



Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

I. Overview

These Merger Guidelines explain how the Department of Justice and the Federal Trade Commission (the “Agencies”) identify potentially illegal mergers. They are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers.

The Agencies seek to identify, investigate, and challenge mergers that are likely to harm competition, while avoiding unnecessary interference with the majority of mergers, which are not likely to harm competition and may even be beneficial to competition. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent, as affirmed by the Supreme Court, that merger enforcement should arrest anticompetitive trends in their incipiency and that certainty about anticompetitive effect is seldom possible and is not required for a merger to be illegal.

The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act¹, 15 U.S.C. §§ 14, 18, 19. Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws.

Section 7 of the Clayton Act is the antitrust law that most directly addresses mergers and acquisitions.² Section 7 prohibits mergers and acquisitions where “in any line of commerce or in

Commented [GS1]: Cite *Brown Shoe*, 370 US 294, 317, and S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5, cited in fn 32 of *Brown Shoe*, and also maybe the 1957 *Dupont* opinion, 353 U.S. 586, 589.)

Commented [GS2]: Distilled from the overview in the 2010 Guidelines. Helps introduce the wider public to what merger enforcement is about. And acknowledges at the outset that most mergers are not problematic.

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any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”³ Section 7 is a preventative statute that reflects the “mandate of Congress that tendencies toward concentration

¹ As amended under the Celler-Kefauver Antimerger Act of 1950, Public Law 81-899, 64 Stat. 1125, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

² Mergers may also violate, *inter alia*, Sections 1 and 2 of the Sherman Act or Section 5 of the FTC Act.

³ 15 U.S.C. § 18.

in industry are to be curbed in their incipency.”⁴

The Clayton Act requires the Agencies to assess the risk to competition from mergers. As the Supreme Court has explained, “Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect ‘*may be* substantially to lessen competition.’”⁵ This is because “[t]he grand design of...Section 7, as to stock acquisitions [and] the acquisition of assets, was to arrest incipient threats to competition which the [more broadly applicable] Sherman Act did not ordinarily reach.”⁶ Accordingly, in analyzing a proposed merger, the Agencies do not seek to predict the future or the precise effects of a merger with certainty. Rather, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation.

Across the economy, competition plays out in many ways and on a variety of dimensions. In recognition of this fact, “Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.”⁷ The Agencies therefore begin their merger analysis with the question: how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?

The Agencies apply the following Guidelines to help answer this question. In some cases, “it is possible...to simplify the test of illegality” by focusing on discrete facts that, when present, suggest a merger is “so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”⁸

Guidelines 1-8 identify several frameworks that the Agencies use to assess the risk that a merger’s effect may be substantially to lessen competition or to tend to create a monopoly. Guidelines 9-12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies consider mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

When application of these Guidelines initially indicates a presumption that a merger is illegal, the merging firms may be able to successfully rebut that presumption by showing the Agencies that the merger would [be unlikely to] [not] substantially lessen competition or tend to create a monopoly. Section IV of the Guidelines explains this further, discussing further how common types of merging firms’ rebuttal claims are assessed.

These Guidelines are not mutually exclusive, as a single merger can have multiple effects or trigger concern in multiple ways. To promote efficient review, for any given merger, the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the merger.

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Commented [GS4]: Advise against using the term “transaction” as a substitute for “merger.” It’s needlessly technical, and not illuminating to the wider public. In fact, it is confusing, as the word has a more commonly understood meaning, used in these Guidelines, to refer to routine commercial transactions.

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⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 346 (1962) (“*Brown Shoe*”).

⁵ *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

⁶ *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-71 (1964).

⁷ *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 321-22) (“*Gen. Dynamics*”).

⁸ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 362-63 (1963) (*Phila. Nat’l Bank*).

Guideline 1: Mergers ~~May Be Illegal Because They~~ Significantly Increase Concentration in Highly Concentrated Markets.⁹ Concentration refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The Agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the Agencies presume that a merger may substantially lessen competition based on market structure alone.

Commented [GS5]: This revision here and in the headings for the other Guidelines answers criticism that the Guidelines sound too much like per se prohibitions. And does so in a way that does not change their intended meaning or force. (Or you could say “May Substantially Lessen Competition [Or Tend to Create a Monopoly] By ...”.)

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Guideline 2: Mergers ~~May Be Illegal Because They~~ Eliminate Substantial Competition between Firms.¹⁰ The Agencies examine whether competition between the merging firms is substantial, since their merger will necessarily eliminate competition between them.

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Guideline 3: Mergers ~~May Be Illegal Because They~~ Increase the Risk of Coordination.¹¹ The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

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Guideline 4: Mergers ~~May Be Illegal Because They~~ Eliminate a Potential Entrant in a Concentrated Market.¹² The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

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Guideline 5: Mergers ~~May Be Illegal Because They~~ Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.¹³ When a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

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Guideline 6: Vertical Mergers ~~May Be Illegal Because They~~ Create Market Structures That Foreclose Competition.¹⁴ The Agencies examine how a merger would restructure a vertical supply and distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a “clog on competition...which deprives rivals of a fair opportunity to compete.”¹⁵

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Guideline 7: Mergers ~~May Be Illegal Because They~~ Entrench or Extend a Dominant Position.¹⁶ The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

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⁹ See, e.g., *Phila. Nat'l Bank*, 374 U.S. at 363, modified by *Gen. Dynamics*, 415 U.S. at 498 (see Section IV).

¹⁰ See, e.g., *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), cert. denied, 575 U.S. 996 (2015).

¹¹ See, e.g., *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387-89 (7th Cir. 1986) (Posner, J.).

¹² See, e.g., *United States v. Marine Bancorp.*, 418 U.S. 602, 623-26 (1974).

¹³ See *United States v. AT&T*, 916 F.3d 1029, 1035-36 (D.C. Cir. 2019).

¹⁴ See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

¹⁵ *Brown Shoe*, 370 U.S. at 324.

¹⁶ See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-78 (1967).

Guideline 8: Mergers May Be Illegal Because They Further a Trend Toward Concentration.¹⁷ If a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

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Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.¹⁸ If an individual merger is part of a firm’s pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.

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Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.¹⁹ Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The Agencies therefore apply these Guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.²⁰ Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The Guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

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These Guidelines consolidate, revise, and replace the various versions of Merger Guidelines issued by the Agencies since the Department of Justice’s first Merger Guidelines in 1968. This revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy.

¹⁷ See, e.g., *Gen. Dynamics*, 415 U.S. at 497-98; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).

¹⁸ See H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).

¹⁹ See, e.g., *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

²⁰ See, e.g., *Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967).

To make their content both accessible to new readers and useful for experts, these Guidelines are organized at varying levels of detail:

- The Overview outlines the guidelines in summary form to help the public and market participants identify potential concerns and understand the Agencies’ approach.
- Section II discusses the application of these Guidelines in further detail.
- Section III identifies some of the tools the Agencies use to define relevant markets; and
- Section IV explains how the Agencies approach several common types of rebuttal claims.²¹

Several appendices follow these Guidelines. The Appendices describe evidentiary and analytical tools the Agencies often use.

- Appendix 1 discusses sources of evidence commonly relied on by the Agencies.
- Appendix 2 describes tools sometimes used to evaluate competition among firms.
- Appendix 3 discusses additional details regarding the process for defining relevant markets.
- Appendix 4 explains how the Agencies typically calculate market shares and concentration metrics.

These Guidelines create no independent rights or obligations and do not limit the discretion of the Agencies or their staff in any way. Although the Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies’ enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Guidelines must be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Guidelines neither dictate nor exhaust the range of evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or merger. Given the variety of markets, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts in analyzing mergers, as they do in other areas of law enforcement.

These Guidelines include citations to binding legal precedent. Citations to court decisions in these Guidelines do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools to new learning, legal

²¹ These Guidelines pertain only to the consideration of whether a merger or acquisition is illegal. The consideration of remedies appropriate for otherwise illegal mergers and acquisitions is beyond its scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

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holdings reflecting the Supreme Court’s interpretation of a statute apply unless subsequently modified. These Guidelines therefore cite binding propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities.

II. Applying the Merger Guidelines

1. Mergers **May Be Illegal Because They Significantly Increase Concentration in Highly Concentrated Markets.**

In highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition. As a result, even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition. The Supreme Court has held that “[a] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”²² In the Agencies’ experience, this type of structural presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

“Concentration” reflects the number and relative size of firms competing to offer a product²³ or service to a group of customers.²⁴ Concentration is “high” when the market only has a few significant competitors. An analysis of concentration begins with calculating pre-merger market shares within a relevant market (see Section III and Appendix 4), then proceeds to assess whether the merger would lead to or increase undue concentration in that market.²⁵

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index (“HHI”). The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with post-merger HHI greater than 1,800 are highly concentrated.²⁶ A merger causes undue concentration and triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly when it would result in a highly concentrated market and produce an increase in the HHI of more

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²² *Phila. Nat’l Bank*, 374 U.S. at 363 (1963).

²³ These Guidelines use the term “products” to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause, or delivery to the customer’s location.

²⁴ In the context of buyers, concentration reflects the number and relative size of firms competing to purchase a product or service.

²⁵ Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.

²⁶ For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2,000$), and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$). Markets with HHI between 1,000 and 1,800 are referred to as “concentrated markets.”

than 100 points.²⁷ The Agencies also may examine the market share of the merged firm: a merger that significantly increases concentration and creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration.²⁸

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

Higher concentration levels suggest even greater risk that the merger may substantially lessen competition.²⁹

2. Mergers ~~May Be Illegal Because They~~ Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control. If evidence demonstrates substantial competition between the merging firms prior to the merger, the Agencies can determine that the merger may substantially lessen competition.³⁰

²⁷ The change in HHI from a merger of firms with shares *a* and *b* is equal to $2ab$. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is $2 \times 20 \times 5 = 200$.

²⁸ *Phi/a. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.")

²⁹ The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982, which used the 1,800 HHI threshold for a highly concentrated market, and 100 HHI for a significant increase. Each subsequent iteration until 2010 maintained those thresholds. See Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (1992), § 1.51; Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (1997), § 1.51; U.S. Dep't of Justice Merger Guidelines (1982), § 3(A). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. See, e.g., *Chicago Bridge & Iron Co. N.V. v. FTC.*, 534 F.3d 410,431 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (relying on Department of Justice's 1984 merger guidelines); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) (referencing the Department of Justice's 1984 guidelines). In practice, the Agencies tended to challenge mergers that greatly exceeded these thresholds to focus their limited resources on the most problematic mergers. The more permissive thresholds included in the 2010 Horizontal Merger Guidelines reflected that agency practice, rather than a judgment of the appropriate thresholds for competitive concern or the requirements of the law. The Agencies consider a threshold of a post-merger 1,800 HHI and an increase in HHI of 100 to better reflect both the law and the risks of competitive harm and have therefore returned to those thresholds here.

³⁰ 15 U.S.C. § 18. See also *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 669-70 (1964) ("it [is] clear that the elimination of significant competition between [merging firms] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act.... It [can be] enough that the two...compete[.]. That their

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Focusing on the competition between the merging firms can reveal that a merger between competitors may substantially lessen competition even where market shares are difficult to measure or where market shares understate the competitive significance of the merging firms to one another.

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Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. The more the merging firms have shaped one another's behavior, or have affected one another's sales, profits, valuation, or other drivers of behavior, the more significant the competition between them.

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The Agencies examine a variety of indicators to identify substantial competition. For example:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence relating to strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products. The Agencies use a variety of tools, detailed in Appendix 2, to assess customer substitution.

Impact of Competitive Actions on Rivals. Competitive actions by one firm can increase its sales at the expense of its rivals. The Agencies may gauge the extent of competition between the merging firms by considering the impact that competitive actions by one of the merging firms has on the other merging firm. The impact of a firm's competitive actions on a rival is generally greater when customers consider their products to be closer substitutes, so that a firm's competitive actions result in greater lost sales for the rival, and when the profitability of the rival's lost sales is greater.

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one firm on the other's actions, such

competition [is] not insubstantial and that the combination [would] put an end to it."); *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), cert. denied, 575 U.S. 996 (2015). The effect on competition of the elimination of competition between the merging firms, without considering the risk of coordination among the merged firm and the other remaining firms, is sometimes referred to as "horizontal unilateral effects."

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as firm choices about price, quality, wages, or another dimension of competition. Appendix 2 describes a variety of approaches to measuring such impacts.

Additional Evidence, Tools, and Metrics. The Agencies may use additional evidence, tools, and metrics to assess the loss of competition between the firms. Depending on the realities of the market, different evidence, tools, or metrics may be appropriate. Appendix 2 provides examples and detail on several tools and settings.

3. Mergers **May Be Illegal Because They Increase the Risk of Coordination.**

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The Agencies determine that a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the **merged firm and the other** remaining firms in a relevant market or makes existing coordination more stable or effective.³¹ Firms can coordinate across any or all dimensions of competition, such as price, product features, customers, wages, benefits, or geography. Coordination among rivals lessens competition whether it occurs explicitly—through collusive agreements between competitors not to compete or to compete less—or tacitly, through observation and response to rivals. Because tacit coordination **is often** difficult to address under Section 1 of the Sherman Act, vigorous enforcement of Section 7 of the Clayton Act to prevent market structures conducive to such coordination is especially critical.

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To assess the extent to which a merger may increase the likelihood, stability, or effectiveness of coordination, the Agencies often consider three primary factors and several secondary factors. The Agencies may consider additional factors depending on the market.

A. Primary Factors

The Agencies presume that post-merger market conditions are susceptible to coordinated interaction if any of the three primary factors are present.

Highly Concentrated Market. By reducing the number of firms in a market, a merger increases the risk of coordination. The fewer the number of competitively meaningful rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination. Markets that are highly concentrated after a merger that significantly increases concentration (see Guideline 1) are presumptively susceptible to coordination. If merging **firms**, claim that a highly concentrated market is not susceptible to coordination, the Agencies will assess this evidence using the framework described in Section IV.4. Where a market is not highly concentrated, the Agencies may still consider other risk factors.

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Prior Actual or Attempted Attempts to Coordinate. Evidence that firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination to lessen competition is highly informative as to the market's susceptibility to coordination. Evidence of failed attempts at coordination in the relevant market suggest that successful coordination was not so difficult as to deter attempts, and a merger reducing the number of rivals may tend to make success more likely.

³¹ See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229-30 (1993) (“In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.”).

Elimination of a Maverick. A maverick is a firm that acts on incentives to disrupt the status quo that other firms in the market might otherwise settle into, by bringing better products and services, or better prices, to the market. The presence of a maverick only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.³²

B. Secondary Factors

The Agencies also examine whether secondary factors demonstrate that a merger may meaningfully increase the risk of coordination, even absent the primary risk factors. Not all secondary factors must be present for a market to be susceptible to coordination.

Market Concentration. Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market with an HHI above 1,000, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.

Market Transparency. A market is more susceptible to coordination if a firm’s behavior can be promptly and easily observed by its rivals. Rivals’ behavior is more easily observed when the terms offered to customers are readily discernible and relatively transparent (that is, known to rivals). Transparency can refer to the ability to observe prices, terms, the identities of the firms serving particular customers, or any other competitive actions of other firms. Information sharing arrangements among market participants, such as public exchange of information through announcements or private exchanges through trade associations or publications, increase market transparency. Regular monitoring of one another’s prices or customers can indicate that the terms offered to customers are relatively transparent. Use of algorithms or artificial intelligence to track or predict competitor prices or actions likewise increases the transparency of the market.

Competitive Responses. A market is more susceptible to coordination if a firm’s prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case the stronger and faster the responses from its rivals because such responses reduce the benefits of competing more vigorously. Some factors that increase the likelihood of strong or rapid responses by rivals include: (1) the market has few significant competitors, (2) products in the relevant market are relatively homogeneous, (3) customers find it relatively easy to switch between suppliers, (4) suppliers use algorithmic pricing, or (5) suppliers use meeting-competition clauses.

Aligned Incentives. Removing a firm that has different incentives from most others in a market can increase the risk of coordination. For example, a firm with a small market share may have less incentive to coordinate because it has more potential to gain from winning new business than do other firms. The same issue can arise when a merger more closely aligns one or both merging firms’ incentives with the other firms in the market.

Profitability or Other Advantages of Coordination for Rivals. The Agencies regard coordinated interaction as more likely to occur when participants in the market stand to gain more from successful coordination. Coordination generally is more profitable or otherwise

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³² *United States v. Alcoa*, 377 U.S. 271, 280-81 (1964).

advantageous for the coordinating firms the less often customers substitute outside the market when firms offer worse terms.

4. Mergers **May Be Illegal Because They Eliminate a Potential Entrant in a Concentrated Market.**

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Mergers can substantially lessen competition by eliminating a potential entrant. For instance, a merger can eliminate the possibility that entry or expansion by one or both firms would have resulted in new or increased competition in the market in the future. A merger can also eliminate current competitive pressure exerted on other market participants by the mere perception that one of the firms might enter. Both of these risks can be present simultaneously.

A merger that eliminates a potential entrant into a concentrated market can substantially lessen competition or tend to create a monopoly.³³ The more concentrated the market, the greater the magnitude of harm to competition from any lost potential entry and the greater the tendency to create a monopoly. Accordingly, for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern.

A. Actual Potential Competition: Eliminating Reasonably Probable Future Entry

The antitrust laws reflect a preference for internal growth over acquisition.³⁴ In contrast to internal growth, merging a current and a potential market participant eliminates the possibility that the potential entrant would have entered on its own.³⁵

To determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition,³⁶ the Agencies examine (1) whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered “a substantial likelihood of ultimately producing deconcentration of [the] market or other significant procompetitive effects.”³⁷

Reasonable Probability of Alternative Entry. The Agencies’ starting point for assessment of a reasonable probability of entry is objective evidence regarding the firm’s available feasible means of entry, including its capabilities and incentives. Relevant objective evidence can include, for example, evidence that the firm has sufficient size and resources to enter; evidence of any advantages that would make the firm well-situated to enter; evidence that

³³ *United States v. Marine Bancorp.*, 418 U.S. 602, 630 (1974). A concentrated market is one with an HHI greater than 1,000 (See Guideline 1).

³⁴ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559 n.13 (1973) (Marshall, J., concurring) (“[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.” (quoting *Phila. Nat’l Bank*, 374 U.S. at 370)).

³⁵ See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 560–61 (1973) (Marshall, J., concurring).

³⁶ Harm from the elimination of a potential entrant can occur in markets that do not yet consist of commercial products, even if the market concentration of the future market cannot be measured using traditional means. Where there are few equivalent potential entrants including one or both of the merging firms, that indicates that the future market, once commercialized, will be concentrated. The Agencies will consider other potential entrants’ capabilities and incentives in comparison to the merging potential entrant to assess equivalence.

³⁷ *United States v. Marine Bancorp.*, 418 U.S. 602, 633 (1974).

the firm has successfully expanded into other markets in the past or already participates in adjacent or related markets; evidence that the firm has an incentive to enter; or evidence that industry participants recognize the company as a potential entrant.³⁸ This analysis is not limited to whether the company could enter with its pre-merger production facilities, but also considers overall capability, which can include the ability to expand or add to its capabilities on its own or in collaboration with someone other than the acquisition target.

Subjective evidence that the company considered entering absent the merger can also indicate a reasonable probability that the company would have entered without the merger.³⁹ Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable.

Likelihood of Deconcentration or Other Significant Procompetitive Effects. New entry can yield a variety of procompetitive effects, including market deconcentration, increased output or investment, higher wages or improved working conditions, greater innovation, higher quality, and lower prices.⁴⁰ If the merging firm had a reasonable probability of entering the concentrated relevant market, the Agencies will usually presume that the resulting deconcentration and other benefits that would have resulted from its entry would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*.⁴¹ To supplement the presumption that new entry yields procompetitive effects, the Agencies will consider projections of the potential entrant’s competitive significance, such as market share, its business strategy, the anticipated response of competitors, or customer preferences or interest.

A merger of two potential entrants can also result in a substantial lessening of competition. The merger need not involve a firm that has a commercialized product in the market or an existing presence in the same geographic market. The Agencies analyze similarly mergers between two potential entrants and those involving a current market participant and a potential entrant.

B. Perceived Potential Competition: Lessening of Current Competitive Pressure

A perceived potential entrant can stimulate competition among incumbents. That pressure can prompt current market participants to make investments, expand output, raise wages, increase product quality, lower product prices, or take other procompetitive actions. The acquisition of a firm that is perceived by market participants as a potential entrant can substantially lessen competition by eliminating or relieving competitive pressure.⁴²

³⁸ As to all of these types of evidence, see *Marine Bancorp.*, 418 U.S. at 636–37; *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 978 (8th Cir. 1981).

³⁹ *Yamaha Motor Co.*, 657 F.2d at 978.

⁴⁰ *Brown Shoe Co.*, 370 U.S. at 345 n.72 (“Internal expansion is . . . more likely to provide increased investment . . . more jobs and greater output.”).

⁴¹ For example, where state banking laws prohibit alternative *de novo* entry and dictate that alternative entry via toehold acquisition “would be frozen at the level of its initial acquisition,” the Agencies would not presume such alternative entry would yield deconcentration as a significant procompetitive effect. *Marine Bancorp., Inc.*, 418 U.S. 602, 633–39 (1974).

⁴² This elimination of present competitive pressure is sometimes known as an anticompetitive “edge effect” or a loss of “perceived potential competition.” *E.g., Marine Bancorp.*, 418 U.S. at 639.

To assess whether the acquisition of a perceived potential entrant may substantially lessen competition, the Agencies consider whether a current market participant could reasonably consider one of the merging companies to be a potential entrant and whether that potential entrant has a likely influence on existing competition.

Market Participant Could Reasonably Consider a Firm to Be a Potential Entrant. The starting point for this analysis is evidence regarding the company’s capability of entering or applying competitive pressure.⁴³ Objective evidence is highly probative and includes evidence of feasible means of entry or communications by the company indicating plans to expand or reallocate resources in a way that could increase competition in the relevant market. Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants’ internal perceptions or direct evidence of strategic reactions to the potential entrant. If such evidence is available, it can weigh in favor of finding that a current market participant could reasonably consider the firm to be a potential entrant.

Likely Influence on Existing Rivals. Objective evidence establishing that a current market participant could reasonably consider one of the merging firms to be a potential entrant can also establish that the firm has a likely influence on existing market participants.⁴⁴ Subjective evidence indicating that current market participants, including for example customers, suppliers, or distributors, internally perceive the merging firm to be a potential entrant can also establish a likely influence. Direct evidence that the firm’s presence or behavior has affected or is affecting current market participants’ strategic decisions can also establish a likely influence.⁴⁵ Circumstantial evidence that the firm’s presence or behavior had a direct effect on the competitive reactions of firms in the market may also show likely influence.⁴⁶

The existence of a perceived potential entrant does not override or counteract harm from mergers between companies that already participate in the relevant market. The impact of perceived potential entrants is secondary to the competition provided by current market participants. Accordingly, when evaluating a merger of current competitors, the Agencies will assess whether firms are likely to enter the market to replace the lost competition using the standards discussed in Section IV.2. Concentrated markets often lack robust competition, and so the loss of even a secondary source of competition, like perceived potential entrants, may substantially lessen competition.

⁴³ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533–36 (1973) (identifying “specific question” as “whether, given [the acquirer’s] financial capabilities and conditions in the market, it would be reasonable to consider it a potential entrant into that market”).

⁴⁴ *Falstaff Brewing Corp.*, 410 U.S. at 534.

⁴⁵ *FTC v. Procter & Gamble*, 386 U.S. 568, 581 (1967) (relying on objective evidence that “barriers to entry . . . were not significant” for the acquirer, that the number of potential entrants was “not so large that the elimination of one would be insignificant,” and that “the acquiring firm was the most likely entrant,” in addition to direct evidence of current edge effects on existing competitors’ behavior).

⁴⁶ For instance, a market participant may have expressed concerns that certain competitive actions would hurt its ability to compete against the potential entrant.

5. Mergers May Be Illegal Because They Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.

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The Agencies evaluate whether a merger may substantially lessen competition by giving a firm control over access to a product, service, or customers that its rivals use to compete. Control of rivals' access to these tools of competition can enable the merged firm to weaken its rivals and, in so doing, lessen competition or tend to create a monopoly.

This concern applies to any merger involving access to products, services, or customers rivals use to compete, whether or not they involve traditional vertical supply and distributor relationships. The concern often arises in vertical mergers between firms in two stages of a supply and distribution chain (see Guideline 6), but may also arise in horizontal mergers that combine two firms to give them control over such access. The Agencies' analysis focuses on the risk that the merged firm would have the ability and incentive to make it harder for rivals to access what they need to compete and thereby harm competition.⁴⁷

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Commented [GS12]: There is considerable overlap between this Guideline and Guideline 6. Consider either merging the two Guidelines into one, or cross-referencing the two Guidelines as suggested here and in Guideline 6.

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The relevant market for this analysis can be the market in which the merged firm competes with its rivals, while the product, service, or customer that rivals use to compete in that market is termed the "related product" or "related service." Many types of related products or services can implicate this concern, such as: (1) related products rivals may use, now or in the future, as inputs; (2) related products that provide distribution services for rivals or otherwise influence consumer purchase decisions, or the firm's own purchases of intermediate products; (3) related products that provide the merged firm access to competitively sensitive information about its rivals; or (4) related products that are complementary to, and therefore increase the value of, rivals' products. Even if the related product or service is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations.

A. The Ability and Incentive to Weaken or Exclude Rivals

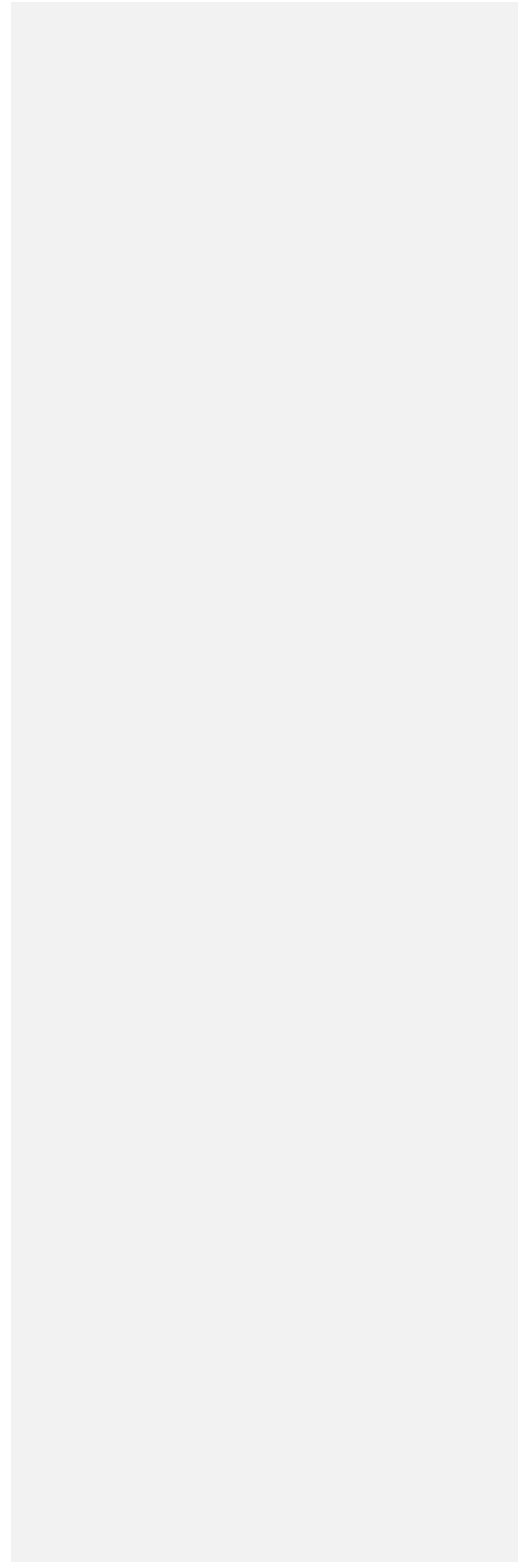
A merger involving products, services, or customers that rivals use to compete may substantially lessen competition when it results in a firm with both the ability and incentive to make it harder for its rivals to compete in the relevant market, or to eliminate them or deter the entry of new firms into the relevant market. Because the merged firm may have the ability to control access to the related product in many different ways, the Agencies do not seek to specify the precise actions the merged firm would take to weaken rivals.

(1) Ability

The Agencies assess the merged firm's ability to make it harder for its rivals to compete by examining (1) the extent to which the firm can limit or degrade its rivals' access to a related product, service, or customers, and (2) the extent to which the related product, service, or customers affects those rivals' competitiveness.

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⁴⁷ The inquiry in Guideline 6 into vertical market structures is distinct from this ability and incentive analysis.



Ability to Limit Access. The Agencies assess whether the merged firm may be able to limit or degrade rivals’ access to the related product or service by looking at the availability of substitutes. In particular, the merged firm might be able to deny rivals access altogether or might be able to worsen the terms on which rivals can access the related product or service. For example, the merged firm might raise price, reduce quality, provide less reliable access, or delay access to product improvements or information relevant to making efficient use of the product.

Competitive Significance of Limiting Rivals’ Access. The Agencies consider the potential impact on competition from limiting or degrading rivals’ access to the related product or service. This inquiry focuses on whether doing so would make it harder for rivals to compete or raise barriers to entry by new firms and expansion by existing firms. For example, it would be harder for rivals to compete if raising rivals’ costs as a result of the merger led rivals to charge higher prices, made their products less attractive to customers, or meant those products were less readily available to customers. The merged firm’s ability to exclude or weaken rivals is greater, the worse are rivals’ alternative options to the merged firm’s related product or service.

(2) *Incentive*

The Agencies assess whether the merged firm may have an incentive to worsen the **costs or other** terms on which rivals can access the related product and thereby benefit from substantially lessened competition. This incentive discourages the merged firm from providing those rivals with access to the related product or service. Evidence regarding the merged firm’s incentives can include evidence about the structure, history, and probable future of the market.

Commented [GS14]: You use “raising rivals’ costs for the first time just above, and here you switch to the broader “worsen the terms”. Suggest you add these words here to more clearly tie them together this first time. Then when you say “worsen the terms” later, it is clear that you mean it in the broad sense that includes raising costs.

Competition with Rivals That Use the Related Product or Service. The merged firm’s incentives to worsen terms for the related product depend on the extent to which it competes with rivals that use the related product. The merged firm may benefit from higher sales or prices in the relevant market if they worsen terms for rivals. This benefit can make it profitable to worsen the terms offered to rivals for the related product and thereby substantially lessen competition, even though it would not have been profitable for the firm that controlled the related product prior to the merger.

The Agencies may assess the extent of competition with rivals using analogous methods to the ones used to assess the extent of competition between the merging firms (see Guideline 2 and Appendix 2). For example, the Agencies may consider evidence about the impact on the merged firm of competitive actions by rivals that use the related product.

Prior Acquisitions or Prior Actions. If **one of the merging** firms used prior acquisitions or engaged in prior actions to limit rivals’ access to the related product, or other products its rivals use to compete, that suggests that the merged firm has an incentive to lessen competition in the relevant market. However, lack of past action does not necessarily indicate a lack of incentive in the present **merger,**

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Internal Documents. Business planning and merger analysis documents prepared by the merging firms might identify instances where the firms themselves believe they have incentives

to raise rivals’ costs ~~or otherwise worsen rivals’ terms for access~~. Such documents, where available, are highly probative of an incentive to ~~worsen~~ rivals’ terms. The lack of such documents, however, is less informative.

* * *

If the merged firm has the ability and incentive to make it harder for its rivals to compete in the relevant market, there are many ways it could act on those incentives. The merging ~~firms~~ may put forward evidence that there are no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder for rivals to compete, or that the merged firm ~~itself~~ will be ~~more able to compete~~ as a result of the merger. When evaluating whether this rebuttal evidence is sufficient to conclude that no substantial lessening of competition is threatened by the merger, the Agencies will give little weight to claims that are not supported by an objective analysis, including, for example, speculative claims about reputational harms. Moreover, the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid harming their rivals that do not align with the firm’s incentives.⁴⁸ The Agencies’ assessment will be consistent with the principle that firms act to maximize their overall profits and valuation rather than the profits of any particular business unit.⁴⁹ A merger may substantially lessen competition or tend to create a monopoly regardless of the ~~expressed~~ intent of the merging companies or their executives.⁵⁰ (See Section IV.)

B. Mergers Involving Access to Rivals’ Competitively Sensitive Information

If rivals would continue to access or purchase a related product controlled by the merged firm post-merger, the merger may substantially lessen competition if the merger would grant the firm access to rivals’ competitively sensitive information. This situation could arise in many settings, including, for example, if the merged firm learns about rivals’ sales volumes or projections from supplying an input or a complementary product; if it learns about promotion plans and anticipated product improvements or innovations from its role as a distributor; or if it learns about entry plans from discussions with potential rivals about compatibility with a complementary product it controls. A merger that gives the merged firm access to competitively sensitive information could undermine rivals’ ability or incentive to compete ~~vigorously~~ or could facilitate coordination.

Undermining Competition. The merged firm might use access to a rival’s competitively sensitive information to undermine competition from the rival. For example, the merged firm’s ability to preempt, appropriate, or otherwise undermine the rival’s procompetitive actions can discourage the rival from fully pursuing competitive opportunities. As a result, rivals might see less value in taking procompetitive actions when a competitor has access to its competitively

⁴⁸ See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

⁴⁹ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770–72 (1984); *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019).

⁵⁰ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957); see also *Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1972) (“Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.”).

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Commented [GS15]: “Able to compete” more clearly describes what the firms’ assertion should be – “more competitive” is a common assertion that often just means “stronger” – which the merging firms always desire, but does not always translate into more competition in the market – especially when the indicators are that the merger is indeed going to increase the merged firms’ power, but in a way that harms competition.

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Commented [GS16]: This also covers sincere expressions of benign intent that are simply not likely to be borne out, because they don’t align with incentives, in addition to disingenuous claims. And really, the former is even more important to this point than the latter. “Expressed” gets a little closer to indicating that both are covered. An alternative might be “regardless of any sincerely expressed intent ...”

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sensitive information. Relatedly, rivals might refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information to undercut them. Those rivals might become less effective competitors if they must rely on less preferred trading partners or accept less favorable trading terms because their outside options have worsened or are more limited.

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Facilitating Coordination. A merger that provides access to rivals’ competitively sensitive information might facilitate coordinated interaction among firms in the relevant market by allowing the merged firm to observe its rivals’ competitive strategies faster and more confidently. (See Guideline 3.)

6. Vertical Mergers **May Be Illegal Because They Create Market Structures That Foreclose or Substantially Impede Competition.**

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A merger is “vertical” when the merging firms operate different stages of the same supply and distribution chain. These different stages are referred to in relation to each other as “downstream” when closer to final consumers and “upstream” when further away from final consumers. Vertical integration occurs when the product or service supplied by the “upstream” firm (e.g., an input supplier) is arranged to be regularly and exclusively used by the “downstream” firm (e.g., a manufacturer of a finished product). The most permanent form of vertical integration is a merger between the upstream and downstream firms. “The primary vice of a vertical merger... is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete.”⁵¹ The Agencies therefore sometimes undertake a structural analysis of a supply chain as a means of assessing whether a vertical merger may substantially lessen competition by making it more difficult for rivals to obtain needed inputs or distribution (see Guideline 5).⁵²

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Commented [GS19]: Helpful description, taken from 2020 Vertical Merger Guidelines p. 1.

Commented [GS20]: It’s not integration just because the input supplier’s product is used by the manufacturer. “Arranged to be regularly and exclusively used” more closely describes the long-term arrangement required for there to be vertical integration as distinct from an ordinary arms-length commercial transaction.

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The Agencies apply a similar analysis to mergers that are not strictly vertical but have vertical elements, such as “diagonal” mergers that combine firms or assets at different stages of competing supply chains), and mergers of complements.

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Commented [GS22]: Helpful description, taken from 2020 Vertical Merger Guidelines p. 1. This is kind of subsumed into Guideline 5, but should be re-referenced here.

A. Market Share Analysis

The risk of harm to competition is greater when unintegrated rivals have fewer substitutes for a related product involved in the merger. The Agencies may define a “related market” around the related product (see Guideline 5), using methodologies described in Section III. The “foreclosure share” is the share of the related market that is controlled by the merged firm, such that it could foreclose rivals’ access to the related product on competitive terms. If the foreclosure share is above 50 percent, that factor alone is a sufficient basis for a presumption that the effect of the merger may be to substantially lessen competition, potentially subject to any rebuttal evidence (see Section IV).⁵³

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B. Plus Factors Analysis

Below a foreclosure share of 50 percent, the Agencies consider a range of plus factors, in addition to the foreclosure share, to determine whether a vertical merger is reasonably likely to

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⁵¹ *Brown Shoe*, 380 U.S. at 323-24 (cleaned up). See *Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 (2d Cir. 1979); *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 599 (6th Cir. 1970); *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 567 (2d Cir. 1983).

⁵² In addition to this structural analysis, many vertical mergers can also be analyzed under the ability and incentive analysis in Guideline 5. Either can be a sufficient basis to warrant concern.

⁵³ *Brown Shoe*, 370 U.S. at 328 (“If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated . . .”); *Fruehauf Corp.*, 603 F.2d 345, 352, n.9 (2d Cir. 1979) (“[N]o such Per se rule has been adopted, except where the share of the market foreclosed reaches monopoly proportions,” and the roughly 50% foreclosure share in *United States v. El du Pont de Nemours & Co.*, 353 U.S. 586 (1957) “left no doubt that the vertical tie conferred market power.”).

restrict options along the supply chain, depriving rivals of a fair opportunity to compete. The following is not an exhaustive list of all sources of potentially relevant evidence.

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets and whether there is a trend toward further vertical integration. The acceleration of a trend toward vertical integration may be shown through, for example: a pattern of vertical integration following mergers by one or both of the merging companies; or evidence that a merger was motivated by a desire to secure supply or distribution in response to similar mergers, or joint ventures, among other companies.⁵⁴

Nature and Purpose of the Merger. When the nature and purpose of the merger is to foreclose rivals, including by raising their costs or otherwise worsening their terms of access, that suggests the merged firm is likely to foreclose rivals.⁵⁵

The Relevant Market is Already Concentrated. The risk to competition from restricted supply chains is greater when the relevant market is already concentrated or when the merged firm already has a dominant position in that market (see Guideline 7).

The Merger Increases Barriers to Entry. A vertical merger can raise barriers to entry by limiting independent sources of supply so that a new entrant would need to invest not only in entering the relevant market, but also in the related market, sometimes referred to as two-stage entry.⁵⁶

7. Mergers May Be Illegal Because They Entrench or Extend a Dominant Position.

In a market that is already concentrated, merger enforcement should seek to preserve the possibility of eventual deconcentration, so that more competition and choice can become available.⁵⁷ Accordingly, the Agencies evaluate whether a merger involving an “already dominant[]” firm may substantially reduce the competitive structure of the industry.⁵⁸ The Agencies also evaluate whether a merger may extend that dominant position into new markets, thereby substantially lessening competition in those markets.⁵⁹ Or whether an acquisition in a new market may help entrench that current dominant position. The effect of entrenching or extending an already dominant position “may be substantially to lessen competition, or ... to tend to create a monopoly” in violation of Section 7 of the

⁵⁴ *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970).

⁵⁵ *See Ford Motor Co.*, 405 U.S. at 571.

⁵⁶ *Marquette Cement Manufacturing, Co.*, 75 FTC 32, 44 (1969) (“The increased capital costs and the greater risks that entry at both levels would entail substantially increased barriers to entry in this market . . .”).

⁵⁷ *Phila. Nat'l Bank*, 374 U.S. at 365 n.42 (1963) (“[I]f concentration is already great, the importance of . . . preserving the possibility of eventual deconcentration is correspondingly great.”).

⁵⁸ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967); *see, e.g., Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 518 (3d Cir. 1969) (“The potential entrenchment of . . . market power . . . may be anticompetitive and violative of § 7.”); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) (the “entrenchment of a large supplier or purchaser” can be an “essential” showing of a Section 7 violation); *United States v. FCC*, 652 F.2d 72, 102 (D.C. Cir. 1980) (under “entrenchment theory” a merger may violate Section 7 when it would allow the firm to “dominate the relevant market and to drive out actual or potential competitors”); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972) (affirming order blocking a merger under Section 7 that would “entrench” an “already dominant position”).

⁵⁹ *Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972) (condemning acquisition by dominant firm to obtain a foothold in another market when coupled with incentive to create and maintain barriers to entry into that market).

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Commented [GS23]: Recommend moving footnote 62 here, and revising it to give a more satisfactory explanation of why you are using “dominant position” instead of “market power,” the term that has been used consistently in the Guidelines since the original 1968 version. Because this is such a significant departure, you should consider putting the explanation into the text here, or perhaps even in the overview. Footnote 62 as written does not give a satisfactory explanation.

Assuming you decide to keep the switch, you need to explain it fully – not just state that you are doing it, but why the term “dominant position” is superior to the one that has been used consistently for 55 years. The explanation should include the understood meaning of market power – the ability to raise price or reduce output or degrade quality or delay innovation without losing profits. And for continuity, it should explain how that meaning is incorporated into the concept of dominant position, so that it is equivalent. And if you are intending to go beyond the long-stated goal of merger enforcement, to prevent the creation, increase, or entrenchment of market power, explain what further goal is now encompassed.

Note also that “market power” is explained in previous versions of the Guidelines to include shared market power, exercised by the companies in a concentrated market as the equivalent of power exercised by one company. “Dominant position” would ordinarily imply a single company with that power. Make sure that shared market power is still appropriately captured in the draft Guidelines, either in your discussions of dominant position or elsewhere.

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Clayton Act.⁶⁰ “Th[is] entrenchment doctrine properly blocks artificial competitive advantages ... but not simple improvements in efficiency.”⁶¹ Thus, not all acquisitions by a firm that is dominant in one market into a new market raise concerns; only acquisitions that have potential to entrench or extend that dominance.

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These concerns can arise in mergers that are neither strictly horizontal nor vertical, so the Agencies seek to identify any connection suggesting the merger may entrench or extend the dominant position.

To evaluate this concern, the Agencies consider whether (a) one of the merged firms already has a dominant position, and (b) the merger may entrench or extend that position. The Agencies assess the magnitude of the lessening of competition that may arise from entrenching a dominant position based on the degree of dominance already held and the extent to which it would be entrenched by a merger. The greater the dominance already held, the lower the degree of entrenchment that gives rise to a substantial lessening of competition. When one merging firm has or is approaching monopoly power, any acquisition that may tend to preserve its dominant position may tend to create a monopoly in violation of Section 7.

To identify whether one of the merging firms already has a dominant position,⁶² the agencies look to whether (i) there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share.

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If this inquiry reveals that at least one of the merging firms already has a dominant position, the Agencies then examine whether the merger would either entrench that position or extend it into additional markets.

Entrenching a Dominant Position. The Agencies examine whether the merger may entrench the dominant position through any mechanism consistent with market realities that lessens the competitive threats the merged firm faces. For example:

- A. *Increasing Entry Barriers Generally.* Entry barriers protect an incumbent firm from competition by making it more difficult for firms to enter the market or for existing firms to expand. Entry barriers can include, for example, the time, money, and expertise needed to develop a competing product; the risk that such entry would fail to recover the required investment; the costs to customers of switching providers, which could prevent or dissuade them from switching;

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⁶⁰ A merger that entrenches or extends a firm’s dominant position may also violate Section 1 or Section 2 of the Sherman Act. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (acquisitions among the types of conduct that may violate the Sherman Act). The various provisions of the Sherman, Clayton, and FTC acts each have separate standards, and one may be violated when the others are not.

⁶¹ See *Emhart Corp. v. USM Corp.*, 527 F.2d 177, 182 (1st Cir. 1975).

⁶² Cases use various terms to describe a firm with an already powerful position in a market. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 575 (1967) (“dominant position”); *id.* at 571 (“leading manufacturer”); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 278 (1964) (“leading producer”); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 524 (3d Cir. 1969) (“leading firm”); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) (“large supplier”); *United States v. FCC*, 652 F.2d 72, 103 (D.C. Cir. 1980) (“dominant firms”); *id.* (“leading firm”); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972) (“dominant position”); *Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 866 (2d Cir. 1974) (“dominant firm”). Concern with entrenching or extending a

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powerful position, however, does not depend on the precise term, and arises whether the firm has market power or monopoly power. These Guidelines generally use the term “dominant position” to refer to the position of those firms for which antitrust law is concerned about extending or entrenching power through a merger.

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existing regulatory barriers that directly restrict entry or make it more costly; the control over necessary inputs by a current market participant; scale economies that favor a firm with large production; network effects that reinforce the advantage of a platform that has a large share of active users; entrenched preferences for established brands; or control of patents that are necessary to produce the product or service. A merger that increases barriers to entry, including by requiring rivals to incur additional entry costs, can entrench a dominant position.⁶³ Several specific entry barriers are discussed below in B-D.

- B. *Increasing Switching Costs.* The costs associated with changing suppliers (often referred to as switching costs) are an important barrier to entry that can entrench a dominant position. A merger may increase switching costs if it makes it more difficult for customers to switch away from the dominant firm’s product or service, such as by enabling the bundling of multiple products or services together. A merger may also increase switching costs if it gives the dominant firm control of something customers use to switch providers, such as a data transfer service.
- C. *Interfering With Use of Competitive Alternatives.* A dominant position may be threatened by a service that customers use to work with multiple providers of similar or overlapping bundles of products and services. If an already dominant firm acquires a firm that provides a service that supports the use of multiple providers, it may have an incentive to degrade the utility or availability of that service, or to modify the service to steer customers to its own products, entrenching its dominant position.
- D. *Depriving Rivals of Scale Economies or Network Effects.* Scale economies and network effects can serve as a barrier to entry. Depriving rivals of access to scale economies and network effects can therefore entrench a dominant position. If an already dominant firm acquires by merger additional scale, or additional customers for its network, such that they are not available to would-be rivals, the merger can limit the ability of rivals to improve their own products and compete more effectively.
- E. *Eliminating a nascent competitive threat.* A nascent threat to a dominant firm is a firm that could grow into a significant rival, facilitate other rivals’ growth, or otherwise lead to a reduction in dominance. In assessing a merger that eliminates a nascent threat, the Agencies examine the merger’s tendency to create a monopoly under Section 7 of the Clayton Act.

In addition to these examples, the Agencies will assess whether the merger entrenches a dominant position in any other way based on the market realities specific to the merger.

At times, entry barriers can become temporarily less effective in protecting a firm’s dominance. For example, technological transitions can render existing entry barriers less relevant, and a dominant firm might seek to acquire firms to help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition. Further, technological transitions can create temporary opportunities for entrants to differentiate based on their alignment with new technologies. A dominant firm might seek to acquire firms that might

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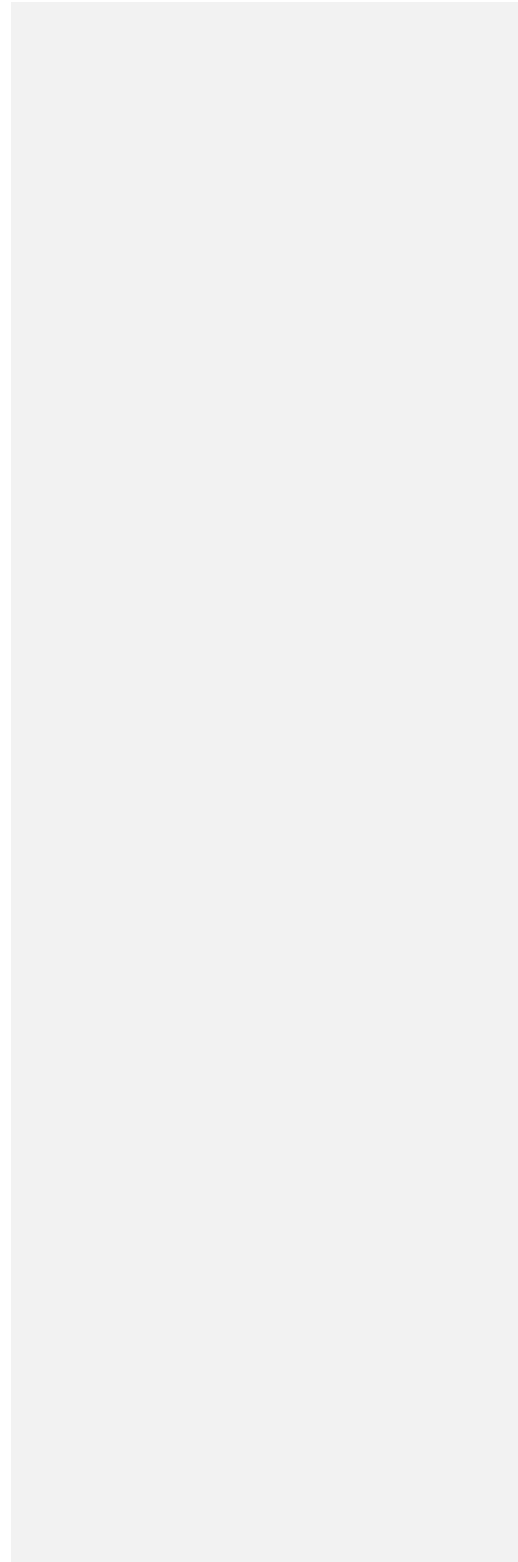
Commented [GS33]: NOTE: This kind of effect could also lessen competition if the acquiring firm is not already dominant, if the acquisition enables it to restrict access to the service.

Commented [GS34]: Not sure this sentence adds much. This is the only place that “tend to create a monopoly” is used apart from “substantially lessen competition.” And using it by itself here actually seems unduly limiting. The merger could entrench a firm’s existing dominance. Or it could give the firm market power short of monopoly power, which may not constitute a tendency to create a monopoly. Or it could enable continued anticompetitive coordinated effects among multiple firms. There’s no context or explanation for introducing this as a separate species of violation here. So recommend deleting the sentence.

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⁶³ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967) (a merger “may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing”).



otherwise gain sufficient customers to overcome entry barriers. The Agencies take particular care to preserve opportunities for deconcentration during technological shifts.

Separate from and in addition to its Section 7 analysis, the Agencies will consider whether the merger violates Section 2 of the Sherman Act. For example, under Section 2 of the Sherman Act, a firm that may challenge a monopolist may be characterized as a “nascent threat” even if the impending threat is uncertain and may take several years to materialize.⁶⁴ The Agencies assess whether the merger is reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2, which turns on whether the acquired firm is a nascent competitive threat.⁶⁵

Extending a Dominant Position into a Related Market. The Agencies also examine the risk that a merger could enable the merged firm to extend a dominant position from one market into a related market, thereby substantially lessening competition in the related market. For example, the merger might enable the merged firm to leverage its position by tying, bundling, conditioning, or otherwise linking sales of two products, excluding rival firms and ultimately substantially lessening competition in the related market.⁶⁶ The Agencies will not attempt to assess whether such tying, bundling, conditioning, or other linkage of the two products would itself violate any law, but instead will assess whether such conduct, if it were to occur, may tend to extend the firm’s dominant position.

8. Mergers **May Be Illegal Because They Further a Trend Toward Concentration.**

The effect of a merger may be substantially to lessen competition or to tend to create a monopoly if it contributes to a trend toward concentration. The Clayton Act “was designed to arrest mergers ‘at a time when the trend to a lessening of competition in a line of commerce is still in its incipiency.’”⁶⁷ The Supreme Court has therefore “adopt[ed] an approach to a determination of a ‘substantial’ lessening of competition [that] allow[s] the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing.”⁶⁸ Guideline 1 explains how the Agencies consider mergers in, or resulting in, highly concentrated markets. If concentration “has been recently increasing,” the Agencies examine whether the merger would further that trend toward concentration.

The Agencies look for two factors that together indicate a merger would further a trend toward concentration sufficiently that it may substantially lessen competition.

⁶⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (“[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will[.]”)

⁶⁵ *See id.* at 79.

⁶⁶ *Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972) (condemning an acquisition by a dominant firm with the incentive to create and maintain barriers to entry into target’s market).

⁶⁷ *United States v. Marine Bancorp.*, 417 U.S. 602, 622 (1974) (quoting *Brown Shoe*, 370 U.S. at 317).

⁶⁸ *Gen. Dynamics*, 415 U.S. at 497-98 nn. 7-8 (1974) (citing *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1974); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-552 (1966) and explaining that evidence of trend toward concentration “would...have sufficed to support a finding of undue concentration in the absence of other considerations.”).

Commented [GS35]: Suggest removing this paragraph. It’s not really a useful addition. Is there any situation in which a merger could violate section 2 but not section 7? Is there any merger remedy that would be available under section 2 but not section 7? You already make the general point in fn 2 that a merger can also violate section 1 or section 2. This paragraph seems not illuminating to either the general public or to practitioners and courts. The Microsoft quote is a good one, but Microsoft was not a merger case. If you want to keep the Microsoft quote, look for a more suitable place for it.

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First, the Agencies consider whether the merger would occur in a market or industry sector where there is a significant tendency toward concentration. That trend may be toward horizontal concentration, or it may be a “trend toward vertical integration” that would ultimately result in the “foreclosure of independent manufacturers from markets otherwise open to them.”⁶⁹ (See Guideline 6). That trend can be established by market structure, for example as a steadily increasing HHI exceeds 1,000 and rises toward 1,800. Or it can be reflected in other market characteristics, such as the exit of significant players or other factors driving concentration.⁷⁰

Second, the Agencies examine whether the merger would increase the existing level of concentration or the pace of that trend. That may be established by a significant increase in concentration, such as a change in HHI greater than 200, or it may be established by other facts showing the merger would increase the pace of concentration.

9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

A firm that engages in an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines may violate Section 7, even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly.⁷¹ In these situations, the Agencies may evaluate the series of acquisitions as part of an industry trend (Guideline 8) or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm under Guidelines 1-7.

In expanding antitrust law beyond the Sherman Act through passage of the Clayton Act, Congress intended “to permit intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.”⁷² As the Supreme Court has recognized, a cumulative series of mergers can “convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply.”⁷³ Accordingly, the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies.

The Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm’s history and current or future strategic incentives. Historical evidence focuses on the actual acquisition practices (consummated or not) of the firm, both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions. Evidence of the firm’s current incentives includes documents and testimony reflecting its plans

⁶⁹ *Brown Shoe*, 370 U.S. at 332.

⁷⁰ See *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-552 (1966).

⁷¹ Such strategies may also violate Section 2 of the Sherman Act and Section 5 of the FTC Act. Fed. Trade Comm’n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* at 12-14 nn.73, 82 (Nov. 10, 2022) (noting that “a series of acquisitions that tend to bring about the harm that the antitrust laws were designed to prevent . . .” have been subject to liability under Section 5).

⁷² H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).

⁷³ See *Brown Shoe*, 370 U.S. at 334 (1962) (citing S.Rep. No. 1775, 81st Cong., 2d Sess. 5, U.S. Code Cong. and Adm. News 1950, p. 4297.61; H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8).

and strategic incentives both for the individual acquisition and for its position in the industry more broadly. Where one or both of the merging firms has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative pattern or strategy under any of the other Guidelines to determine if that pattern or strategy may substantially lessen competition or tend to create a monopoly.

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10. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Platforms provide different products or services to two or more different groups or “sides” who may benefit from each other’s participation. Mergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical. When evaluating a merger involving a platform, the Agencies apply Guidelines 1-8 while accounting for market realities associated with platform competition. Specifically, the Agencies consider competition *between* platforms, competition *on* a platform, and competition to *displace* the platform.

Multi-sided platforms generally have several attributes in common, though they can also vary in important ways. Some of these attributes include:

- A. Platforms have multiple sides. On each side of a platform, platform participants provide or use distinct products and services.⁷⁴ Participants can provide or use different types of products or services on each side.
- B. A platform operator provides the core services that enable the platform to connect participant groups across multiple sides. The platform operator controls other participants’ access to the platform and can influence how interactions among platform participants play out.
- C. There are platform participants on each side of a platform. Their participation might be as simple as using the platform to find other participants, or as involved as building platform services that enable participants to connect in new ways and allow new participants to join the platform.
- D. Network effects occur when platform participants contribute to the value of the platform for other participants and the operator. The value for groups of participants on one side may depend on the number of participants either on the same side (direct network effects) or on the other side(s) (indirect network effects).⁷⁵ Network effects can create a tendency toward concentration in platform industries. Indirect network effects can be asymmetric and heterogeneous; for example, one side of the market or one segment of participants may place relatively greater value on the number of participants on another side.

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⁷⁴ For example, on 1990s operating-system platforms for personal computer (PC) software, software developers were on one side, PC manufacturers on another, and software purchasers on another.

⁷⁵ For example, 1990s PC manufacturers, software developers, and consumers all contributed to the value of the operating system platform for one another.

- E. A conflict of interest may arise when a platform operator is also a platform participant. The conflict of interest is between the operator’s interest in operating the platform as a forum for competition and its interest in winning competition on it.

Consistent with the Clayton Act’s protection of competition “in any line of commerce,” the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., on any one side of the platform (see Section III, Market Definition).⁷⁶

The Agencies protect competition between platforms by preventing the acquisition or exclusion of other platforms that may substantially lessen competition or tend to create a monopoly. This scenario can arise from various types of mergers:

- A. Mergers involving two platforms with different operators eliminate the competition between them. In a market with a dominant platform, entry or growth by smaller competing platforms can be particularly challenging because of network effects. A common strategy for smaller platforms is to specialize, providing distinctive features. Thus, a dominant platform can lessen competition and entrench its position by systematically acquiring other platforms while they are in their infancy. The Agencies seek to stop these trends in their incipency.
- B. A platform operator may acquire a platform participant, which can entrench the platform’s position by depriving rival platforms of participants and, in turn, depriving those rivals of network effects. For example, a platform operator could acquire a major seller that previously was willing to sell on multiple platforms and then restrict the presence of that seller on rival platforms, which could make it harder for rival platforms to recruit buyers. The long-run benefits to a platform operator of denying network effects to rival platforms create a powerful incentive to withhold or degrade those rivals’ access to platform participants that the operator acquires. The more powerful the platform operator, the greater the threat to competition presented by mergers that may weaken rival platforms or increase barriers to platform entry and expansion.
- C. Acquisitions by a platform operator of a firm that provides services that facilitate participation on multiple platforms can deprive rival platforms of platform participants. Many services can facilitate such participation, such as tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms.
- D. Mergers that involve firms that provide other important inputs to platform services can enable the platform operator to deny rival platforms the benefits of those inputs. For example,

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⁷⁶ In the limited scenario of a “special type of two-sided platform known as a ‘transaction’ platform,” under the Sherman Act, *Ohio v. Am. Express*, 138 S. Ct. 2274, 2280 (2018), a relevant market encompassing both sides of a two-sided platform may be warranted. *Id.* Simultaneous transaction platforms have the “key feature...that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.” *Id.* Because “they cannot sell transaction services to [either user group] individually...transaction platforms are better understood as supplying only one product—transactions.” *Id.* at 2286. This characteristic is not present for many types of two-sided or multi-sided platforms; in addition, many platforms offer simultaneous transactions as well as other products

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and services, and further they may bundle these products with access to transact on the platform or offer quantity discounts. Even for simultaneous transaction platforms, non-price evidence such as a change in market structure (see Guideline 1) or a loss of competition between the merging firms (see Guideline 2) can still indicate that a merger may substantially lessen competition in a line of commerce for purposes of the Clayton Act.

acquiring data that helps facilitate matching, sorting, or prediction services may enable the platform **operator** to weaken rival platforms by denying them that data.

The Agencies protect competition *on* a platform in any markets that interact with the platform. When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against **rivals**, participating on the platform, harming competition in the product market for that product or service. This problem is exacerbated when discrimination in favor of **the platform operator's** product or service would reduce access to distribution for rivals in the participants' market and deprive rivals of network effects in the platform market, both extending and entrenching **the operator's** dominant position.

The Agencies protect competition to *displace* the platform or any of its services. For example, new technologies or services may create an important opportunity for firms to replace one or more services the incumbent platform operator provides, shifting some participants to partially or fully meet their needs in different ways or through different channels. Similarly, a non-platform service can lessen dependence on the platform by providing an alternative to one or more functions provided by the platform. **When a platform is** dominant, the Agencies seek to prevent even relatively small accretions of power from inhibiting the prospects for displacing the platform or for decreasing dependency on the platform.

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

A merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers.⁷⁷ **As explained in Guideline 6, suppliers of a firm are referred to as "upstream," as distinct from customers of the firm, which are referred to as "downstream."** The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the **merged buyer and the other** remaining buyers. It can likewise lead to undue concentration among buyers, accelerate a trend towards undue concentration, or entrench or extend the position of a dominant buyer. Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces **burdens** for suppliers. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, **or to other less favorable terms being offered, any of** which in turn reduces incentives for suppliers to invest in capacity or innovation. The level of concentration at which competition concerns arise may be lower in buyer markets than in seller markets, given the unique features of certain buyer markets.

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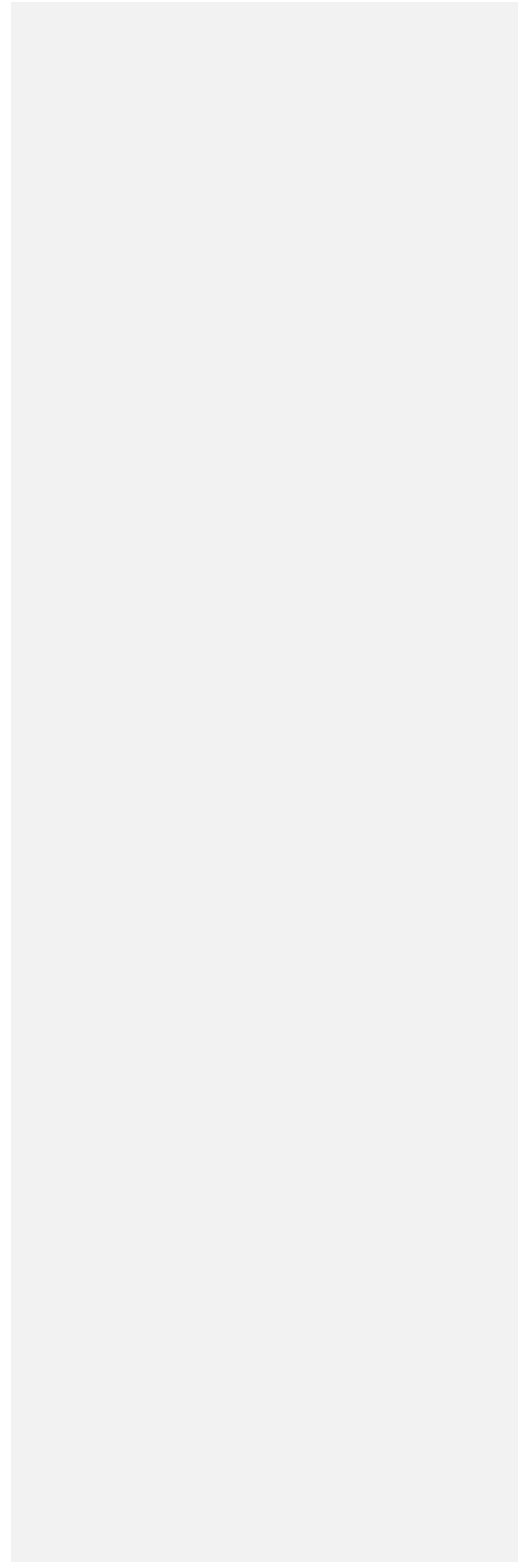
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⁷⁷ See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (in the Sherman

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Act context noting that “[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”).



Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor.⁷⁸ Where a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality. When assessing the degree to which the merging firms compete for labor, any one or more of **these effects** may demonstrate that substantial competition exists between the merging firms.

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Labor markets frequently have characteristics that can exacerbate the **adverse** competitive effects of a merger between competing employers. For example, labor markets often exhibit high switching costs and search **burdens**, due to the process of finding, applying, interviewing for, and acclimating to, a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that **otherwise appear to be** competitive substitutes.

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In addition, finding a job requires the worker and the employer to agree to the match. Even within a given salary and skill range, employers often have specific demands for the experience, skills, availability, and other attributes they desire in their employees. At the same time, workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently. This matching process often narrows the range of rivals competing for any given employee.

In light of **these** characteristics, labor markets are often relatively narrow.

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The features of labor markets may in some cases put firms in dominant positions. To assess this dominance in labor markets (see Guideline 7), the Agencies often examine the merging firms' power to cut or freeze wages, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market. Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country, a merger's harm to competition among buyers is not saved by **purported** benefits to competition among sellers.⁷⁹ That is, a merger can substantially lessen competition in one or

⁷⁸ See, e.g., *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (applying the Sherman Act to protect workers from an employer-side agreement to limit compensation).

⁷⁹ *Brown Shoe*, 370 U.S. at 325 (“Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition ‘in *any* line of commerce’ (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.”).

more buyer markets, seller markets, or both, and the Clayton Act protects competition in any and every one of them.

Just as they do when analyzing competition in the markets for products and services, the Agencies will analyze labor market competition on a case-by-case basis.

12. When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

In many acquisitions, two companies come under common control. In some situations, however, the acquisition of less-than-full control may still influence decision-making at the target firm or another firm in ways that may substantially lessen competition. Acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, veto the firm’s ability to raise capital, or impact operational decisions, or access to competitively sensitive information. The Agencies have concerns with both cross-ownership, which refers to holding a non-controlling interest in a competitor, as well as common ownership, which occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings.

Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority position may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition. The post-acquisition relationship between the merging firms and the independent incentives of the firms outside the acquisition may be important in determining whether the partial acquisition may substantially lessen competition. Such partial acquisitions are subject to the same legal standard as any other acquisition.⁸⁰

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While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects:

First, a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm.⁸¹ For example, a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select particular managers, can create such influence. Additionally, a nonvoting interest may, in some instances, provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making. Such influence can lessen competition because the partial owner could use its influence to induce the target firm to compete less vigorously or to coordinate its conduct with that of the acquiring firm.

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⁸⁰ See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (“[A]ny acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.”).

⁸¹ See *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 860–61 (6th Cir. 2005).

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete.⁸² Acquiring a minority position in a rival might blunt the incentive of the partial owner to compete vigorously, because it may profit through dividend or other revenue share even when it loses business to the rival. For example, the partial owner may decide not to develop a new product feature to win market share from the firm in which it has acquired an interest, because doing so will reduce the value of its investment in its rival. This reduction in the incentive of the acquiring firm to compete arises even when it cannot directly influence the conduct or decision making of the target firm.

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Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can substantially lessen competition through other mechanisms. For example, it can enhance the ability of the target and the partial owner to coordinate their behavior and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the merger also facilitates the flow of competitively sensitive information from the investor to the target firm. Even if coordination does not occur, the partial owner may use that information to preempt or appropriate a rival's competitive business strategies for its own benefit. If rivals know their efforts to win trading partners can be immediately appropriated, they may see less value in taking pro-competitive actions in the first place, resulting in a lessening of competition.

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13. Mergers May Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.

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The analyses above address common scenarios that the Agencies use to assess the risk that a merger may substantially lessen competition or tend to create a monopoly. However, they are not exhaustive. The Agencies have in the past encountered mergers that lessen competition through mechanisms not covered above. For example:

- A. A merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms;
- B. A merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger; or
- C. In a concentrated market, a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.

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As these scenarios and these Guidelines indicate, there is a wide range of evidence that can show that a merger may lessen competition or tend to create a monopoly. Whatever the sources of evidence, the Agencies look to the facts and the law in each case.

⁸² See *Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967) (identifying Section 7 concerns with 20% investment).

III. Market Definition

The Clayton Act protects competition “in any line of commerce in any section of the country.”⁸³ The Agencies identify the “area of effective competition” in which competition may be lessened “with reference to a product market (the ‘line of commerce’) and a geographic market (the ‘section of the country.’).”⁸⁴ The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a “market definition” exercise and the markets so defined as “relevant antitrust markets.” Market definition can also allow the Agencies to identify market participants and measure market shares and market concentration.

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. The outer boundaries of a relevant product market are determined by the “reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”⁸⁵ Within a broad relevant market, however, effective competition often occurs in numerous narrower relevant markets.⁸⁶ Market definition ensures that antitrust markets are sufficiently broad, but it does not lead to a single relevant market. Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition “in any line of commerce” and in “any section of the country” and the Agencies protect competition by challenging a merger that may lessen competition in any one or more relevant markets.

Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market “cannot meaningfully encompass that infinite range” of substitutes.⁸⁷ There may be effective competition among a narrow group of products, and the loss of that competition may be harmful, making the narrow group a relevant market, even if competitive constraints from significant substitutes are outside the group. ~~Even if the loss of competition between the narrow group of products and the significant substitutes outside that group would be even more harmful, that does not prevent the narrow group from being a market in its own right.~~

Relevant markets need not have “precise ‘metes and bounds.’”⁸⁸ Some substitutes may be closer, and others more distant, and defining a market necessarily requires including some substitutes and excluding others. Defining a relevant market sometimes requires a line drawing exercise around product features, such as size, quality, distances, customer segment, or prices. There can be many places to draw that line and properly define a relevant market. The Agencies recognize that such scenarios are common, and indeed “fuzziness would seem inherent in any

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⁸³ 15 U.S.C. § 18.

⁸⁴ *Brown Shoe*, 370 U.S. at 324.

⁸⁵ *Brown Shoe*, 370 U.S. at 325.

⁸⁶ *Id.* (“[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes”). Multiple overlapping markets can be appropriately defined relevant markets. For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger.

⁸⁷ *United States v. Cont’l Can Co.*, 378 U.S. 441, 449 (1964).

⁸⁸ *United States v. Gen. Dynamics Corp.* 415 U.S. 486, 521 (1974).

attempt to delineate the relevant...market.”⁸⁹ Market participants may use the term “market” colloquially to refer to a broader or different set of products than those that would be needed to constitute a valid antitrust market.

Moreover, a product or service may be in more than one market. There can be overlapping markets, or markets within markets. Section 7 of the Clayton Act requires examination of the potential competitive effects of a merger in each relevant market. If the merger may substantially lessen competition or tend to create a monopoly in any market, it violates Section 7. To ensure that no market is overlooked, the Agencies seek to narrow each candidate market to the fullest extent that still exhibits the characteristics of a valid market.

The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to demonstrate the validity of a candidate relevant antitrust market.

- A. Direct evidence of substantial competition between the merging firms can demonstrate that a relevant market exists in which the merger may substantially lessen competition, and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the precise metes and bounds of the market are not specified. (See Guideline 2).
- B. Direct evidence of the exercise of market power can demonstrate a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended by the merger, since the same evidence identifies market power and the rough contours of the relevant market.
- C. A relevant market can be identified from evidence on observed market characteristics (“practical indicia”), such as “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”⁹⁰ Various practical indicia may identify a relevant market in different settings.
- D. Another “common method employed by courts and the [Agencies]...is the hypothetical monopolist test.”⁹¹ This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopolist test applies when considering the impact of a merger on competition among buyers. Appendix 3 describes this test in more detail.

The Agencies use these tools to define relevant markets because they each employ commercial realities to identify an area of effective competition.

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⁸⁹ *Phila. Nat’l Bank*, 374 U.S. at 360 n.37.

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⁹⁰ *Brown Shoe*, 370 U.S. at 325, quoted in *United States v. U.S. Sugar Corp.*, No. 22-2806, slip op. at 11, 13-14 (3d Cir. July 13, 2023) (affirming district court’s application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who “could counteract monopolistic restrictions by releasing their own supplies.”).

⁹¹ *FTC v. Penn State Hershey Med. Center*, 838 F.3d 327 (3d Cir. 2016). While these guidelines focus on applying the hypothetical monopolist test in analyzing mergers, the test can be adapted for similar [market definition](#) purposes in cases involving alleged monopolization or other conduct. See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015).

IV. **Evaluating Rebuttal Claims** that No Substantial Lessening of Competition is Threatened by the Merger.

The Agencies may assess whether a merger may substantially lessen competition or tend to create a monopoly based on a fact-specific analysis under any one or more of the Guidelines discussed above.⁹² Supreme Court precedent also examines whether “other pertinent factors” presented by the merging firms, nonetheless “mandate[] a conclusion that no substantial lessening of competition [is] threatened by the acquisition.”⁹³

Several types of merging firms’ rebuttal claims have been recognized by the courts, which have established legal tests for considering these claims. The Agencies consider these claims in their own analysis, consistent with prevailing law, as described below.

1. Failing Firms

When merging firms suggest the weak or weakening financial position of one of the merging firms will prevent a lessening of competition, the Agencies examine that claim under the “failing firm” defense established by the Supreme Court. This defense applies when the assets to be acquired would imminently cease playing a competitive role in the market even absent the merger.

As set forth by the Supreme Court, the failing firm defense has three requirements:

- A. “[T]he evidence show[s] that the [failing firm] face[s] the grave probability of a business failure.”⁹⁴ The Agencies typically look for evidence in support of this element that the allegedly failing firm would be unable to meet its financial obligations in the near future. Declining sales and/or net losses, standing alone, are insufficient to show this requirement.
- B. “The prospects of reorganization of [the failing firm are] dim or nonexistent.”⁹⁵ The Agencies typically look for evidence suggesting that the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Code, taking into account that “companies reorganized through receivership, or through [the Bankruptcy Code] often emerge[] as strong competitive companies.”⁹⁶ Evidence of the firm’s actual attempts to resolve its debt with creditors is important.
- C. “[T]he company that acquires the failing [firm] or brings it under dominion is the only available purchaser.”⁹⁷ The Agencies typically look for evidence that a company

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⁹² See *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (either “short cut” market-concentration presumption or “fact-specific showing” sufficient to establish prima facie case of Section 7 violation).

⁹³ See *Gen. Dynamics*, 415 U.S. 486, 498 (1974); *United States v. Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990) (quoting *General Dynamics* and describing its holding as permitting rebuttal based on a “finding that ‘no substantial lessening of competition occurred or was threatened by the acquisition’”).

⁹⁴ *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 138 (1969).

⁹⁵ *Citizen Publ’g*, 394 U.S. at 138.

⁹⁶ *Id.*

⁹⁷ *Id.* at 136-39 (1969) (quoting *Int’l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930)).

has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger.⁹⁸

Although merging firms sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has “confine[d] the failing company doctrine to its present narrow scope.”⁹⁹ The Agencies evaluate evidence of a failing firm consistent with this prevailing law.¹⁰⁰

2. Entry and Repositioning

Merging firms sometimes claim that any substantial lessening of competition resulting from the merger would induce new entry into the relevant market, which would prevent or quickly neutralize the anticompetitive effect, so that the merger would not substantially lessen competition. This claim posits that any such substantial lessening competition would make the market more profitable, not only for the merged firm, but also for other competitors, and that this increased profitability would induce new entry, or expansion by existing competitors, or a repositioning by other firms of products or services that are close substitutes, sufficient to remove the profitability of taking advantage. To evaluate this claim, the Agencies assess whether entry induced by the merger would be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”¹⁰¹

A. **Timeliness.** To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger can take hold. Entry in most industries takes a significant amount of time and is therefore likely to be ineffective in counteracting any substantial lessening of competition that is threatened by a merger in time to neutralize its profitability. Moreover, the entry must be durable: an entrant that does not sustain its investment or that exits the market would not provide long-term preservation of competition.

B. **Likelihood.** Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the posited new entry is sufficient to counteract the merger’s effect on competition, the Agencies analyze why the merger’s expected effects would be enough to induce entry that was not planned in pre-merger competitive conditions.

⁹⁸ Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. The failing firm must actively solicit reasonable alternative offers before it can use the failing firm defense. Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the merging firms cannot use the failing firm defense. The fact that the acquiring firm is willing to pay a higher price is not relevant.

⁹⁹ *Citizen Publ’g Co. v. United States*, 394 U.S. at 139.

¹⁰⁰ When analyzing one firm’s acquisition of a division of another firm, or of the assets of that division, the Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market

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and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

¹⁰¹ *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

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The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple stages of the market supply and distribution chain at sufficient scale to compete effectively.

- C. **Sufficiency.** Even where timely and likely, entry may not be enough to prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant’s effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging firms to be considered sufficient. The Agencies typically do not credit entry that depends on moving assets from another market with the potential effect of lessening competition in that other market.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry.

3. Procompetitive Efficiencies

Merging firms often claim that, notwithstanding indications that competition may be lessened, procompetitive efficiencies that would result from the merger mean that the merger does not in fact threaten any substantial lessening of competition.

The Supreme Court has held that “possible economies [from a merger] cannot be used as a defense to illegality.”¹⁰² Competition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth. Firms also often work together using contracts short of a merger to combine complementary assets for a specific purpose and finite duration, without the full anticompetitive consequences of a merger.

Merging firms often claim that, notwithstanding indications that competition may be lessened, procompetitive efficiencies that would result from the merger mean that the merger does not in fact threaten any substantial lessening of competition. When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market.¹⁰³ Rather, the Agencies examine whether the evidence¹⁰⁴ presented by the merging firms shows each of the following:

- A. **Merger Specificity.** The merger will produce substantial procompetitive benefits that could not be achieved without the merger under review.¹⁰⁵ Alternative ways of achieving the claimed benefits are considered in making this determination.

¹⁰² *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).

¹⁰³ *Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1972) (“[T]he anticompetitive effects of an acquisition

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in one market cannot be justified by procompetitive effects in another market. Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.”).

¹⁰⁴ In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies’ investigation or litigation.

¹⁰⁵ If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of identified barriers to achieving them by contract.

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Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

- B. **Verifiability.** These benefits are verifiable, and have been **satisfactorily** verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging **firms**, or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying **the claimed efficiencies** is not presented by the merging **firms**, the Agencies are unable to credit those efficiencies.
- C. **Benefit to Competition in the Market.** To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging **firms** must show that, within a short period of time, the benefits will improve competition in the relevant market or prevent the threat that it may be lessened. **Reductions in the merged firm's costs must be passed on as lower prices, improved quality, or other benefits to the market.** Any benefits claimed by the merging **firms** are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.¹⁰⁶ Similarly, efficiencies are not cognizable if they will accelerate a trend toward concentration (see Guideline 8) or vertical integration (see Guideline 6).

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To overcome evidence that a merger may substantially lessen competition, cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the **substantial lessening of competition** or creation of a monopoly cannot **be used as offsets** to justify a merger that may **substantially lessen competition** or tend to create a monopoly.

4. Structural Barriers to Coordination Unique to the Industry

When market structure evidence suggests that a merger may substantially lessen competition through coordination (Guidelines 1 and 3), the merging **firms** sometimes **claim** that anticompetitive coordination is nonetheless impossible due to structural market barriers to coordinating. The Agencies consider whether structural market barriers to coordination are “so much greater in the [relevant] industry than in other industries that they rebut the normal presumption” of coordinated effects.¹⁰⁷ In the Agencies’ experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. The greater the level of concentration in the relevant market, the greater must be the **demonstrated** structural barriers to coordination in order to show that no substantial lessening of competition is threatened.

¹⁰⁶ The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power **that enables the merged firm to force suppliers to accept reduced payments.**

¹⁰⁷ See *FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001).

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Appendix 1: Sources of Evidence

This appendix describes the most common sources of evidence the Agencies draw on in a merger investigation. The evidence the Agencies will rely upon to evaluate whether a merger *may* substantially lessen competition or tend to create a monopoly is weighed based on its probative value. In assessing the available evidence, the Agencies consider documents, testimony, available data, and analysis of those data, including credible econometric analysis and economic modeling.

Merging Firms. The Agencies often obtain substantial information from the merging firms, including documents, testimony, and data. Across all of these categories, evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review. Similarly, the Agencies give less weight to predictions by the merging firms or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. Where the testimony of outcome-interested merging party employees contradicts ordinary course of of business records, the Agencies typically give greater weight to the business records.

Evidence that the merging firms intend or expect the merger to lessen competition, such as plans to coordinate with other firms, raise prices, reduce output or capacity, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market without a merger, withdraw products or delay their introduction, or curtail research and development efforts after the merger, can be highly informative in evaluating the effects of a merger on competition. The Agencies give little weight, however, to the lack of such evidence or the expressed contrary intent of the merging firms.

Customers, Workers, Industry Participants, and Observers. Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself. The Agencies consider the relationship between customers and the merging firms in weighing customer evidence. The ongoing business relationship between a customer and a merging party may discourage the customer from providing evidence inconsistent with the interests of the merging firms.

Workers and representatives from labor organizations can provide information regarding, among other things, wages, non-wage compensation, working conditions, the individualized needs of workers in the market in question, the frictions involved in changing jobs, and the industry in which they work.

Similarly, other suppliers, indirect customers, distributors, consultants, and industry analysts can also provide information helpful to a merger inquiry. As with other interested parties, the Agencies give less weight to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business.

Market Effects in Consummated Mergers. Evidence of observed post-merger price increases or worsened terms is given substantial weight. A consummated merger, however, may substantially lessen competition even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and is therefore moderating its conduct. Consequently, in evaluating consummated mergers, the Agencies also consider the same types of evidence as when evaluating proposed mergers.

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Econometric Analysis and Economic Modeling. Econometric analysis of data and other types of economic modeling can be informative in evaluating the potential effects of a merger on competition. The Agencies typically give more weight to analysis using high quality data and adhering to rigorous standards. But the Agencies also take into account that in some cases, the availability or quality of data or reliable modeling techniques might limit the availability and relevance of econometric modeling. When data is available, the Agencies recognize that the goal of economic modeling is not to create a perfect representation of reality, but rather to inform an assessment of the likely change in firm incentives resulting from a merger.

Transaction Terms. The financial terms of the transaction may also be informative regarding a merger’s impact on competition. For example, a purchase price that exceeds the acquired firm’s stand-alone market value can sometimes indicate that the acquiring firm is paying a premium because it expects to be able to benefit from reduced competition.

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Appendix 2. Evaluating Competition Between Firms

This appendix discusses evidence and tools the Agencies look to when assessing competition between firms. The evidence and tools in this section can be relevant to a variety of settings, for example: to assess competition between rival firms (Guideline 2); [to assess](#) the incentive to reduce or withhold access to a product rivals use to compete (Guideline 5); or for market definition (Section III of these Guidelines), for example when carrying out the Hypothetical Monopolist Test (Appendix 3.A).

For [simplification and](#) clarity, the discussion in this appendix often focuses on competition between two suppliers of substitute products that set prices. Analogous analytic tools may also be relevant in more general settings, for example when considering: competition between more than two suppliers; competition among buyers or employers to procure inputs and labor; competition that derives from customer willingness to buy in different locations; and competition that takes place in dimensions other than price or when terms are determined through, for example, negotiations or auctions.

Guideline 2 describes [generally](#) how different types of evidence can be used in assessing the potential harm to competition from a merger; some portions of Guideline 2 that are relevant in other settings are repeated [and elaborated upon](#) below.

A. Generally Applicable Considerations

The Agencies may consider one or more of the following types of evidence, tools, and metrics when assessing the degree of competition among firms:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence of their strategic deliberations or decisions in the regular course of business, as well as information considered during the process of deciding whether to merge. For example, in some markets, the firms may monitor each other’s pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers’ willingness to switch between different firms’ products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products.

Evidence commonly analyzed to show the extent of substitution among firms’ products includes: how customers have shifted purchases in the past in response to relative changes in

price or other terms and conditions; documentary and testimonial evidence such as win/loss reports, evidence from discount approval processes, switching data, customer surveys, as well as information from suppliers of complementary products and distributors; objective information about product characteristics; and market realities affecting the ability of customers to switch.

Impact of Competitive Actions on Rivals. Competitive actions, such as lowering prices or increasing output, by one firm can increase its sales at the expense of its rivals. The Agencies may gauge the extent of competition among firms by considering the impact that competitive actions by one firm have on the others. The impact of a firm’s competitive actions on a rival generally depends on how many sales a rival would lose as a result of the competitive actions, as well as the profitability of those lost sales. The Agencies may use margins to measure the profitability of the sale a rival would have made.¹

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one or more firms on the other firms’ actions, such as firm choices about price, quality, wages, or another dimension of competition. This can be gauged by comparing the two firms’ actions when they compete and make strategic choices independently, against the actions the firms might choose if they acted jointly. Actual or predicted changes in these results of competition, when available, can indicate the degree of competition between the firms.

To make this type of comparison, the Agencies sometimes rely on economic models. Often, such models consider the firms’ incentives to change their actions in one or more selected dimensions, such as price, in a hypothetical, simplified scenario. For example, a model might focus on the firms’ short-run incentives to change price, while abstracting from a variety of additional competitive forces and dimensions of competition, such as the potential for firms to reposition their products or for the merging firms to coordinate with other firms. Such a model may incorporate data and evidence in order to produce quantitative estimates of the impact of a loss of competition on firm incentives and corresponding choices. For example, the model may yield a range of estimates of the effect of a merger on short-run prices or output. This type of exercise is sometimes referred to by economists as “merger simulation” despite the fact that the hypothetical setting considers only selected aspects of the loss of competition from a merger. The Agencies use such models to give an indication of the scale and importance of competition, not to precisely predict outcomes.

B. Considerations When Terms Are Set by Firms

The Agencies may use various types of evidence and metrics to assess the strength of competition between firms that offer the same terms to many different customers. These firms might still offer different terms to different groups of customers.

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¹The margin on incremental units is the difference between incremental revenue (often equal to price) and incremental cost on those units. The Agencies may use accounting data to measure incremental costs, but do not necessarily rely on accounting margins recorded by firms in the ordinary course of business because such margins often do not align with the concept of incremental cost that is relevant in economic analysis of a merger.

Competition in this setting can lead firms to set lower prices or offer more attractive terms when they act independently than they would in a setting where that competition is eliminated by a merger. When considering the impact of competition on the incentives to set price, to the extent price increases on one firm’s products would lead customers to switch to products from the other firm, their merger will enable the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost because of the price increase will be diverted to the products of the other firm, and capturing the value of these diverted sales can make the price increase profitable even though it would not have been profitable prior to the merger.

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A measure of customer substitution between firms in this setting is the diversion ratio. The diversion ratio from one product to another is a metric of how customers likely would substitute between them. The diversion ratio is the fraction of unit sales lost by the first product due to a change in terms, such as an increase in its price that would be diverted to the second product. The higher the diversion ratio between two products made by different firms, the stronger the competition between them.

A high diversion ratio between the products owned by the merging firms can indicate strong competition between them even if the diversion ratio to a non-merging firm is higher. The diversion ratio from one of the products of one firm to a group of products made by other firms, defined analogously, is sometimes referred to as the aggregate diversion ratio or the recapture rate. Thus, the Agencies will also consider the potential for customers to switch to the products of non-merging firms; this could mitigate the adverse effects of the merger eliminating the competitive benefit of switching between products of the merging firms.

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A measure of the impact on rivals of competitive actions is the value of diverted sales from a price increase. The value of sales diverted from one firm to a second firm, when the first firm raises its price on one of its products, is equal to the number of units that would be diverted from the first firm to the second, multiplied by the difference between the second firm’s price and the incremental cost of the diverted sales. To interpret the magnitude of the value of diverted sales, the Agencies may use as a basis of comparison either the incremental cost to the second firm of making the diverted sales, or the revenues lost by the first firm as a result of the price increase. The ratio of the value of diverted sales to the revenues lost by the first firm can be an indicator of the upward pricing incentive that would result from the loss of competition between the two firms. Analogous concepts can be applied to analyze the impact on rivals of worsening terms other than price.

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C. Considerations When Terms Are Set Through Bargaining or Auctions

In some industries, buyers and sellers negotiate prices and other terms of trade. When bargaining, buyers commonly negotiate with more than one seller, and may play competing sellers off against one another. In other industries, sellers might sell their products, or buyers might procure inputs, using an auction. Negotiations may involve aspects of an auction as well as aspects of one-on-one bargaining. Competition among sellers can significantly enhance the ability of a buyer to obtain a result more favorable to it, and less favorable to the sellers, compared to a situation where a merger between the sellers eliminates the opportunity for buyers to play those sellers off against each other in negotiations.

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Sellers may compete even when a customer does not directly play their offers against each other. The attractiveness of alternative options influences the importance of reaching an agreement to the negotiating parties and thus the terms of the agreement. A party that has many attractive alternative trading partners places less importance on reaching agreement with any one particular trading partner than a party with few attractive alternatives. As alternatives for one party are eliminated (such as through a merger), the counterparty gains additional bargaining leverage reflecting that loss of competition. A merger between sellers may lessen competition even if the merged firm handles negotiations for the merging firms' products separately. The analysis would be analogous for a merger between buyers as it would affect suppliers.

Thus, qualitative or quantitative evidence about the leverage provided to buyers by competing suppliers may be used to assess the extent of competition among firms in this setting. Analogous evidence may be used when analyzing a setting where terms are set using auctions, for example, procurement auctions where suppliers bid to serve a buyer. If, for some categories of procurements, the suppliers are often among the most attractive to the buyer, competition among them is likely to be strong.

Firms sometimes keep records of the progress and outcome of individual sales efforts, and the Agencies may use this data to generate measures of the extent to which customers would likely substitute between the two firms. Examples of such measures might include a diversion ratio based on the rate at which customers would buy from one firm if the other one was not available, or on the frequency with which the two firms bid on contracts with the same customer, and the frequency with which one of them was the runner-up when the other was the winning bidder.

D. Considerations When Firms Determine Capacity and Output

In some markets, the choice of how much to produce (output decisions) or how much productive capacity to maintain (capacity decisions) are key strategic variables. When a firm decreases output, it may lose sales, but also drive up prices. It will take into account both the decrease in sales and the increase in price in calculating the net profitability. Because a merged firm will take into account the impact of higher prices across all of the merged firms' sales, it may have an incentive to decrease output as a result of the merger. The loss of competition through a merger of two firms may lead the merged firm to leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, lay off or stop hiring workers, or eliminate pre-existing production capabilities. Similarly, a firm may also divert the use of capacity away from one relevant market and into another market so as to raise the price in the former market. The analysis of the extent to which firms compete may differ depending on how a merger between them might create incentives to reduce output.

Competition between merging firms is greater when (1) the merging firms' market shares are relatively high; (2) the merging firms' products are relatively undifferentiated from each other; (3) the market elasticity of demand is relatively low; (4) the margin on the suppressed output is relatively low; and (5) the supply responses of non-merging rivals are relatively small. Qualitative or quantitative evidence may be used to evaluate and weigh each of these factors.

In some cases, competition between firms—including one firm with a substantial share of the sales in the market and another with significant excess capacity to serve that market—can prevent a strategy by the firm with the substantial market share to inflate prices and its profits by suppressing its output. This can occur even if the firm with the excess

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Separately, there could be situations in which a merger could actually create an incentive and ability to *increase* output beyond its current level. That should be referenced and described somewhere here in D, for a complete and balanced explanation.

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capacity has a relatively small share of sales, as long as that firm’s ability to expand, and thus keep prices from rising, makes an output suppression strategy unprofitable for the firm with the larger market share. A merger between the two firms could make this output suppression strategy profitable to the merged firm.

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Output or capacity reductions also may affect the market’s resilience in the face of future shocks to supply or demand, and the Agencies will consider this loss of resilience in assessing whether the merger may substantially lessen competition or tend to create a monopoly.

E. Considerations for Innovation and Product Variety Competition

Firms can compete for customers by offering varied and innovative products and features, which could range from minor improvements to the introduction of a new product category. Features can include new or different product attributes, services offered along with a product, or higher-quality services standing alone. Customers value the variety of products or services that competition generates, including having a variety of locations at which they can shop.

Offering the best mix of products and features is a critically important dimension of competition that may be harmed as a result of the elimination of competition between the merging ~~firms and the resulting reduction of competition in the market generally,~~

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When a firm introduces a new product or improves a product’s features, some of the sales it gains may be at the expense of its rivals, including rivals that are competing to develop similar products and features. As a result, competition between firms may lead them to make greater efforts to offer a variety of products and features ~~and to develop new innovations~~ than would be the case if the firms were jointly owned, for example, if they merged. The merged firm may have a reduced incentive to continue or initiate development of new products that ~~pre-merger~~ would have competed with the other merging party, but post-merger would “cannibalize” ~~some of~~ what would be its own sales.² A service provider may have a reduced incentive to continue valuable upgrades offered by the acquired firm. The merged firm may have a reduced incentive to engage ~~in innovation that would threaten the business of one of the merging firms. Or it may have the incentive to~~ ~~downgrade~~ its product mix, such as by ceasing to offer one of the merging firms’ products.

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The incentives to compete ~~vigorously~~ on innovation and product variety depend on the capabilities of the firms and on customer reactions to the new offerings. Development of new features depends on having the appropriate expertise and resources. Where firms are two of a small number of companies with specialized employees, development facilities, intellectual property, or research projects in a particular area, ~~preserving~~ competition between them will have a greater impact on their incentives to innovate.

Innovation may be directed at outcomes beyond product features; for example, innovation may be directed at reducing costs or adopting new technology for the distribution of products.

² Sales “cannibalization” refers to a situation where customers of a firm substitute away from one of the firm’s products and to another product offered by the same firm.

Appendix 3: Details of Market Definition

Section III of these Guidelines describes several approaches that can be used to define markets. In this appendix, we further discuss several details of market definition. Appendix 3.A describes one of the approaches, the Hypothetical Monopolist Test, in greater detail. Appendix 3.B addresses issues that may arise when defining antitrust markets in a number of specific scenarios.

A. The Hypothetical Monopolist Test

This Section describes the Hypothetical Monopolist Test, which is a method by which the Agencies often define antitrust markets. As outlined in Section III of these Guidelines, a relevant antitrust market is an area of effective competition. The Hypothetical Monopolist/Monopsonist Test (“HMT”) evaluates whether a group of products (or services) is sufficiently broad to constitute a relevant antitrust market. To do so, the HMT asks whether eliminating the competition among the group of products by combining them under the control of a hypothetical monopolist likely would lead to a worsening of terms for customers. The Agencies generally focus their assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes. The Agencies are concerned with the impact on economic incentives, and assume the hypothetical monopolist would seek to maximize profits.

When evaluating a merger of sellers, the HMT asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products (“hypothetical monopolist”), likely would undertake at least a small but significant and non-transitory increase in price (“SSNIP”) or other worsening of terms (“SSNIPT”) for at least one product in the group.³ For the purpose of this analysis, the terms of sale of products outside the candidate market are held constant, to focus on the effects of creating the hypothetical monopolist. Analogously, when considering a merger of buyers, the Agencies ask the equivalent question for a hypothetical monopsonist. This Appendix often focuses on merging sellers to simplify the explanation.

1. Implementing the Hypothetical Monopolist Test

The SSNIPT. A SSNIPT may entail worsening terms along any dimension of competition, including price (SSNIP), but also other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort.

Input and Labor Markets. When the competition at issue involves firms buying inputs or employing labor, the HMT considers whether the hypothetical monopsonist would undertake at

³ If the pricing incentives of the firms actually supplying the products in the group differ substantially from those of the hypothetical monopolist, for reasons other than the latter’s hypothetical control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment. Analogous considerations apply when considering a SSNIPT for terms other than price.

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least a SSNIPT, such as a decrease in the price offered or a worsening of the terms of trade offered to suppliers, or a decrease in the wage offered to workers or a worsening of their working conditions or benefits.

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The Geographic Dimension of the Market. The hypothetical monopolist test is generally applied to a group of products together with a geographic region to determine a relevant market, though for ease of exposition the two dimensions are discussed separately, with geographic market definition discussed in Appendix 3.B.2.

Negotiations or Auctions. For clarity, the HMT is stated in terms of a hypothetical monopolist *undertaking* a SSNIPT. This includes the hypothetical monopolist imposing a price increase, but it also applies to cases where terms are the result of a negotiation or an auction.

Benchmark for the SSNIPT. The HMT asks whether the hypothetical monopolist likely would worsen terms relative to those that likely would prevail absent the proposed merger. In some cases, the Agencies will use as a benchmark different outcomes than those prevailing prior to the merger. For example, if outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark. Or if suppliers in the market are coordinating prior to the merger, the Agencies may use a benchmark that reflects conditions that would arise if coordination were to break down. When evaluating whether a merging firm is dominant (Guideline 7), the Agencies may use terms that likely would prevail in a more competitive market as a benchmark.⁴

Commented [GS83]: This warrants further explanation/justification. The antitrust laws prohibit mergers that substantially lessen competition, but cannot be used to improve the status quo. Unlike the example in the previous sentence, here the coordination would appear to already be a baked-in product of the status quo. Perhaps the additional assumption, which could be stated, is that the coordination is unstable and reasonably expected to end absent the merger.

Magnitude of the SSNIPT. What constitutes a “small but significant” worsening of terms depends upon the nature of the industry and the merging firms’ positions in it, the ways that firms compete, and the dimension of competition at issue. When considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value. The Agencies, however, may consider a different term, or a price increase that is larger or smaller than five percent.⁵

The Agencies may base a SSNIP on explicit or implicit prices for the firms’ specific contribution to the value of the product sold, or an upper bound on the firms’ specific contribution, where these can be identified with reasonable clarity. For example, the Agencies may derive an implicit price for the service of transporting oil over a pipeline as the difference between the price the pipeline firm paid for oil at one end and the price it sold the oil for at the other and base the SSNIP on this implicit price.

⁴ In the entrenchment context, if the inquiry is being conducted after market or monopoly power has already been achieved and exercised, using prevailing prices can lead to defining markets too broadly and thus inferring that dominance does not exist when, in fact, it does. The problem with using prevailing prices to define the market when a firm is already dominant is known as the “Cellophane Fallacy,” named after a Supreme Court antitrust decision involving that product, *U.S. v. E. I. du Pont*, 351 U.S. 377 (1956).

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⁵ The five percent price increase is a standard analytical metric for using the HMT in defining a market; it is not a threshold for assessing actual competitive harm from the merger. Because the five percent SSNIP is a minimum expected effect of a hypothetical monopolist of an entire market, the actual predicted effect of a merger within that market may be significantly lower than five percent. A merger within a well-defined market that causes undue concentration can be illegal even if the predicted price increase is well below the SSNIP of five percent.

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2. Evidence and Tools for Carrying Out the Hypothetical Monopolist Test

Appendix 2 describes some of the qualitative and quantitative evidence and tools the Agencies can use to assess the extent of competition between two firms. The Agencies can use similar evidence and analogous tools to apply the HMT, in particular to assess whether competition among a set of firms likely leads to better terms than a hypothetical monopolist would undertake.

The Agencies sometimes interpret the qualitative and quantitative evidence using an economic model of the profitability to the hypothetical monopolist of undertaking at least a SSNIP on one or more products in the candidate market; the Agencies may adapt these tools to apply to other forms of SSNIPs.

One approach utilizes the concept of a “recapture rate” (the percentage of sales lost by the hypothetical monopolist on one product in the candidate market, when its price alone rises, that is recaptured by other products of the hypothetical monopolist in the candidate market). A price increase is profitable when the recapture rate is high enough that the incremental profits from the increased price plus the incremental profits from the recaptured sales going to other products in the candidate market exceed the profits lost from sales that are diverted outside the candidate market. It is possible that a price increase is profitable even if a majority of sales are diverted outside the candidate market, for example if the profits lost on the lost sales are relatively low, or the overall profits from the product on which the price is increased – including on the recaptured sales – are relatively high.

Sometimes evidence is presented in the form of “critical loss analysis,” which can be used to assess whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist’s profits. Critical loss analysis compares the magnitude of the two offsetting effects resulting from the price increase. The “critical loss” is defined as the number of lost unit sales that would result in a “break-even” point, leaving profits unchanged. The “predicted loss” is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist’s profits if the predicted loss is less than the critical loss. Smaller or larger price increases may be even more profitable or more likely to be implemented by the hypothetical monopolist.

The Agencies require that estimates of the predicted loss be consistent with other evidence, including the pre-merger profit margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction, high pre-merger profit margins normally indicate that each firm’s product individually faces demand that is not highly sensitive to price. Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture rate⁶ necessary for the candidate market to satisfy the hypothetical monopolist test. Similar considerations inform other analyses of the profitability of a price increase.

B. Market Definition in Certain Specific Settings

This section provides details on market definition in several specific common settings. In much of this section, concepts are presented for the scenario where the merger involves

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⁶ The recapture rate is sometimes referred to as the aggregate diversion ratio, defined in Appendix 2.B.

sellers. In some cases, clarifications are provided as to how the concepts apply to merging buyers; in general, the concepts apply in an analogous way.

1. Targeted Trading Partners

If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers. The Agencies may do so even if firms are not currently targeting specific customer groups but could do so after the merger.

For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identifying individual customers to which different terms are offered, or offering different terms to different types of customers based on observable characteristics.⁷ Markets for targeted customers need not have precise metes and bounds. In particular, defining a relevant market for targeted customers sometimes requires a line-drawing exercise based on observable characteristics. There can be many places to draw that line and properly define a relevant market.

Second, the targeted customers must not be likely to defeat a targeted worsening of terms by arbitrage (e.g., by purchasing indirectly from or through other customers). Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers, and it is inherently impossible for many services. Arbitrage on a modest scale may be possible but too costly or limited, for example due to transaction costs or search costs, to deter or defeat a discriminatory pricing strategy.

If prices are negotiated or otherwise set individually, for example through a procurement auction, there may be relevant markets that are as narrow as an individual customer. Nonetheless, for analytic convenience, the Agencies may define cluster markets for groups of targeted customers for whom the conditions of competition are reasonably similar. (See Appendix 3.B.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers that merged would target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite whatever potential for customers to substitute away from the product or to take advantage of arbitrage.

⁷ In some cases, firms offer multiple versions of products or services defined by their characteristics (where brand might be a characteristic). When customers can select among these products, and terms do not vary by customer, the Agencies will typically define markets based on products rather than the targeted customers. In such cases, relevant antitrust markets may include only some of the differentiated products, for example products with only “basic”

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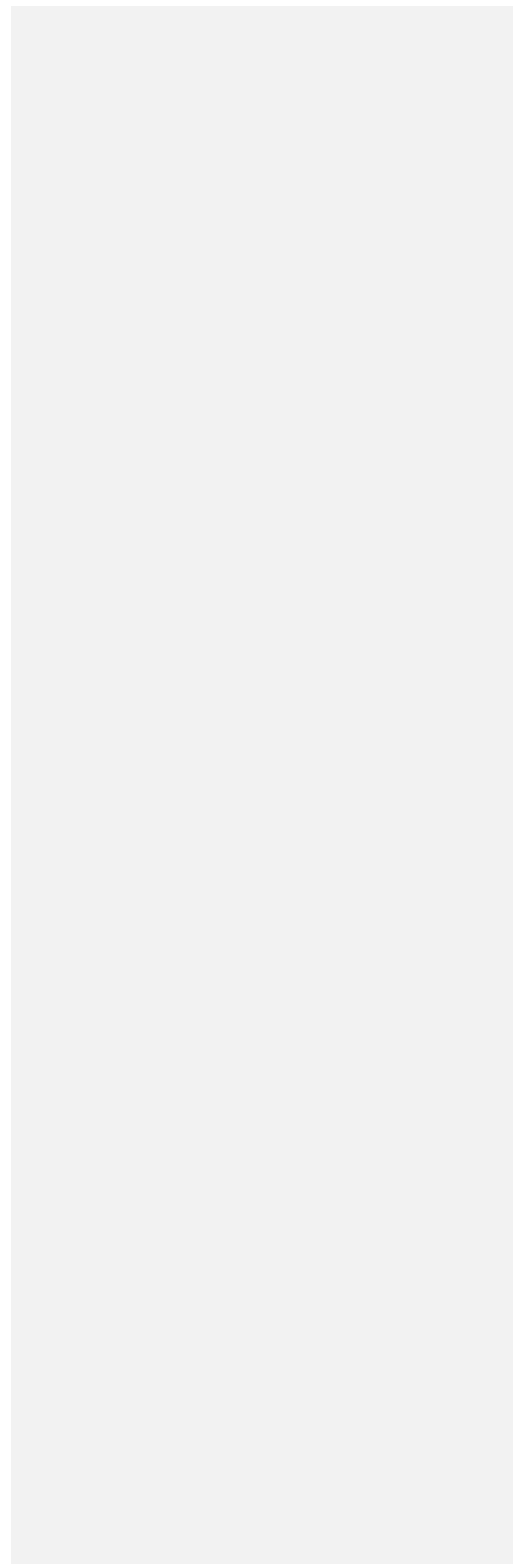
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features, or products with “premium features.” The tools described in Appendix 2 can be used to assess competition among differentiated products.



In this exercise, the terms of sale for products sold to all customers outside the region are held constant, to focus on the effects of creating the hypothetical monopolist.

2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market’s geography depends on the limits that distance puts on some customers’ willingness or ability to substitute to some products, or some suppliers’ willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs (relative to the price of the good), language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

a) *Geographic Markets Based on the Locations of Suppliers*

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market’s scope is determined by customers’ willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers’ facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers’ willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Appendix 4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.⁸

b) *Geographic Markets Based on Targeting of Customers by Location*

When targeting based on customer location is feasible (see Appendix 3.B.1), the Agencies may define geographic markets as a region encompassing a group of customers.⁹ For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers’ locations, or tailor terms of trade based on customers’ locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares, because that is where the competition is taking place (see Appendix 4 for more detail about calculating market shares).

⁸ In some circumstances, as when the merging firms operate in multiple geographies, if applying the HMT, the Agencies may apply a “Hypothetical Cartel” framework for market definition, following the approach outlined in Appendix 3A n.3.

⁹ For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.

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If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Appendix 3.B.4 for further discussion of cluster markets.)

A firm’s attempt to target customers in a particular geographic area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. But in some cases, arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.¹⁰

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If the HMT is used to evaluate market definition in cases when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for some customers to substitute away from the product or go to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.¹¹

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3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers’ ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Appendix 2), entry and repositioning (Section IV), and in calculating market shares and concentration (Appendix 4).

4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple antitrust markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a “cluster market” for analytical convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may aggregate them into a cluster market for acute care services if the conditions of competition are reasonably similar across the services in the cluster.

¹⁰ Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition; see Appendix 3.B.3.

¹¹ In some circumstances, as when the merging firms operate in multiple geographies, the Agencies may apply a “Hypothetical Cartel” framework for market definition, as described in Appendix Footnote 2.

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The Agencies need not separately analyze market definition for each product included in the cluster market, and market shares will typically be calculated for the cluster market as a whole.

Analogously, the Agencies sometimes define a market as a cluster of targeted customers (see Appendix 3.B.1) or a cluster of customers located in a region (see Appendix 3.B.2(b)).

5. Bundled Product Markets

Firms may sell a combination of products as a bundle or a “package deal,” rather than offering products “*a la carte*,” that is, separately as standalone products. Different bundles offered by the same or different firms might package together different combinations of component products and therefore be differentiated according to the composition of the bundle. If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the *a la carte* product prices.

The Agencies take a flexible approach based on the specific circumstances to determine whether a candidate market that includes one or more bundled products, standalone products, or both is a relevant antitrust market. In some cases, a relevant market may consist of only bundled products. A market composed of only bundled products might be a relevant antitrust market even if there is significant competition from the unbundled products. In other cases, a relevant market may include both bundled products and some unbundled component products.

Even in cases where firms commonly sell combinations of products or services as a bundle or a “package deal,” relevant antitrust markets do not necessarily include product bundles. In some cases, a relevant market may be analyzed as a cluster market, as discussed in Appendix 3.B.4.

6. One-Stop Shops in Markets

In some settings, the Agencies may consider a candidate market that includes one or more “one-stop shops,” where customers can select a combination of products to purchase from a single seller, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.

A multi-product retailer such as a grocery store or online retailer is an example of a one-stop shop. Customers can select a particular basket of groceries from a range of available goods and different customers may select different baskets. Some customers may make multiple stops at specialty shops (e.g., butcher, baker, green grocer), or they may do the bulk of their shopping at a one-stop shop (the grocery store), but also shop at specialty shops for particular product categories.

There are several ways in which markets may be defined in one-stop shop settings, depending on market realities, and the Agencies may further define more than one antitrust market for a particular merger. For example, a relevant market may consist of only one-stop shops, even if there is significant competition from specialty shops; or it may include both one-stop shops and specialty shops. When a product category is sold by both one-stop shops and

specialty suppliers (such as a type of produce sold in grocery stores and produce stands), the Agencies may define antitrust markets for the product category sold by a particular type of supplier, or it may include multiple types of suppliers.

7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives for innovation, the Agencies may define relevant antitrust markets around the products that would result from that innovation, even if they do not yet exist. In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

8. Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products (goods or services) and a geographic area defined by the location of the purchasers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. See Appendix 2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.

When defining a market for labor the Agencies will consider the alternative job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Appendix 3.B.4).

Appendix 4: Calculating Market Shares and Concentration

This appendix further describes how the agencies calculate market shares and concentration metrics.

A. Market Participants

All firms that currently supply products (or consume products, when buyers merge) in a relevant market are considered participants in that market. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently supplying products in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not currently active in a relevant market, but that very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without **having to incur significant sunk costs**, are also considered market participants. These firms are termed “rapid entrants.” Sunk costs are entry or exit costs that cannot be recovered outside **the relevant market, and whose recovery is therefore dependent on sufficient success from a maintained presence in that market**. Entry that would take place more slowly in response to a change in competitive conditions, or that requires firms to incur significant sunk costs, is considered in Section IV.2 of the Guidelines.

Firms that are active in the relevant product market but not in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are already active in geographic **areas** that are close to the geographic market. Factors such as transportation costs are important; or for services or digital goods, other factors may be important, such as language or regulation.

In markets for relatively homogeneous goods where a supplier’s ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available “swing” capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm’s possession of idle or swing capacity alone does not make that firm a rapid entrant.

B. Market Shares

The Agencies normally calculate product market shares for all firms that currently supply products (or consume products, when buyers merge) in a relevant market, subject to the availability of data. The Agencies measure each firm’s market share using the metrics that are informative about the commercial realities of competition in the particular market and firms’ future competitive significance. When interpreting shares based on historical data, the Agencies may consider whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm’s shares overstate or understate its future competitive significance.

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How market shares are calculated may further depend on the characteristics of a particular market, and on the availability of data. Moreover, multiple metrics may be informative in any particular case. For example:

- Revenues in a relevant market often provide a readily available basis on which to compute shares and are often a good measure of attractiveness to customers.
- Unit sales may provide a useful measure of competitive significance in cases where one unit of a low-priced product can serve as a close substitute for one unit of a higher-priced product. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively low revenues.
- Revenues earned from recently acquired customers (or paid to recently acquired suppliers, in the case of merging buyers) may provide a useful measure of competitive significance of firms in cases where trading partners sign long-term contracts, face switching costs, or tend to re-evaluate their relationships only occasionally.
- Measures based on capacities or reserves may be used to calculate market shares in markets for homogeneous products where a firm’s competitive significance may derive principally from its ability and incentive to rapidly expand production in a relevant market in response to a price increase or output reduction by others in that market (or to rapidly expand its purchasing in the case of merging buyers).
- Non-price indicators, such as number of users or frequency of use, may be useful indicators in markets where price forms a relatively small or no part of the exchange of value.

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C. Market Concentration Stability

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm’s important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

Commented [GS92]: Consider adding this, from the 2010 guidelines p. 18. These point seems illuminating, and does not appear to be covered elsewhere.