise, Fall, and Legacy of the Structure-Conduct-Performance Paradigm*, J. Hist. Econ. Thought 1 (2023), https://www.cambridge.org/core/journals/journal-of-the-history-of-economic-thought/article/abs/rise-fall-and-legacy-of-the-structureconductperformance-paradigm/3BA4E9F9FE29BAED06E9F1860BD37052 (providing a history of the SCP paradigm and its proponents).

28 *E.g.*, George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 182 (1955) ("Every merger by a firm which possesses one-fifth or more of an industry's output after the merger shall be presumed to violate the statute."); Carl Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis 133 (1959) (similar for a combined share exceeding 20%); *see also* Jesse W. Markham, *Merger Policy under the New Section 7: A Six-Year Appraisal*, 43 Va. L. Rev. 489, 522 (1957) (estimating that the Agencies were using a threshold of 25%).

29 George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964).

30 *But cf.* Stephen W. Salant et al., *Losses from Horizontal Merger: The Effects of an Exogenous Change in Industry Structure on Cournot-Nash Equilibrium*, 98 Q.J. Econ. 185 (1983) (questioning whether Cournot competitors would have the profit incentive to undertake output-suppressing mergers).

31 *See* Panhans, *supra* note 27, at 4 (noting that the SCP paradigm was less concerned with theory than with empirical demonstration of its claimed causal link).

32 United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963).

33 *Id.* at 363.

of general economic acceptance of the SCP thesis.[34] In *Von's Grocery*, the Court demonstrated how strong this shortcut could be, finding a merger illegal when it would have yielded a combined share of less than 8% of a relatively unconcentrated market.[35]

446. Against this backdrop, the structuralism of the 1968 Guidelines was unremarkable. In markets with a C_4 greater than 75%, the guidelines predicted challenges to mergers with a combined share of more than 8%.[36] In less concentrated markets, a combined share between 10 and 26% spelled potential doom.[37] Without any apparent economic foundation,[38] the guidelines also followed the Supreme Court in making evidence of a "trend toward concentration" an exacerbating feature that would justify intervention against a merger causing a share increase of as little as 2%.[39]

447. Looking back today, this approach to market structure reasoning was simplistic and clumsy. Its conflation of market structure with competition was later shown to be unjustified as the early empirical foundations of the SCP thesis crumbled under scrutiny.[40] This is not to say that market structure cannot provide useful information for evaluating mergers; merely that the link between concentration and performance is not as simple or as universal as it was thought to be in 1968.[41] With the demise of the SCP thesis fell the only economic justification for the market share thresholds and structuralism of the 1968 Guidelines. Strong reliance on the SCP thesis proved to be a weakness of the document, but the independent errors of the 1968 Guidelines are found elsewhere: in how the guidelines handled market definition and how they attempted to infer unspecific injury from market structure evidence.

448. On market definition, the 1968 Guidelines presented about as loose a standard as one could imagine. Apparently satisfied to follow vapid Supreme Court platitudes, the guidelines adopted a blend of language from *Brown Shoe* and *General Motors* to delineate markets by an observational process similar to the way lawyers might try to distinguish adverse legal precedent: "any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily

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34 *See supra* note 13 and accompanying text (indicating judicial and perhaps Congressional reliance on SCP economics as the justification for structural reasoning).

35 United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966).

36 1968 Guidelines, *supra* note 21, at § 5.

37 *Id.* at § 6.

38 *See* Donald F. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 Antitrust L.J. 307, 307 (1982) ("[T]he horizontal merger guidelines for prospective illegality were in some respects too severe, particularly where there was a so-called trend … .").

39 1968 Guidelines, *supra* note 21, at § 7.

40 *See generally* Richard Schmalensee, *Inter-industry Studies of Structure and Performance*, *in* 2 Handbook Of Industrial Organization 951 (Richard Schmalensee & Robert D. Willig eds., 1989).

41 *See generally* Sherrill Shaffer, *Structure, Conduct, Performance, and Welfare*, 9 Rev. Indus. Org. 435 (1994) (identifying conditions in which commonly supposed associations with market structure are provably violated).

constitute a relevant product market."[42] In fairness, the guidelines did elsewhere connect market boundaries to the assumption of some competitive insulation of in-market competitors from out-of-market competitors,[43] but the capacity of the 1968 Guidelines to arrive at excessively narrow markets is beyond dispute.

449. The immediate consequence of this undisciplined approach to market definition was that market shares under the 1968 Guidelines lacked reliable content as indicators of market power or as predictors of the competitive consequences of mergers. More than a decade after their release, Donald Turner conceded this error in a critical review of his own guidelines:

> [S]ome language in the discussion of market definition may have suggested the adoption of unduly narrow markets, which of course undermine, if not destroy, the significance of the resulting market share figures and the reasonableness of any presumptive tests based upon them.[44]

450. The severity of unprincipled market definition for market structure reasoning cannot be overstated. Even in a parallel universe in which the SCP thesis had proved entirely accurate, market definition under the 1968 Guidelines would still have precluded sensible outcomes in many cases.

451. On the absence of specific inferences of injury, the 1968 Guidelines embraced the SCP paradigm's general refusal to commit to a specific explanation of how or why an increase in concentration would cause a negative effect on competition. Demand for specificity in merger challenges can be taken too far,[45] to be sure, but here the absence of a coherent logical narrative undermined the 1968 Guidelines in two ways. First, it left nothing to support the guidelines' market concentration thresholds when the SCP paradigm fell. Second, it prevented dialogue between market structure evidence and the many other factual considerations that were supposed to be important in merger law.[46] It is impossible to say whether a particular fact about a market or the history of interaction between competitors increases or decreases concern about a merger when the basis for concern has never been identified in the first place.

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42 1968 Guidelines, *supra* note 21, at § 3(i) para. 1.

43 *Id.* at § 3 para. 1.

44 Turner, *supra* note 38, at 307.

45 *See* D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 Fl. L. Rev. § IV.C (forthcoming 2024) (identifying excessive demand for specificity and quantification as causes of underenforcement for coordinated effects theories).

46 *Compare* Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger."), *with* 1968 Guidelines, *supra* note 21, at § 2 para. 2 ("In certain exceptional circumstances … the structural factors used in these guidelines will not alone be conclusive … .").

2. 1982 and 1984 Merger Guidelines

452. In 1982, the Merger Guidelines were revised about as wrenchingly as they have been again in 2023. A snapshot of the shock, elation, and gloom surrounding these changes is captured in a symposium sponsored by the *California Law Review* in 1983.[47] Enough has been written about the philosophical underpinnings of the 1982 Guidelines to dispense with detailed rehashing, here. Suffice it to say, Reagan's appointed agency leaders cleaved small-business protectionism, strong structuralism, and most social and political considerations out of the guidelines, leaving behind only a few specific theories of harm – chiefly the risk that a merger would facilitate tacit collusion among a remaining group of competitors.[48]

453. There is room to disagree whether these changes were good or bad from social, economic, and policy perspectives. Regardless, they deserve credit as one of the few instances in which the drafters of U.S. Merger Guidelines attempted to prune any of the overgrowth from merger law. The 1982 Merger Guidelines did more than just cut, though. They also contributed new ideas and approaches to merger law. In terms of market structure reasoning, their greatest contributions were the introduction of the Hypothetical Monopolist Test and the exposition of coordinated effects as a specific theory of harm.

454. While something like the HMT was probably an inevitable invention,[49] the 1982 Guidelines were the entry point for this type of effect-oriented market definition in conventional merger practice. As articulated in a slight revision of the 1982 Guidelines in 1984, the HMT scoped relevant markets around the identification of potential exercises of market power through coordinated conduct:

> [F]or each product of each merging firm, the Department seeks to define a market in which firms could effectively exercise market power if they were able to coordinate their actions. Formally, a market is defined as a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a "small but significant and nontransitory" increase in price above prevailing or likely future levels.[50]

455. The emergence of the HMT was an evolutionary leap in the guidelines' approach to market structure reasoning.[51] For the first time, market

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47 Symposium, *1982 Merger Guidelines*, 71 Calif. L. Rev. 280 (1983).

48 *See* Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 Calif. L. Rev. 311, 317 (1983) ("Where economic, social, and political considerations once received more or less equal billing as the basis for merger policy, economic considerations have now achieved primacy." (footnote omitted)).

49 *See* Sullivan, *supra* note 14, at 1109 n.87 (collecting similar expressions of this approach to defining markets).

50 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines*, § 2.0 para. 1 (1984) ("1984 Guidelines").

51 *See* Sullivan, *supra* note 14, at 110 (collecting praise for the HMT by antitrust commentators).

shares held at least theoretically reliable evidentiary value for predicting the competitive effects of mergers. Collusion in a market not satisfying the HMT would be ineffective by definition. But within a market validated by the HMT, collusion could in principle lead to higher prices and other anticompetitive effects. The risk that a merger would facilitate this type of collusion turned on factors including the number and relative size of competitors in the potential collusive set. This structure was precisely what the HMT revealed.

456. The connection between market structure and coordinated effects also restored economic content to the type of market concentration thresholds put forth in the 1968 Guidelines. The 1982 revision replaced the C_4 index with the Herfindahl–Hirschman Index (HHI), in view of its perceived better fit with anticompetitive coordination;[52] a new definition of highly concentrated markets – a HHI of at least 1800 – roughly equated to the previous C_4 of greater than 75%.[53] Mergers resulting in unconcentrated markets – a HHI below 1000 – were set aside as unlikely to be challenged "[b]ecause implicit coordination among firms is likely to be difficult [in this region]."[54] But mergers increasing the HHI by more than 100 points in highly concentrated markets were designated likely to be challenged.[55] And those increasing the HHI by 50 to 100 points in the highly concentrated markets, or by over 100 points in less concentrated markets, were to be evaluated on market structure and other evidence.

457. The identification of "other evidence" was another area of improvement. In contrast to the incommensurability of structural and non-structural evidence in 1968, adoption of a coordinated effects focus allowed the 1982 and 1984 Guidelines to transition from market structure evidence – primary evidence for the prediction of coordinated effects – to other relevant factors for evaluating coordination. Relevant factors included perceived determinants of the ease and stability of tacit price coordination, such as ease of entry,[56] similarity of economic interests,[57] market transparency,[58] and other now familiar considerations.[59]

458. But while the pivot to coordinated effects unlocked significant improvements in market structure reasoning in the 1982 and 1984 Guidelines, some aspects of the approach continued to hold market structure reasoning back.

52 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines* § III.A para. 2 (1982) ("1982 Guidelines").

53 *See id.* para 3 ("An empirical study by the Department of the size dispersion of firms within markets indicated that the critical HHI thresholds at 1000 and 1800 correspond roughly to four-firm concentration ratios of 50% and 70%, respectively.").

54 *Id.* at § III.A.1 para. 2.a.

55 *Id.* at para. 2.c.

56 *Id.* at § III.B.

57 *Id.* at § III.C.1.

58 *Id.* at § III.C.2.

59 *Id.* at § III.C; *see also* 1984 Guidelines, *supra* note 50, at § 3.2.

One problem was that the strong focus on coordinated effects crowded out similarly thoughtful treatment of how market structure could inform other concerns. The 1982 Guidelines devoted a single paragraph to a type of unilateral effect under the title of the "Leading Firm Proviso:"

> [T]he Department is likely to challenge the merger of any firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market.[60]

459. While conceding that non-structural coordination factors were "of little relevance to the ability of a single dominant firm to exercise market power,"[61] the guidelines where quiet about what factors did matter, or why markets scoped around possible collusion were the appropriate context for evaluating this concern.

460. Another problem of the 1982 and 1984 Guidelines was that they commanded little outside authority for their retooled market concentration thresholds. Where the 1968 Guidelines were at least arguably supported by then-relevant scholarship and caselaw, the 1982 Guidelines could point to no similar external authority for the thresholds they propounded. To his credit, William Baxter candidly admitted this weakness:

> The present state of the theoretical and empirical literature on collusion precludes a rigorous basis for any particular thresholds. Those used in the Guidelines were adopted because they were consistent with the experience of those in the Division and also with empirical literature.[62]

461. On the 35% threshold for the leading firm proviso, Baxter similarly retreated: "As with the selection of HHI thresholds in those cases involving the danger of collusion, the selection of a threshold for the leading-firm proviso was somewhat arbitrary."[63]

462. Any bright line rule is bound to be somewhat arbitrary. But arbitrary selection between well-supported options is different than arbitrary selection between well-intended guesses. And the thresholds of the 1982 and 1984 Guidelines were of the latter sort. Future decades would see improvements in the understanding of structural predictors of coordination in the form of experimental economics research and retrospective studies.[64] At the time of drafting, the empirical literature was unimpressive and not

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60 1982 Guidelines, *supra* note 52, at § III.A.2.

61 *Id.*

62 William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 Calif. L. Rev. 618, 626–27 (1983).

63 *Id.* at 627–28.

64 Sokol & Sullivan, *supra* note 45, at § IV.A (surveying experimental and retrospective evidence on the connection between market structure and coordination).

addressed to the type of narrow relevant markets scoped by the newly minted HMT. Thus, the "experience of those in the Division" seems to have been the only serious authority for these concentration thresholds. One need not question the experience or intentions of the staff of the Division to feel some modest skepticism toward concentration thresholds emerging from the *ipse dixit* of interested parties.

3. 1992 and 1997 Horizontal Merger Guidelines

463. In the 1990s, market structure reasoning took another evolutionary leap. A more sophisticated understanding of market structure and antitrust injuries was emerging to replace the vacuum left by the collapse of the SCP thesis. But devolution was happening, too, as the growing sophistication of some market structure reasoning began to grate against the coarser reasoning of other parts of the same document. The locus of these evolutionary dynamics was the intersection of two areas of significant revision: (1) the expansion and separation of specific theories of coordinated and unilateral effects; and (2) the retreat from structural reasoning under market concentration thresholds.

464. The expanded treatment of specific theories of harm was the more notable change. The drafters of the 1992 Horizontal Merger Guidelines set aside non-horizontal mergers and used the space to introduce a new section on "Potential Adverse Competitive Effects of Mergers."[65] This section was further subdivided into anticompetitive harms arising from coordinated interactions and anticompetitive harms arising from unilateral effects of mergers. The treatment of unilateral effects embraced two broad theories of how a post-acquisition firm could exercise market power without competitor cooperation. First, in differentiated-product markets, mergers of particularly close rivals could produce unilateral incentives for the merged firm to raise its prices.[66] Second, in undifferentiated markets, mergers of firms with substantial market shares could produce unilateral incentives for the merged firm to suppress its output, thereby elevating the market price.[67]

465. Another change was a revised interpretation of market structure thresholds. The 1992 Guidelines continued a retreat from giving dispositive weight to market concentration evidence that had begun in 1984.[68] They added an affirmative commitment to evaluate structural evidence while also considering theory-relevant non-structural evidence:

> "[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will

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65 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines* § 2 (1992) ("1992 Guidelines").

66 *Id.* at § 2.21.

67 *Id.* at § 2.22.

68 1984 Guidelines, *supra* note 50, at § 3.11 ("[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger").

assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure."[69]

466. This addressed, for theories other than coordinated effects, the market structure puzzle left open in 1968: how does structural reasoning interact with non-structural evidence? The answer was that market structure constituted one form of evidence about risk that a merger would have specific effects on competition. Non-structural considerations suggested by the relevant theory constituted other evidence. In arriving at a prediction about the competitive effect of a merger, both sources of evidence would be considered simultaneously.

467. Another subtle but important change to the market structure thresholds in 1992 was the introduction of several broad assertions about the likely absence of competitive effects. Mergers resulting in post-merger HHIs of less than 1000 were described as "unlikely to have adverse competitive effects."[70] Below a post-merger HHI of 1800, mergers creating an HHI delta of less than 100 points were similarly said to be "unlikely to have adverse competitive consequences,"[71] and so, too, mergers with an HHI delta of less than 50 points when the post-merger HHI was greater than 1800.[72] Though these assertions might be labeled "safe harbors," they went further than that in not just promising safety from challenge but in affirmatively asserting the likely absence of competitive effects.

468. At the intersection of these changes, evolutionary dynamics were mixed. The 1982 Guidelines had already drawn the connection between market structure and coordinated effects, but the 1992 revision expanded upon it.[73] The 1992 Guidelines also contributed a new and conceptually distinct link between market structure and unilateral output suppression.[74] The economic theory of differentiated-product unilateral effects outpaced the associated market structure reasoning in these guidelines, but the initial step was in a positive direction.[75]

469. That final quibble about structural reasoning was, unfortunately, one facet of a larger problem. The 1992 Guidelines, and the minor 1997 revision,[76] introduced new theories of competitive harm without making corresponding revisions to market definition or market concentration thresholds to

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69 1992 Guidelines, *supra* note 65, at § 2.0.

70 *Id.* at § 1.51 para. 1.a.

71 *Id.* at para. 1.b.

72 *Id.* at para. 1.c.

73 *Id.* at § 2.1

74 *Id.* at § 2.22.

75 The asserted connection between market shares and price effects rested on questionable assumptions. *See* Robert D. Willig, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 22 Brookings Papers on Econ. Activity: Microeconomics 281, 299–304 (1991) (providing formal exposition of the model and its sensitivity).

76 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines*, § 0.1 (1997) ("1997 Guidelines").

adjust structural reasoning to the distinct competitive mechanics underlying each type of harm. The HMT, designed to identify potential collusive groups, was put to off-label use scoping markets for differentiated-product unilateral effects theories.[77] Market concentration thresholds – asserted in the 1980s to be probative of likely coordinated effects – were suddenly promoted to plenary predictors of three distinct forms of anticompetitive effect. What were inadequately supported economic assertions in 1982 had become nearly incoherent economic assertions in 1992.

470. This confusion came to a head in the safe harbor provisions. In 1984, the presence of many competitors in a market defined around a potential collusive group was seen as evidence against the need for intervention "[b]ecause implicit coordination among firms is likely to be difficult" in this setting.[78] Now, the same feature of the same method of defining markets was also being interpreted as evidence that unilateral price increases could not result from mergers of close competitors in a differentiated product space.[79] In fairness, careful enforcers could wiggle their way to sensible results by targeting the HMT at extremely narrow markets when pursuing unilateral effect cases.[80] But this was proceeding to a sensible result despite the framework, not because of it.

4. 2010 Horizontal Merger Guidelines

471. The 2010 Horizontal Merger Guidelines improved upon previous iterations with a clearer explanation of unilateral effects theories and a better separation of analysis according to different theories of harm. The first of these contributions was transparent in an extended treatment of unilateral effects.[81] The treatment of unilateral effects in a differentiated product space was particularly improved, with redirected emphasis from market shares to diversion ratios fixing some questionable structural assertions in the prior guidelines.[82]

472. The 2010 Guidelines also made the evolutionary leap of rejecting any uniform process for the evaluation of mergers and surrounding evidence. As the guidelines put it:

> [M]erger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies… apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns … .[83]

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77 As a quirk of the different mechanism of predicted harm, the HMT did generalize quite well to defining market in homogenous-good unilateral effects cases. *See* Sullivan, *supra* note 14, at 1136–37.

78 1984 Guidelines, *supra* note 50, at § 3.11 para. 2.

79 1992 Guidelines, *supra* note 65, at § 1.51 para. 1.

80 *See* Sullivan, *supra* note 14, at 1116 (explaining how predicted price effects justify narrow HMT markets).

81 2010 Guidelines, *supra* note 19, at § 6.

82 *See supra* note 75 and accompanying text.

83 2010 Guidelines, *supra* note 19, at § 1 para. 4.

473. This laid the foundation for evaluating different theories of harm according to different evidence and techniques. It supported, for example, the use of hypothesized injuries to guide market definition,[84] a major improvement on the previous suggestion that market definition preceded competitive effects analysis.

474. But, despite these and other advances, a series of missteps prevented the 2010 Guidelines from realizing their potential to improve market structure reasoning. On net, the 2010 revision probably did more harm than good.

475. One error was the missed opportunity to reconcile diversion ratios with market structure reasoning. Market shares had long ago lost legal significance except to the extent that evidence of past trades predicted a firm's future competitive significance.[85] Diversion ratios similarly use evidence of current or past purchasing patterns to draw inferences about the relative future competitive significance of firms in a differentiated product space. It would have been helpful and clarifying to introduce diversion ratios as a species of market structure evidence – something like a generalized market share better suited to the multidimensional competitive significance of firms in a differentiated product space.[86]

476. Instead, diversion ratios and market structure evidence were presented as categorically distinct types of evidence. The 2010 Guidelines drove that interpretive wedge in the presentation of unilateral effects theories:

> Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.[87]

477. The guidelines did the same for market definition. Where unilateral effects predictions could have been presented as a form of market definition useful to the evaluation of specific types of competitive effect,[88] the guidelines instead opted to distance these concepts, asserting that "[s]ome of the analytical tools used by the Agencies … do not rely on market definition,"[89] and specifically that "merger simulation methods need not rely on market definition."[90]

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84 *See* Glasner & Sullivan, *supra* note 15, at 316–24 (explaining that the HMT base price and price increase should fit the anticipated anticompetitive harm if the resulting market is to be helpful in evaluating potential competitive effects).

85 United States v. Gen. Dynamics Corp., 415 U.S. 486, 503, 510 (1974).

86 *Cf.* Christopher Conlon & Julie Holland Mortimer, *Empirical properties of diversion ratios*, 52 RAND J. Econ. 693 (2021) (describing other interpretations of diversion ratios, some specific to particular empirical specifications).

87 2010 Guidelines, *supra* note 19, at § 6.1 para. 6.

88 Sullivan, *supra* note 14, at 1115–17 (arguing that there is no conceptual difference between the HMT and the predicted price effects of a merger simulation model).

89 2010 Guidelines, *supra* note 19, at § 4 para. 2.

90 *Id.* at § 6 para. 7.

478. Semantically isolating market definition and market concentration evidence from other sources of information about the structure of competition allowed the 2010 Guidelines to clean up selected unilateral effects theories without addressing the broader structural confusion of the 1992 Guidelines. Thus, the 2010 Guidelines continued to interpret concentration thresholds as somehow simultaneously predictive of a range of potential competitive injuries.[91] Worse, without support from external authority,[92] the guidelines raised the concentration thresholds, redefining "highly concentrated" markets as those with HHI above 2500 and "unconcentrated" markets as those with HHI below 1500.[93] If the objective of these changes was merely to fit the thresholds to agency enforcement patterns,[94] it would have made sense to speak in terms of agency actions: mergers falling in a certain range would be labeled "likely" or "unlikely" to be challenged.[95]

479. Instead, the 2010 Guidelines spoke in terms of likely adverse competitive effects.[96] The implication, under the raised thresholds, was that some mergers that would have "raise[d] significant competitive concerns" in 1997 were suddenly declared "unlikely to have adverse competitive effects" in 2010.[97] Since, logically, at least one of these claims about likely competitive effects must have been wrong, it would have been nice to know how the 2010 Guidelines arrived at the thresholds and likely competitive effect predictions that they did. As in previous guidelines, however, vague reference to agency "experience" was the only answer.[98]

480. The confused safe harbor provision of the 1992 and 1997 Guidelines was also preserved and even expanded in these guidelines. Carl Shapiro directed attention to the illogic of the safe harbor in commentary on the 2010 Guidelines. After noting that HHI figures played a limited role in differentiated-product unilateral effects analysis,[99] he continued:

> The express acknowledgement that HHI levels typically are not very helpful diagnostics in these [unilateral effects] cases has led to concerns that the valuable screening role played by the HHI thresholds since 1982

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91 *Id.* at § 5.3.

92 Dennis W. Carlton & Mark A. Israel, *Will the New Guidelines Clarify or Obscure Antitrust Policy?*, Antitrust Source, Oct. 2010, 1 ("[W]e know of no body of economic research that provides either an econometric or a theoretical basis for the HHI thresholds in the 2010 Guidelines (or for that matter in previous versions of the Guidelines).").

93 2010 Guidelines, *supra* note 19, at § 5.3 para. 6.

94 Christine E. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, not Revolution*, 77 Antitrust L.J. 651, 659 (2011) (stating that "the increased HHI thresholds more accurately describe actual practice").

95 *Cf.* 1982 Guidelines, *supra* note 52, at § III.A para. 2 (using concentration thresholds to describe when the Division was "likely" or "unlikely" to challenge a merger).

96 2010 Guidelines, *supra* note 19, at § 5.3 para. 6.

97 *Compare* 1997 Guidelines, *supra* note 76, at § 1.51, *with* 2010 Guidelines, *supra* note 19, at § 5.3.

98 2010 Guidelines, *supra* note 19, at § 5.3 para. 6.

99 Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog To Fox In Forty Years*, 77 Antitrust L.J. 701, 720 (2010).

> has been reduced or lost. In fact, the 2010 Guidelines recognize the importance of these HHI thresholds to help identify mergers that are "unlikely to have adverse competitive effects and ordinarily require no further analysis." Indeed, the 2010 Guidelines not only retain HHI thresholds but raise them. DOJ continues to apply the HHI thresholds to all horizontal mergers.[100]

481. The statement speaks for itself.

5. 2023 Merger Guidelines

482. Today, the 2023 Guidelines stand as another wrenching revision to the document. In contrast to other recent guidelines, they present a dazzling display of potential theories of harm. They also diverge from previous guidelines in asserting now dated Supreme Court opinions as primary authority for statements about competitive effects and what evidence can be used to prove them. Whatever the overall merits of this approach, it motivates the 2023 Guidelines to adopt an eclectic mix of market structure inferences – some thoughtful, some careless.

483. In one important point of consistency with all Merger Guidelines since 1982, the 2023 Guidelines use market structure as evidence of likely competitive effects – not as an end objective of merger law itself.[101] This would be unremarkable if an earlier draft had not appeared to conflate changes in market concentration with changes in competition.[102] Edits to the final document mostly foreclose that interpretation.

484. The 2023 Guidelines also keep with prior iterations in largely preserving the haphazard separation of market structure reasoning by competitive effects that held back the 1992, 1997, and 2010 Guidelines. Like the 2010 Guidelines, the 2023 Guidelines are of two minds about the relevance of market concentration evidence in the evaluation of unilateral effects theories: they embrace the presumption of harm from evidence of high and increasing concentration,[103] while insisting that harm can also be proved without the support of concentration evidence,[104] and while apparently denying that structural reasoning can disprove unilateral effects.[105] Market

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100 *Id.* at 720–21.

101 2023 Guidelines, *supra* note 3, at § 1 para. 8 ("Market concentration is often a useful indicator of a merger's likely effects on competition.").

102 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Draft Merger Guidelines* § 1 para. 9 (2023) ("2023 Draft Guidelines") ("Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets… . [In some cases,] the Agencies presume that a merger may substantially lessen competition based on market structure alone.").

103 2023 Guidelines, *supra* note 3, at § 2.2 para. 1 ("Although a change in market structure can also indicate risk of competitive harm (see Guideline 1), an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares.").

104 *Id.*

105 *See infra* note 111 and accompanying text (discussing the absence of a safe harbor provision in these guidelines).

shares are given appropriate weight in an elaborated discussion of output suppression theories,[106] but this follows the almost complete neglect of market shares and market concentration information in an enumeration of evidence generally considered in unilateral effects analysis.[107]

485. One area of evolutionary improvement is the clarified use of structural reasoning in coordinated effects analysis. Consistent with the suggestions of recent scholarship,[108] the 2023 Guidelines emphasize the importance of market structure for evaluating coordination theories.[109] Evidenced that a merger would significantly increase concentration, leading to a highly concentrated market, is treated as evidence "that post-merger market conditions are susceptible to coordinated interaction and that the merger materially increases the risk of coordination."[110]

486. Another evolutionary improvement in the 2023 Guidelines is the quiet elimination of the plenary safe harbor provision of the 1992, 1997 and 2010 Merger Guidelines.[111] With this omission, the 2023 Guidelines escape the disastrous logic of interpreting evidence against the plausibility of coordinated effects in one relevant market as evidence against all potential competitive effects in all potential relevant markets. The inclusion of theory-specific or market-specific safe harbors might have been a better approach, but the existing document provides the foundation for future changes in this direction.

487. Elsewhere, the 2023 Guidelines make some baffling decisions. In another chapter of this volume, Gregory Werden critiques the relaxed approach that the 2023 Guidelines take to market definition. The new guidelines preserve the HMT as one method of defining markets,[112] but also embrace *Brown Shoe*'s practical indicia test as another method of defining markets,[113] as well as other vague language about inferring market boundaries from "direct evidence" of observed competition or exercises of market power.[114]

488. The problem with this approach is the same problem that hobbled the 1968 Guidelines. Unless relevant markets are defined in ways that ensure market shares have economic significance, market structure provides no reliable basis for drawing inferences about the competitive effects of

106 2023 Guidelines, *supra* note 3, at § 4.2.D para. 2.

107 *Id.* at § 4.2.A.

108 *E.g.*, Sokol & Sullivan, *supra* note 45, at § IV.A (advocating for greater emphasis of structural evidence); *id.* at 48 (collecting similar advocacy).

109 2023 Guidelines, *supra* note 3, at § 2.3.

110 *Id.* at § 2.3.A.

111 *Id.* at § 2.1.

112 *Id.* at § 4.3.

113 *Id.*

114 *Id.*

mergers.[115] To their credit, the 2023 Guidelines do recognize this problem, noting that "[a]lthough any market that is properly identified using the methods [in these guidelines] is valid, the extent to which structural measures calculated in that market are probative in any given context depends on a number of considerations."[116] The suggestion that a relevant market could still be "valid," even when no aspect of its structure would be probative of any competitive effect, is curious to say the least.

489. Even more curious is a subsequent statement that, in clarifying the previous proposition, limits the scope of structural reasoning to markets defined by the HMT:

> [T]he market used to estimate shares should be broad enough that it contains sufficient additional products so that a loss of competition among all the suppliers of the products in the market would lead to significantly worse terms for at least some customers of at least one product. Markets identified using the various tools in [these guidelines] can satisfy this condition – for example, all markets that satisfy the HMT do so.[117]

490. The question is what markets *except* those that satisfy the HMT would meet this requirement. The condition "that a loss of competition among all the suppliers … would lead to significantly worse terms for at least some customers" simply restates the HMT inquiry.

491. The puzzling result is that the 2023 Guidelines embrace multiple methods of defining markets, but only stand behind market structure evidence when markets are defined by the HMT. Relying on the HMT when engaging in market structure reasoning is sensible and aligns these guidelines with many of the advances of prior iterations. What role this leaves for the other three tests is a mystery perhaps best left unsolved.

492. Finally, the 2023 Guidelines make some simple missteps. The new guidelines reverse the 2010 Guidelines in returning the definitions of "highly concentrated" markets and of "significant increase[s]" in concentration to the levels initially set in 1982.[118] In a footnote, the 2023 Guidelines defend this change:

> The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982. These guidelines referred to mergers with HHI above 1,000 as concentrated markets, with HHI between 1,000 and 1,800 as "moderately concentrated" and above 1,800 as "highly concentrated," while they referred to an increase in HHI of 100 as a "significant increase." Each subsequent iteration until 2010 maintained those thresholds… . Although the Agencies

115 *See supra* note 44 and accompanying text.

116 2023 Guidelines, *supra* note 3, at § 4.4 para. 2.

117 *Id.* at para 4.

118 *Id.* at § 2.1.

> raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds.[119]

493. The now predictable justification of agency "experience" is here augmented by "evidence developed since [2010],"[120] but the result is little different and no less opaque.

494. The optics of this wobble are the concerning part. The 2010 Guidelines offered no persuasive justification for raising the "highly concentrated" threshold;[121] the 2023 Guidelines offer no persuasive justification for lowering it. Both guidelines treat evidence of concentration above this threshold, initially suggested to identify opportunities for tacit collusion, as somehow plenary evidence of various different competitive effects. But while the substance of the revised threshold is no more lacking than before, the act of self-aggrandizement might have demanded better justification in 2023 than the act of self-restraint did in 2010. Claims made in knowing concession of agency enforcement power are different than claims made in arrogation of it.[122]

495. There is less room for equanimity when considering other structural assertions introduced in the 2023 Guidelines. The claim that a "trend toward concentration in an industry" raises a merger's threat to competition is a triumph of rhetoric over reason.[123] The claim that unspecific competitive effects can be presumed when a merger produces a firm with a combined share of 30%, at a change in HHI of at least 100 points, is similarly specious.[124] Though this proposition looks a bit like the leading firm proviso of 1982,[125] it actually appears to be inspired by the Supreme Court's reasoning in *Philadelphia National Bank*,[126] the sole authority the guidelines cite for the claim.[127]

496. As already discussed, *Philadelphia National Bank* was decided at a time when broad acceptance of the SCP thesis meant that many economists

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119 *Id.* at n.15.

120 *Id.*

121 *See supra* note 92 and accompanying text.

122 *Cf.* Fed. R. Evid. 804(b)(3) (reflecting the common-sense assumption that people are less likely to mislead when the result would be damaging to their own self-interest).

123 2023 Guidelines, *supra* note 3, at § 2.7. This assertion also raises the new question of what defines an "industry." This is evidently something different than a "relevant market," yet it is also evidently a scope of trade in which concentration statistics have economic significance.

124 *Id.* at § 2.1.

125 1982 Guidelines, *supra* note 52, at § III.2 (discussing a situation in which "the leading firm has a market share that is at least 35% and is approximately twice as large as that of the second largest firm in the market").

126 United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

127 2023 Guidelines, *supra* note 3, at § 2.1 n.16.

agreed with the Court's reasoning. The *Philadelphia National Bank* majority specifically defended its approach as "fully consonant with economic theory," since concern about significant market shares was "common ground among most economists."[128] This is no longer the case. Market structure and market concentration can still be probative of market power and competitive effects, but the strong form of SCP reasoning that the Court invoked to defend its market share reasoning in *Philadelphia National Bank* was discredited decades ago. If there is a defensible basis, today, for believing that this 30% share threshold is an empirically accurate predictor of competitive effects, it will not be found in the pages of *Philadelphia National Bank*. The guidelines are only a hair less vulnerable on the claim that this 30% threshold still reflects antitrust law.[129]

IV. Discussion

497. Merger Guidelines evolve over time. We might hope that this evolution would be in the direction of clearer thinking and better predictions. But change is never that certain. Market structure reasoning has both evolved and devolved over the history of the Merger Guidelines, and both trends are evident in the latest revision. Market structure reasoning is better and more informed in the 2023 Guidelines than it was in 1968 or even 1982. But there is still vast room for improvement. Like all Merger Guidelines, the current revision began to age the instant it was published. It will fall to the drafters of future revisions to decide what branches of structural reasoning will be kept, what branches will be cut, and whether it makes sense to start again from seed.

128 *Phila. Nat'l Bank*, 374 U.S. at 363.

129 *See* Kimble v. Marvel Entm't, 576 U.S. 446, 461 (2015) ("We have … felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences."); *id.* at 461–62 (reasoning that in cases where effects on trade need to be predicted "the Court's rulings necessarily turn[] on its understanding of economics" and thus that "to overturn [earlier] decisions in light of sounder economic reasoning [is] to take them on [their] own terms" (internal quotation marks removed)); *see also* Seth D. Greenstein, *The US Supreme Court hears arguments before the decision on whether post-expiration license royalty obligations are caught in the web of patent policies or antitrust analysis (Kimble/Marvel)*, e-Competitions Mar. 2015, art. No. 72308.

The 2023 U.S. Merger Guidelines
A Review

Sean P. Sullivan (ed.)

| Foreword by Ilene K. Gotts

This multi-contributors guide invites you to explore the detailed landscape of antitrust law and economic policy through a comprehensive review of the 2023 U.S. Merger Guidelines. Written by a panel of esteemed scholars and practitioners, this volume offers a diverse array of perspectives on the pivotal changes reshaping U.S. merger control.

In the wake of significant shifts in the global economic landscape, the updated Guidelines reflect a nuanced understanding of contemporary market dynamics. From the intricacies of common ownership to the complexities of market delineation, from the implications of monopsony power to the considerations surrounding buyer power, or the role and relevance of economics in antitrust analysis, each chapter investigates critical aspects of the evolving regulatory framework.

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