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Federal Trade Commission**

**From *Von's Grocery* to *Whole Foods*:
How Narrowing Product Markets Have Quietly Changed Antitrust**

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Many thanks to the University of California at Berkeley for inviting me to participate in the Seventh Annual Berkeley Spring Forum on M&A and Governance. While I'm sure the event's organizers have a longstanding interest in mergers, the subject has become more interesting to the general public as the focus on antitrust has broadened and intensified. Some observers have attributed higher prices, poor customer service, and other ills to a modern antitrust policy that allowed mergers in airlines, social media, and other sectors. These critics characterize many industries in the U.S. as highly concentrated, and harken back to the 1960s as a more enlightened era of enforcement.¹ They advocate for a return to the 1968 Merger Guidelines issued by the U.S. Department of Justice Antitrust Division ("DOJ" or "Division"),² which said the agency would ordinarily challenge mergers between firms with shares totaling as little as 8% to 10% of a relevant market. Two years earlier, in *Von's Grocery*, the Supreme Court had agreed with the DOJ that a merger of two supermarket chains with a total of 7.5% of the Los Angeles market for retail groceries violated Section 7 of the Clayton Act.³

Of course, the share of a market that a company holds necessarily depends on how the market is defined. Despite attempts to obviate it, market definition remains a critical part of most antitrust cases. The Supreme Court explained in 1992: "Because market power is often inferred from market share, market definition generally determines the result of the case."⁴ Former

¹ See, e.g., Open Markets Institute and American Economic Liberties Project, "The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines" (Feb. 2020) https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf; American Economic Liberties Project, *The Courage to Learn: A Retrospective on Antitrust and Competition Policy during the Obama Administration and Framework for a New, Structuralist Approach* at 38 and 142 (Jan. 2021), https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf.

² Department of Justice, 1968 Merger Guidelines (1968), available at <https://www.justice.gov/archives/atr/1968-merger-guidelines>.

³ *United States v. Von's Grocery Co.*, 384 US 270, 272 (1966).

⁴ *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992).

Federal Trade Commission Chairman Bob Pitofsky likewise called it “the most important single issue in most enforcement actions.”⁵ Market definition continues to be a deciding factor in merger challenges brought under Section 7 of the Clayton Act today.⁶

The primacy of market definition in antitrust analysis – at least in the courts⁷ – reflects the large number of substantive legal rules that rely on it. For merger challenges, how the decisionmaker defines the market determines both whether the merging firms are deemed competitors in the first place,⁸ and whether their merger would substantially diminish competition.⁹

In a brief filed in 2015, the DOJ observed that “frequently, the government alleges narrow markets, the defendant describes broad markets, and the court must choose between the

⁵ Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1807 (1990).

⁶ See, e.g., *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 2020); *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Apr. 8, 2020) (holding a one-sided firm could not compete in a two-sided market as a matter of law), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (per curiam); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020).

⁷ While the Agencies have long asserted that direct proof of market power relieves the plaintiff of its obligation to define a relevant antitrust market, courts continue to view it as a bedrock statutory requirement. Compare *Ohio v. American Express Co. (Amex)*, 138 S. Ct. 2274, 2284-85 (2018) (“Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's anti-steering provisions have caused anticompetitive effects in the credit-card market. To assess this evidence, we must first define the relevant market.” (emphasis added)) and *Rag-Stiftung*, 436 F. Supp. 3d 291 (“Defining the relevant market is a necessary predicate to finding a Clayton Act violation because the proposed merger must be one which will substantially lessen competition within the area of effective competition.” (internal citations and quotations omitted)), with U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, § 4, at 7 (issued Aug. 19, 2010), available at https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf (demoting the role of market definition, explaining that “[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition,” and that direct evidence “may more directly predict the competitive effects of a merger”) and J. Thomas Rosch, *The Past and Future of Direct Effects Evidence: Remarks before the ABA Section of Antitrust Law’s 59th Spring Meeting*, Mar. 30, 2011, https://www.ftc.gov/sites/default/files/documents/public_statements/past-and-future-direct-effects-evidence/110330aba-directeffects.pdf (arguing an assessment of whether the Clayton Act is violated “may turn on market definition, but it doesn’t have to,” and that “direct evidence can shed light directly” on the ultimate question).

⁸ See, e.g., *Sabre*, No. 1:19-cv-01548-LPS (holding a one-sided firm could not compete in a two-sided market as a matter of law).

⁹ See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (“Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition.” (internal quotation marks omitted)).

competing approaches.”¹⁰ Of course, narrower markets also can favor defendants that claim they are not competing in the same market. How a market is defined is often outcome-determinative, leading many to charge that market definition is “an essentially ex post choice”¹¹ designed “to achieve the desired results in calculating market shares.”¹²

This gripe is long-standing. In the 1960s, commentators charged that “the Government has not been averse to shifting its market theories from case to case, seemingly with little justification other than making the relevant percentages more favorable to its cause.”¹³ But the tendency of antitrust enforcers to redefine product markets to suit their needs persists today. In February 2020, the Federal Trade Commission (“FTC”) (collectively with the DOJ, “the Agencies”) sued to block Edgewell’s acquisition of Harry’s, defining the market as “the *manufacture and sale*” of certain razors, thereby excluding from the market companies like upstart Billie that did not actually manufacture the razors themselves.¹⁴ The FTC’s complaint

¹⁰ United States’ Pretrial Mem. at 15-16, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed Dec. 18, 2015), available at <https://www.justice.gov/atr/file/801726/download> [hereinafter *Electrolux Pretrial Brief*].

¹¹ Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107, 124 (2011).

¹² G.E. Hale & Rosemary D. Hale, *A Line of Commerce: Market Definition in Anti-Merger Cases*, 52 IOWA L. REV. 406, 426 (1966); see also G.E. HALE & ROSEMARY D. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 97-103, 111 (1958) (arguing that the legal tests for market definition “are basically irrational, arbitrary and hopelessly confused”). This results-first orientation continues to appear from time to time. See, e.g., Jonathan B. Baker, Dir., FTC Bureau of Econ., *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, Address to the Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York City, Feb. 6, 1996, <https://www.ftc.gov/public-statements/1996/02/product-differentiation-through-space-and-time-some-antitrust-policy> (arguing that, when “we know, directly, that a merger or other practice is harmful,” but “it is hard to draw lines around a market,” then “[j]ust exactly where the market’s boundaries are may not be very important” and “[a]ll that should matter to the doctrine is that the market contain the transactions or parties that are causing or suffering the consumer injury.”); accord, Tim Wu, *The American Express Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFORCEMENT 117, 123 (2019) (arguing “everyone knows[] it is nearly always possible to manipulate market definition to justify deciding a case in a particular direction” and therefore direct evidence of anticompetitive effects should control the analysis).

¹³ Thomas M. Lewyn & Stephen Mann, *Some Thoughts on Policy and Enforcement of Section 7 of the Clayton Act*, 50 A.B.A.J. 154, 156 (1964); see Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Cellar-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 649-50 (1961) (arguing enforcers expanded and contracted markets at will “to find a market that will magnify the acquisition and thus facilitate its condemnation”).

¹⁴In the Matter of Edgewell Personal Care Company and Harry’s, Inc., Docket No. 9390, Compl. ¶ 21 (Feb. 2, 2020) (“The relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than the manufacture and sale of wet shave system razors and disposable razors (‘wet shave razors’) sold in the United States.”).

stated explicitly that “to be a significant competitor, a razor company must be able to manufacture and sell its own blades: in other words, the razor company must build or buy a factory.”¹⁵ But ten months later, this defining characteristic of a “significant competitor” in the razor industry evaporated. In its suit to block Proctor & Gamble’s acquisition of Billie, the FTC redefined the market as “the *production* and sale” of certain razors, thereby putting non-manufacturer Billie into the same market as P&G.¹⁶ For the record, I voted “yes” in the first case and “no” in the second, in part because I was concerned about shape-shifting market definitions.¹⁷

Given this broad discretion, market definition can vary not just from one case or judge to the next, but also over time, as new tools and theories gain traction. These changes, in turn, may affect the way substantive antitrust rules are applied, even if those rules themselves have not changed.¹⁸ Many have argued that a particular policy change or analytical approach may

¹⁵ Id. at ¶ 74.

¹⁶ In the Matter of The Procter & Gamble Company and Billie, Inc., Docket No. 9400, Compl. ¶ 15 (“A relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than production and sale of wet shave system razors and disposable razors (‘wet shave razors’) sold in the United States.”).

¹⁷ Press Release, FTC Files Suit to Block Edgewell Personal Care Company’s Acquisition of Harry’s, Inc. (Feb. 3, 2020) (“The Commission vote to issue the administrative complaint and to authorize staff to seek a temporary restraining order and preliminary injunction was 5-0.”); Press Release, FTC Sues to Block Procter & Gamble’s Acquisition of Billie, Inc. (Dec. 8, 2020) (“The Commission vote to issue the administrative complaint and to authorize staff to seek a temporary restraining order and preliminary injunction was 4-1. Commissioner Christine S. Wilson voted no.”).

¹⁸ For example, Robert Pitofsky objected to the 1982 and 1984 Merger Guidelines because he thought they “have tended to expand relevant markets and thus diminish apparent market power.” Pitofsky, *supra* note 5, at 1808; see also Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for the Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 587 (1983) (arguing the 1982 Merger Guidelines’ “treatment of substitute products . . . represents an effort to incorporate more production into the base figure so that particular firms’ nominal shares will be minimized.”). Former Assistant Attorney General for antitrust Don Baker took the opposite view of the 1982 Guidelines, predicting narrower markets. Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 324-25 (1983) (“If the “5%” quantitative test in fact supplants horseback testimonial judgments as the basis for market definition, we may well see narrower product markets than those to which we have become accustomed.”). More recently, former FTC Commissioner Josh Wright argued the 2010 Horizontal Merger Guidelines would lead to narrower markets and fewer cognizable efficiencies than under the prior Guidelines. Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, [at *12-13], in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (2014) (“Under the 2010 Guidelines, some efficiencies benefits that may have fallen within the relevant market under the antitrust agencies’ market definition exercise

theoretically broaden or narrow antitrust markets, and thereby affect substantive antitrust enforcement.¹⁹

As far as I can tell, though, none have empirically tested the hypothesis. My former Attorney Advisor Keith Klovers and I have written an article that attempts to fill this gap, albeit crudely, for mergers.²⁰ It finds that, *in practice and on average*, product markets in Clayton Act cases have narrowed since the 1960s and 1970s. We do not characterize this narrowing as either desirable or undesirable – but the empirical evidence demonstrates this narrowing is real.

In my remarks today, I'll describe how we conducted our analysis by comparing Supreme Court market definitions from the 1960s and 1970s with their modern analogues. Of the 12 product markets defined in Section 7 cases decided by the Supreme Court in the relevant period,²¹ half have narrowed over time. Those six product markets are banking, beverage containers, energy, footwear, groceries, and spices. The other six product markets – automotive paint, beer, electrical conductors, natural gas, sodium chlorate, and spark plugs – have remained more or less the same. Remarkably, none of the 12 has broadened.²² In other words, whereas previously the Supreme Court and lower courts defined a mix of broad and narrow markets,

under earlier iterations of the Horizontal Merger Guidelines will now fall outside the relevant market.”); Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, [*16] (2011) (“*Philadelphia National Bank* mandates this inability to balance cross-market effects. Under the 1997 Revisions, this dictate remained a curiosity of antitrust past. The 2010 Guidelines’ diversion approach to market definition is likely to dramatically increase *Philadelphia National Bank*’s practical significance.”).

¹⁹ See, e.g., Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123 (1992) (tracing the history of market definition); Pitofsky, *supra* note 5 (same).

²⁰ Christine S. Wilson and Keith Klovers, Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules (Mar. 3, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797089.

²¹ See Appendix.

²² The lack of any broader markets is notable; if market scope had not systematically changed over time, we would expect the number of markets that had narrowed to roughly match the number that had broadened. Instead we find many of the former and *none* of the latter.

courts today usually define narrow ones, leaving litigants to debate whether the market is narrow or very narrow.²³

I'll also discuss the likely causes for the narrowing of product markets, the substantive legal rules affected by this narrowing, and the important policy implications. First, because the narrowing of product markets has the effect of making antitrust enforcement *more* stringent, at least on average, it cuts against the narrative that antitrust rules have become “overly lenient” since the 1980s.²⁴ For example, all else being equal, bank merger enforcement is more stringent when markets are drawn narrowly. Second, and relatedly, proposals to return to 1960s-era antitrust rules – which, to be clear, I do not endorse – should do so wholesale, adopting both

²³ Given the broad markets defined in *Philadelphia National Bank* and *Brown Shoe*, the Court’s decision in *Ohio v. American Express* to define a somewhat broader market—at least by recent standards, if not historical ones—is neither surprising nor in conflict with traditional antitrust law. *But see, e.g.*, Testimony of Sally Hubbard, Dir. of Enforcement Strategy, Open Markets Institute, Before the House Judiciary Comm., Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Appx. A, at 20, Oct. 1, 2020, <https://docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-HubbardS-20201001.pdf> (calling for the “legislative repeal” of *Ohio v. American Express* because it “adopt[s] [the] two-sided markets construct” and purportedly requires a plaintiff to “prove a net anti-competitive harm across two different markets”).

²⁴ Jonathan B. Baker et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, Apr. 30, 2020, available at <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf>; *see also, e.g.*, Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV., Dec. 15, 2017, available at <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> (“[A]ntitrust policy and enforcement declined during the fourth cycle (late-1970s–mid-2010s) with the rise of the Chicago School of Economics in the late 1970s By the Obama administration, we had neither a popular antitrust *movement* nor many significant antitrust prosecutions.”); Sally Hubbard, *The Rise and Fall of the Word “Monopoly” in American Life*, THE ATLANTIC, June 20, 2017, available at <https://www.theatlantic.com/business/archive/2017/06/word-monopoly-antitrust/530169/> (“Since Reagan took office, corporate concentration has increased dramatically. . . . Plenty of Americans seem to be troubled by these effects and the hands-off policy that led to them.”).

lower thresholds *and* broader markets.²⁵ Or, to borrow a phrase from Justice William Rehnquist, these proposals should avoid cherry-picking, instead taking “the bitter with the sweet.”²⁶

I. NARROWING MARKETS

Despite its importance, the rules that govern market definition have always been flexible enough to support a range of permissible choices. In the 1950s, the Supreme Court held both that product markets should be “drawn narrowly” and that it was not “proper” to define them so narrowly that only “fungible products” remained in the market.²⁷ The decision in *Brown Shoe* confused matters further by creating a list of factors capable of supporting a definition as broad or as narrow as the fact-finder desired.²⁸

How courts exercise this discretion has varied substantially over time. During the first 25 years after the Celler-Kefauver Act of 1950, the Supreme Court and lower courts defined a mix of broad and narrow product markets. Examples of broad markets included “retail grocery” sales²⁹ and “children’s shoes”³⁰; narrow ones included “accredited central station alarm services”³¹ and automotive finishes and fabrics.³² Beginning in the 1980s, perhaps in response to

²⁵ See, e.g., WILLIAM A. GALSTON & CLARA HENDRICKSON, BROOKINGS INSTITUTION, A POLICY AT PEACE WITH ITSELF: ANTITRUST REMEDIES FOR OUR CONCENTRATED, UNCOMPETITIVE ECONOMY, Jan. 5, 2018, <https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/> (“This suggests that antitrust enforcers should lower the threshold at which prospective mergers are subject to rigorous scrutiny.”); Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, Apr. 26, 2019, <https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/>. (arguing for the readoption of the “thresholds enumerated in the 1968 guidelines”).

²⁶ *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J.) (plurality opinion).

²⁷ See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (“drawn narrowly”); *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (“Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.”).

²⁸ 370 U.S. 294, 325 (1962) (endorsing, in addition to “interchangeability of use or the cross-elasticity of demand[,] . . . practical indicia 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”).

²⁹ *United States v. Von’s Grocery Co.*, 384 U.S. 270, 272 (1966).

³⁰ *Brown Shoe*, 370 U.S. at 326 (defining three markets in all: “men’s, women’s, and children’s shoes”).

³¹ *United States v. Grinnell Corp.*, 384 U.S. 563, 571-74 (1966) (defining a product market for “the accredited central station service business”).

³² *United States v. DuPont de Nemours & Co.*, 353 U.S. 586, 594-95 (1957).

the issuance of the 1982 Merger Guidelines, narrow markets became the rule. For example, the product market in grocery store mergers changed from “retail grocery” sales in the 1960s to “supermarkets” in the late 1980s and “premium natural and organic supermarkets” in the 2010s.³³

Today, the Agencies and courts routinely define product markets so narrowly that they require several adjectives. Consider “the sale of superpremium ice cream to the retail channel,”³⁴ “broadline foodservice distribution to national customers,”³⁵ and “branded seasoned salt products . . . (not including private or store label) sold at retail.”³⁶ Some of these product market definitions call to mind Justice Abe Fortas’s complaint in a 1966 monopolization case: “This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification.”³⁷ Comparing the product markets used by the Supreme Court during the relatively “broad market” era to their modern equivalents suggests many product markets are narrower today.

A. Law

The basic legal rules for market definition were put in place decades ago. As a threshold matter, the Supreme Court recognized that the facts on the ground do not always lend themselves

³³ Compare *Von’s Grocery*, 384 U.S. at 272 (retail grocery), *Van de Kamp ex rel. California v. American Stores, Inc.*, 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (accepting the state’s proposed product market of “‘supermarkets,’ full line grocery stores with more than 10,000 square feet”), *aff’d*, 495 U.S. 271, 283 (1990) (assuming the correctness of the district court’s antitrust analysis), and *FTC v. Whole Foods Market*, 548 F.3d 1028, 1043-49 (D.C. Cir. 2008) (opinion of Brown, J.) (finding clearly erroneous the district court’s definition of a market encompassing all supermarkets and cataloguing evidence suggesting a market for “premium, natural, and organic supermarkets” (PNOS) was plausible); *id.* at 1043-49 (Tatel, J., concurring in the judgment) (finding the evidence strongly suggests a PNOS market).

³⁴ Complaint ¶ 11, *Nestle Holdings, Inc.*, Dkt. No. C-4082, available at

<https://www.ftc.gov/sites/default/files/documents/cases/2003/06/dreyercomplaint.htm>

³⁵ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining overlapping product markets for (i) “broadline foodservice distribution” and (ii) “broadline foodservice distribution to national customers”).

³⁶ Compl. ¶ 8, *McCormick & Co., Inc.*, No. C-4225 (F.T.C. filed July 30, 2008).

³⁷ *United States v. Grinnell Corp.*, 384 U.S. 563, 591 (1966) (Fortas, J. dissenting).

to a single, obvious result. It set out two principles that bestow substantial discretion on factfinders. First, the Court explained that “a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn.”³⁸ This concept is known today as the “narrowest market” principle, which both courts and the Agencies routinely use.³⁹ Second, the Court cautioned against drawing the circle *too* narrowly, explaining that it is also improper “to require that products be fungible to be considered in the relevant market.”⁴⁰ This tension – that markets should be narrow, but not too narrow – has haunted market definition exercises ever since. Indeed, both commandments appear, almost side-by-side, in the current Horizontal Merger Guidelines.⁴¹

B. Practice

Although the basic legal rules for defining relevant product markets have not changed since the mid-1960s, the product market in the average Clayton Act case has narrowed. Today, the Agencies typically allege – and courts routinely find – markets that are substantially narrower than their historical counterparts.

³⁸ *Times-Picayune*, 345 U.S. at 612 n.31.

³⁹ See, e.g., *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 2020) (“Crucial to the Court’s conclusion is the ‘narrowest market principle.’”); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (2015) (quoting and applying the *Times-Picayune* rule).

⁴⁰ *DuPont*, 351 U.S. at 394.

⁴¹ HORIZONTAL MERGER GUIDELINES, *supra* note 7, § 4.1.1 (“Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”); *id.* § 4, at 8 (“However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.”).

1. The Broad Market Era (1950 – 1975)

Between approximately 1950 and 1975, the Supreme Court defined a mix of broad and narrow relevant product markets. In the 1962 *Brown Shoe* ruling, for example, the Supreme Court defined separate relevant product markets for all men’s shoes, all women’s shoes, and all children’s shoes.⁴²

The Supreme Court also endorsed a fairly broad product market the next year in *United States v. Philadelphia National Bank*.⁴³ There the district court had rejected both the plaintiffs’ and defendants’ suggested narrower markets as attempts to “subdivide a commercial bank into certain selected services and functions.”⁴⁴ The lower court said that this approach, if “carried to the logical extreme, would result in many additional so-called lines of commerce” but would serve “no useful purpose.” The Supreme Court took the same view, holding that the relevant product market was “the cluster of products... and services... denoted by the term ‘commercial banking.’”⁴⁵ The Court acknowledged that the competitive dynamics varied among the products and services included in this broad market. But it nonetheless concluded that “it is clear that commercial banking is a market sufficiently inclusive to be meaningful in terms of trade realities.”⁴⁶ The Supreme Court applied the same “commercial banking” product market to six

⁴² 370 U.S. 294, 326 (1962) (“Applying these considerations to the present case, we conclude that the record supports the District Court’s finding that the relevant lines of commerce are men’s, women’s, and children’s shoes.”).

⁴³ 374 U.S. 321 (1963).

⁴⁴ *United States v. Philadelphia Nat’l Bank*, 201 F. Supp. 348, 363 (E.D. Pa. 1962).

⁴⁵ *Philadelphia Nat’l Bank*, 374 U.S. at 356 (internal parentheticals omitted).

⁴⁶ *Id.* at 357 (internal quotations and citations omitted).

other bank mergers in the following 12 years,⁴⁷ in the process rejecting both broader and narrower candidate markets.⁴⁸

Even in this era, though, the Court did not always define broad markets. In the *DuPont* case, for example, the Court chose to define narrow product markets for “automotive finishes and fabrics.”⁴⁹ The dissent argued that this market was drawn too narrowly because the very same finishes and fabrics were also used in many other industries.⁵⁰

Lower courts also defined a mix of broader and narrower markets. In *United States v. General Dynamics Corp.*,⁵¹ for example, the district court defined an “energy market”⁵² based on evidence of significant competition from “oil, gas, and nuclear power.”⁵³ Yet as Bob Pitofsky once wrote, there were also “many instances” during this era in which lower courts defined “excessively, and sometimes ludicrously, narrow market definitions.”⁵⁴ In the late 1950s and

⁴⁷ *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 667 (1964); *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171, 181-82 n.15 (1968) (affirming “commercial banking” product market); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360-61 (1970) (holding the district court erred when it defined narrower product markets with a broader range of participants because “the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved”); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618-619 (1974) (noting that the district court’s definition of a “commercial banking” product market “is in full accord with our precedents”); *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 666 (1974) (reversing a district court finding that the relevant market included both savings banks and commercial banks, and remanding the case with instructions that “the District Court should treat commercial banking as the relevant product market”); *United States v. Citizens & So. Nat'l Bank*, 422 U.S. 86, 120-21 (1975) (affirming “commercial banking” product market). The Court did not reach the question in a seventh case. See *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 n.1 (1967).

⁴⁸ See *Connecticut Nat'l Bank*, 418 U.S. at 666 (rejecting a broader market that encompassed both commercial and savings banks); *Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. at 360-61 (rejecting a narrower market that did not include the full “cluster” of services traditionally included in the term “commercial banking”).

⁴⁹ *United States v. DuPont de Nemours & Co.*, 353 U.S. 586, 594-95 (1957) (“Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.”).

⁵⁰ *Id.* at 648-54 (Burton, J., dissenting) (noting that the Court defined a relevant market that included products used in both automotive and non-automotive applications but arbitrarily excluded all non-automotive uses from the market share calculations).

⁵¹ 341 F. Supp. 534 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486 (1974).

⁵² *Id.* at 555 (“Based upon the extensive evidence presented at trial concerning the coal industry, its consumers and its competitors, this court is of the opinion that the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination.”).

⁵³ *Id.* at 545.

⁵⁴ Pitofsky, *supra* note 5, at 1808.

early 1960s, for example, government enforcers successfully alleged relevant product markets for a type of aluminum foil called “florist foil,” “high-priced iron golf clubs,” “low-priced baseballs,” and “industrial-grade rental garments.”⁵⁵

2. Subsequent Narrowing (1980 to the Present)

Starting in the 1980s, courts and enforcers began to define product markets in a more standardized fashion, a dynamic that remains largely true today. Standardization typically meant rejecting broad markets in favor of somewhat narrower ones, often focused on a particular industrial or consumer good.⁵⁶ For example, in the early 1980s Frederick Rowe argued that the Agencies had “scored easy triumphs against trivial horizontal deals” in markets like “local towel rental services” and “vandal-resistant plumbing fixtures” used in prisons.⁵⁷ In 1986, Judge Bork wrote a decision affirming the definition of a relevant product market for “aircraft transparencies requiring, for want of a better term, ‘high technology’ to produce, without regard to the materials of which they are fabricated.”⁵⁸ Courts and enforcers sometimes made further distinctions,

⁵⁵ *Id.* at 1808 n.9 (citing *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 227 (D.C. Cir. 1962) (florist foil); *A.G. Spaulding & Bros. v. FTC*, 301 F.2d 585, 588, 597 (3d Cir. 1962) (golf clubs and baseballs); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 543 (M.D. Tenn. 1975) (garments)).

⁵⁶ See Werden, *supra* note 19 (tracing the ebb and flow of market definition over time).

⁵⁷ Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1528 (1984) (citing, *inter alia*, *United States v. Acorn Eng'g Co.*, 1981-2 Trade Cas. (CCH) 64,197 (N.D. Cal. 1981); *United States v. Mission Indus.*, 601 TRADE REG. REP. (CCH) 4 (June 21, 1983)).

⁵⁸ *FTC v. PPG Indus.*, 798 F.2d 1500, 1504-06 (D.C. Cir. 1986) (Bork, J.). As a market defined by supply-side factors, the present Guidelines may arrive at a different (presumably narrower) formulation.

particularly as price-discrimination markets gained traction.⁵⁹ Although a few product markets broadened, these cases were rare and sometimes controversial.⁶⁰

Most narrowing took place along two dimensions. First, markets narrowed to focus upon a product's next-closest substitutes, which often meant defining a market around a single price tier or product characteristic. For example, in the early 2000s the FTC alleged that "the sale of superpremium ice cream to the retail channel" was a relevant product market and that "refrigerated pickles" and "shelf-stable pickles" were in different product markets.⁶¹ And in *Whole Foods* the FTC alleged a market for "premium natural and organic supermarkets," which the district court rejected as too narrow but the court of appeals accepted.⁶² In contrast, during the broad market era the Court rejected the defendant's attempt to define narrower shoe markets using "price/quality" and "age/sex" distinctions as "unrealistic."⁶³ It found particularly laughable

⁵⁹ See, e.g., Compl. ¶¶ 20-26, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed July 1, 2015) (defining separate markets for different distribution channels of the same product); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining a separate price-discrimination market around "national customers"); see also Ian Simmons et al., *Price Discrimination Markets in Merger Cases: Practical Guidance from FTC v. Sysco*, 31 ANTITRUST at 40, 40 (Fall 2016) (arguing the enforcement agencies are asserting "narrow 'price discrimination markets' . . . in a growing number of merger investigations and enforcement actions").

⁶⁰ See, e.g., Fed. Trade Comm'n, *Federated Department Stores, Inc./The May Department Stores Company*, File No. 051-0111 (2005) (Statement of the Commission) (defining markets for specific categories of goods sold by both department stores and specialty stores, rather than a market for "department stores," as the district court previously did in *The Bon-Ton Stores, Inc. v. The May Department Store Company*, 881 F. Supp. 860 (W.D.N.Y. 1994)); Mark D. Bauer, *Department Stores on Sale: An Antitrust Quandary*, 26 GA. STATE U. L. REV. 255, 319 (2010) (criticizing the FTC's decision in *Federated/May* and identifying "a homogenization of retail choices, a loss of civic identity and at least perceived disrespect by distant corporations that have usurped cherished local institutions" as "issues [that] demand investigation by the FTC").

⁶¹ See Compl. ¶ 11, *Nestle Holdings, Inc.*, Dkt. No. C-4082, available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/06/dreyercomplaint.htm>; *Complaint ¶¶ 12-13, 15(a), FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P.*,

⁶² *FTC v. Whole Foods Market, Inc.*, 502 F.Supp.2d 1, 34-36 (D.D.C. 2007), *rev'd*, 548 F.3d 1028, 1041 (D.C. Cir. 2008) (Brown, J.).

⁶³ *Brown Shoe*, 370 U.S. at 326; see also *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 363 (E.D. Pa. 1962) (rejecting both plaintiffs' and defendants' attempts to "subdivide a commercial bank into certain selected services and functions" as misguided because these smaller markets "would result in many additional so-called lines of commerce" but serve "no useful purpose"), *aff'd*, 374 U.S. 321 (1963).

the suggestion that “men’s shoes selling below \$8.99 are in a different product market from those selling above \$9.00.”⁶⁴

Second, enforcers more often defined narrow price-discrimination markets, even though those markets were hardly new.⁶⁵ The DOJ had long defined markets around specific household appliances like dishwashers, washing machines, and ovens, both before and after the rise of price-discrimination markets.⁶⁶ But in the 2015 case involving *Electrolux*, the DOJ alleged both individual markets for kitchen ranges, cooktops, and ovens *and* price-discrimination submarkets for “contract-channel” and “retail channel” purchasers of those appliances.⁶⁷ The “national broadline customers” market in the 2015 *Sysco/US Foods* case was also defined around the customers most vulnerable to price discrimination post-transaction.⁶⁸

3. Systematic Comparison

These examples and other cases have led to a perception that enforcers allege narrow markets and that courts typically agree,⁶⁹ particularly as the market definition exercise has

⁶⁴ *Brown Shoe*, 370 U.S. at 326.

⁶⁵ See, e.g., U.S. DEP’T OF JUSTICE, MERGER GUIDELINES § II.A (1982), available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf> (“If such price discrimination is possible, the Department will consider defining additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power.”).

⁶⁶ See Press Release, U.S. Dep’t of Justice, Department of Justice Antitrust Division Statement on Closing of Its Investigation of Whirlpool’s Acquisition of Maytag, Mar. 29, 2006, available at https://www.justice.gov/archive/atr/public/press_releases/2006/215326.htm (finding the transaction was unlikely to reduce competition in various household appliance markets, including “residential clothes washers and dryers”); Final Judgement, *United States v. Commercial Elec. Co.*, 1959 Trade Cas. ¶ 69,505 (N.D. Ohio Oct. 23, 1959), available at <https://www.justice.gov/atr/page/file/1114471/download> (defining “GE major appliances” subject to the judgment as “refrigerators, freezers, ranges and ovens, water heaters, dishwashers, disposals, washers, dryers, combination washer-dryers, air conditioners, and television receivers”).

⁶⁷ See Compl. ¶¶ 20-26, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed July 1, 2015) (defining separate markets for different distribution channels of the same product).

⁶⁸ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015).

⁶⁹ See, e.g., *Electrolux Pretrial Brief*, *supra* note 10, at 15-16 (“Frequently, the government alleges narrow markets, the defendant describes broad markets, and the court must choose between the competing approaches.”); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 150 n.76 (2007) (“Narrow markets that cannot be described absent multiple adjectives are often ridiculed as gerrymandered—carefully crafted in order to make concentration appear high, rather than defined on a principled basis. . . . But the number of adjectives is beside the point: the issue is whether the market definition is consistent with the evidence as to demand substitution.”).

become more standardized. What has been missing, at least so far, is substantial evidence that courts and the Agencies are defining product markets in a systematically narrower way than before.

Comparing older Supreme Court product market definitions to their modern analogues brings rigor to this discussion. A useful starting point is the collection of Supreme Court cases involving a product market definition issued during the quarter century following the strengthening of the Clayton Act in 1950. This sample is manageable in size; the era itself is important given its role in setting basic substantive merger rules; and it precedes the significant paradigm shift in antitrust enforcement that occurred in the 1980s.

Of the markets that have narrowed, *how* and *when* the definitional shift occurred varies significantly. Some markets, like retail groceries, have narrowed several times. In the 1966 *Von's Grocery* case, the relevant product market for a merger of two Los Angeles-area grocery stores was the market for “retail grocery” sales, including small corner stores.⁷⁰ In the 1990 case *California v. American Stores Co.*, the relevant market was “supermarkets,” defined as grocery stores of at least 10,000 square feet.⁷¹ By 2008, in the *Whole Foods* case, the FTC alleged, and the D.C. Circuit found, an even narrower market for the “operation of premium natural and organic supermarkets.”⁷² Beverage containers also exhibit the sequential narrowing trend, moving from a product market for “the combined glass and metal container industries and all end uses for which they compete” in the 1960s⁷³ to separate product markets for particular uses of

⁷⁰ *United States v. Von's Grocery Co.*, 384 U.S. 270, 272 (1966).

⁷¹ 495 U.S. 271 (1990).

⁷² *FTC. v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

⁷³ *United States v. Continental Can Co.*, 378 US 441, 457 (1964).

glass containers in 2002 and 2013⁷⁴ and to specific sizes and shapes of metal containers in 2016.”⁷⁵

Other product markets like coal mining narrowed quickly and then stayed narrow. Take the early 1970s case *United States v. General Dynamics Corp.*,⁷⁶ which involved a merger of two coal mining companies. There, the district court concluded that the relevant market was “interfuel” competition among different energy sources – including coal, natural gas, and uranium – used to generate electricity.⁷⁷ But in a merger of coal mines in the early 2000s, *Arch Coal*, the FTC alleged a market for “8800 BTU coal from the Southern Powder River Basin”⁷⁸ in Wyoming and the district court found a market for all Southern Powder River Basin coal.⁷⁹ In 2020, the FTC alleged the same Southern Powder River Basin coal product market in a second transaction involving Arch Coal. The district court provisionally accepted this market definition when it granted a preliminary injunction.⁸⁰ In this last case, the court emphasized that its finding was dictated primarily by “the ‘narrowest market principle’” in *Brown Shoe*.⁸¹

⁷⁴ See *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (parties stipulated the relevant product market was “foodservice glassware”); Complaint ¶ 30, *FTC v. Ardagh Group S.A.*, No. 1:13-cv-01021-RMC (D.D.C. filed July 17, 2013) (alleging the relevant product markets were “(1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers”).

⁷⁵ Complaint ¶¶ 5, 9, *In re Ball Corp.*, No. 151-0088 (F.T.C. filed June 28, 2016) (defining one product market for “standard 12-ounce aluminum beverage cans” and a separate cluster market for various kinds of “specialty aluminum beverage cans” that “come in a variety of dimensions” but can be clustered for convenience).

⁷⁶ 341 F. Supp. 534 (N.D. Ill. 1972), *aff’d*, 415 U.S. 486, 510-11 (1974) (without reaching the relevant product market).

⁷⁷ *Id.* at 545-46.

⁷⁸ *FTC v. Arch Coal, Inc.*, 328 F. Supp. 2d 109, 121 (D.D.C. 2004) (recounting plaintiff’s argument before the court).

⁷⁹ *Id.* at 119-123.

⁸⁰ *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 2020).

⁸¹ *Id.* at *22. This conclusion is odd for two reasons. First, the district court defined overlapping broad and narrow product markets, while the narrowest market principle requires the definition of only one product market. See, e.g., Werden, *supra* note 19, at 196 (“The Guidelines’ Smallest Market Principle states that the one and only relevant market for the antitrust market subsequence and the corresponding candidate market sequence ‘generally’ is the smallest element in the antitrust market subsequence, that is, the only one contained in each of the others.”). Second, the district court cited *Brown Shoe* for this point, even though the Court there defined relatively broad markets and pointedly rejected the defendants’ attempt to make narrower distinctions, such as price tiers. See *Peabody*, No. 4:20-cv-00317, at *23 (quoting *Times Picayune*, 345 U.S. 594, 612 n.31).

The same dynamic also appears in banking cases. The Supreme Court defined a broad cluster market in seven different cases between 1963 and 1975. But the DOJ eventually moved to narrower categories for checking, savings, and trust products as well as different kinds of customers.⁸² The Department’s approach has been consistent for many years, aided by the 1995 Bank Merger Guidelines, which the DOJ may soon revise.⁸³

The banking industry provides a particularly useful case study on the evolution of product market definition because mergers are reviewed by both the DOJ and the Federal Reserve Board (“the FRB”). The DOJ has adopted ever-narrower markets during its antitrust review. In contrast, the FRB has retained the “broad market” approach of the 1960s, even broadening the geographic markets further to account for suburban sprawl. In at least two bank mergers, CoreStates/FirstUnion (1998) and BB&T/SunTrust (2020), the DOJ and the FRB explicitly acknowledged that this difference in methodology has led to different substantive results. (Ironically, CoreStates was a successor to Philadelphia National Bank.) By defining narrower markets, the DOJ has found significantly greater harm and fewer cognizable efficiencies than the Federal Reserve Board, and consequently has demanded larger divestitures.⁸⁴ These bank mergers illustrate both how antitrust product markets have narrowed

⁸² See, e.g., U.S. DEP’T OF JUSTICE, BANK MERGER GUIDELINES § 2 (using separate HHI calculations for two different sizes of “commercial and industrial loans”); U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide, <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide> (“Depending on the transaction, the Division generally reviews three separate product markets in banking matters: (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services.”)

⁸³ See Press Release, U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis, Sept. 1, 2020, <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.

⁸⁴ See Robert Kramer, Chief, Lit. II Section, U.S. Dep’t of Justice Antitrust Div., Address before the Am. Bar Ass’n: “Mega-Mergers” in the Banking Industry, at 3, Apr. 14, 1999, available at <https://www.justice.gov/atr/speech/mega-mergers-banking-industry> (explaining “the FRB and [DOJ] in their analysis use[d] different product markets and this [difference] played a significant role in this matter”); U.S. Dep’t of Justice, Antitrust Div., 2020 Division Update, at 19 (June 2020), available at <https://www.justice.gov/file/1280196/download> (“In several cases, Division

and how that narrowing affects the application of various legal rules. (Interestingly, Senator Elizabeth Warren has criticized the DOJ for not defining markets narrowly enough.⁸⁵)

A few markets initially stayed constant and then narrowed, such as food products. In a 1965 FTC case, the Supreme Court defined separate markets for dehydrated onions and dehydrated garlic.⁸⁶ The FTC was still applying these market definitions in 1993, when it resolved allegations that an acquisition by McCormick & Co. would harm competition in the “U.S. dehydrated onions business.”⁸⁷ Since then, the FTC has taken a narrower tack in other food and seasoning deals. In a 2008 consent order with McCormick, the FTC defined the market as branded salt products sold at retail, explicitly excluding chemically identical store brand and private label products.⁸⁸

I believe there are at least four likely causes for the narrowing of product markets. First, the methodologies used to define markets have changed substantially over the years. As enforcers shifted their focus to differentiated products and unilateral effects, the models and tools

staff concluded that the relevant antitrust market was narrower than the banking markets defined by the banking regulators, which underscored the need for a robust remedy.”)

⁸⁵ See Letter from Sen. Elizabeth Warren to Asst. Atty. Gen. Makan Delrahim, Oct. 16, 2020, *available at* <https://www.justice.gov/atr/page/file/1330251/download> (“The Division currently analyzes the impact of a proposed transaction on competition within three separate product markets: retail banking products and services, small business products and services, and middle-market banking products and services. While this approach is preferable to that of banking agencies, which rely on a *cluster market* approach that uses an overly simplistic measure of deposits as a proxy to estimate overall activity in a market, it still lacks the specificity needed to ensure that there is not a reduction in the quantity or availability of banking products used by lower-income households. . . . The 2019 approval of the merger for Branch Banking and Trust Company (BB&T) and SunTrust Bank (SunTrust) revealed the inadequacy of current DOJ merger guidelines.”).

⁸⁶ *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 595 (1965). (reporting the merging parties’ shares of the market for the “manufacture of dehydrated onion and garlic”).

⁸⁷ See Press Release, Fed. Trade Comm’n, Announced Actions for March 1, 1996, Mar. 1, 1996, <https://www.ftc.gov/news-events/press-releases/1996/03/announced-actions-march-1-1996> (reporting the agency had granted McCormick’s petition “to modify a 1993 consent order” that had resolved allegations an acquisition “would substantially reduce competition in the U.S. dehydrated onion business”).

⁸⁸ Compl. ¶ 8, *In re McCormick & Co., Inc.*, No. 0810045 (F.T.C. filed July 30, 2008) (alleging a relevant product market for “the manufacture and sale of branded seasoned salt products,” which “include any dry branded product or product formulation (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices, and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt”).

used to define markets began to change. For example, the hypothetical monopolist test and diversion ratios have become commonplace.⁸⁹ Second, as confidence in measures of demand-side substitution improved, courts and enforcers began to de-emphasize supply-side substitution. In fact, supply-side substitution has largely been excluded from the market definition exercise since the 1992 Horizontal Merger Guidelines.⁹⁰ Third, the *Guidelines* have emphasized some concepts, like price-discrimination markets, that can result in narrower markets.

Fourth, the narrowing product markets may reflect – at least in some cases – real changes in the underlying economy, like greater product differentiation. For example, the “premium natural and organic supermarkets” at issue in *Whole Foods* did not exist when the Court decided *Von’s Grocery* in 1966.⁹¹ But it is unlikely that greater differentiation can explain all, or even most, of the narrowing. Some products were already differentiated in the 1960s; there were many kinds of children’s shoes, even though the Supreme Court consciously chose to lump them all

⁸⁹ See also, e.g., Stone & Wright, *supra* note 18, at *8 (“The market definition analysis endorsed by the new Guidelines correspondingly favors narrower markets” than under the 1997 Guidelines because, among other things, “the [new] Guidelines’ value of diversion test tends to narrow relevant markets, all else held constant.”).

⁹⁰ See, e.g., Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, at 133-38 (2000) (discussing the concept from *Cellophane* to the 2000s); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 293-99 (D.D.C. 2020) (finding the Commission failed to prove that supply-side factors could be used to define the product market). Substitution of supply has not disappeared entirely, but instead factors into the analysis only *after* the market has been defined. Even if supply-side substitution was always fully considered in subsequent steps (which is no sure thing), this approach does nothing to recapture efficiencies that have been pushed out-of-market by the elimination of supply substitution in the market definition exercise.

⁹¹ Nor did “club stores,” which are occasionally counted as supermarkets. See, e.g., Compl. ¶ 9, *In re Wal-Mart Stores, Inc.*, No. C-4066 (F.T.C. Nov. 20, 2002), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/02/walmartamigocmp.pdf>.

together in its *Brown Shoe* decision.⁹² And the courts have narrowed many commodity product markets like coal and spices, even though the products' physical properties have not changed.

III. SUBSTANTIVE CHANGES AFFECTED BY NARROWING MARKETS

Narrowing markets affect the way several other substantive antitrust rules are applied in ways that, all else being equal, favor plaintiffs.⁹³ Impacted rules include the exclusion of out-of-market efficiencies; the market share at which a transaction becomes presumptively unlawful; and the traditional emphasis on mergers involving “overlapping” horizontal competitors.

Narrowing product markets have altered the rules on cross-market balancing and structural presumptions in ways that favor plaintiffs. But narrowing product markets have impacted the traditional scrutiny of mergers involving overlapping competitors in ways that can favor either plaintiffs or defendants.

A. Efficiencies

The move toward narrower relevant product markets has affected the way courts assess efficiency claims in two ways.

1. Out-of-Market Efficiencies

First, narrow markets push more otherwise-cognizable efficiencies outside the relevant market. The Supreme Court held in *Philadelphia National Bank* that “anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another.”⁹⁴ The Agencies

⁹² See *Brown Shoe Co. v. United States*, 370 U.S. 294, 326-28 (1962).

⁹³ Although there are several proposals to tighten merger rules for firms in different (but adjacent) markets, none of them acknowledge or assess the extent to which this alleged defect could be addressed by defining broader (*e.g.*, 1960s-era) markets.

⁹⁴ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963)

and courts have characterized this holding as precluding the “cross-market” or “multi-market” balancing of competitive effects and the consideration of out-of-market efficiencies.⁹⁵

But in *Philadelphia National Bank*, the relevant product market for banking mergers included everything “denoted by the term ‘commercial banking,’”⁹⁶ and the relevant geographic market was the four-county Philadelphia area.⁹⁷ The rule against out-of-market efficiencies should be understood within this context of a broad product and geographic market. Perhaps we should reconsider the propriety of applying the out-of-market rule verbatim when the market is defined very narrowly. A solution consistent with the Court’s original formulation would aggregate harms and efficiencies into product markets akin in size to those in *Philadelphia National Bank* and assess the net effect within these broader markets.⁹⁸

2. Magnitude of Offsetting Efficiencies

Since *FTC v. H.J. Heinz Co.*,⁹⁹ known to antitrust practitioners as “the Baby Foods case,” narrower markets have also changed the magnitude of offsetting efficiencies a defendant must prove. Two dimensions of that case are relevant here.

⁹⁵ See, e.g., Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015) (coining the former term).

⁹⁶ *Id. Phila. Nat’l Bank*, 374 U.S. at 356 (“We have no difficulty in determining the ‘line of commerce’ (relevant product or services market) and ‘section of the country’ (relevant geographical market) in which to appraise the probable competitive effects of appellees’ proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking,’ composes a distinct line of commerce.”).

⁹⁷ *Id.* at 359 (finding “the four-county area in which appellees’ offices are located would seem to be the relevant geographical market”).

⁹⁸ In theory, this approach could be employed by both the courts and the agencies. In court, it would be a legal question of how best to interpret the holding of *Philadelphia National Bank*, which could account for the broad scope of the market there. The agencies could do so either as a matter of law (following the same method just discussed) or as an exercise of prosecutorial discretion. See, e.g., 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 7, § 10 at 30 n.14 (“In some cases . . . the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).”).

⁹⁹ 246 F.3d 708 (D.C. Cir. 2001).

First, the D.C. Circuit adopted a sliding scale for assessing efficiency claims that becomes more exacting as markets narrow and market shares increase. In general, defendants must show only that the likely cognizable efficiencies exceed the likely anticompetitive effects, and therefore are unlikely “to substantially lessen competition.”¹⁰⁰ But when the market is highly concentrated, the court said the defendants must prove “*extraordinary* efficiencies.”¹⁰¹ This statement appears to mean that the magnitude of those efficiencies that remain in the relevant market must substantially exceed the magnitude of harms.¹⁰² Although this rule started in the D.C. Circuit,¹⁰³ it is now also binding circuit precedent in the Third and Ninth Circuits,¹⁰⁴ and has been followed by trial courts in the Sixth and Seventh Circuits.¹⁰⁵

¹⁰⁰ See *id.* at 719-20; see also 15 U.S.C. § 18; see U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 4 (Apr. 2, 1992, rev. Apr. 8, 1997) [hereinafter 1997 GUIDELINES], available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf>.

¹⁰¹ *Heinz*, 246 F.3d at 720 (emphasis added).

¹⁰² See *id.*; see also 1997 GUIDELINES, *supra* note 100, § 4 at 32 (“The greater the potential adverse competitive effect of a merger . . . the greater must be the cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market.”). Notably, the D.C. Circuit managed to dismiss even the very large production efficiencies in *Heinz*—approximately 22.3% of the acquired firm’s variable manufacturing costs—as failing the merger specificity requirement. See *id.* at 721-22.

¹⁰³ See *id.*; at 720; *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (“[W]e hold that the district court did not abuse its discretion in enjoining the merger based on Anthem’s failure to show the kind of extraordinary efficiencies necessary to offset the conceded anticompetitive effect of the merger in the fourteen Anthem states: the loss of Cigna, an innovative competitor in a highly concentrated market.”).

¹⁰⁴ See *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) (“In order to rebut the prima facie case, the Hospitals must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger.” (citing *Heinz*, 246 F.3d at 718-25)); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015) (“Because § 7 seeks to avert monopolies, proof of ‘extraordinary efficiencies’ is required to offset the anticompetitive concerns in highly concentrated markets.” (citing, *inter alia*, *Heinz*, 246 F.3d at 720-22)).

¹⁰⁵ See *FTC v. Advocate Health Care, No. 15-cv-11473*, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017) (“Where the merger would result in high market concentration levels, as in this case, the defendants must provide proof of ‘extraordinary efficiencies’ based on a ‘rigorous analysis’ that ensures that the proffered efficiencies represent more than ‘mere speculation and promises about post-merger behavior.’” (quoting *Heinz*, 246 F.3d at 720-21)); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) (“Moreover, [h]igh market concentration levels require proof of extraordinary efficiencies . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.” (quoting *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011))); *FTC v. ProMedica Health Sys., Inc., No. 3:11-cv-00047*, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011) (“Efficiencies must be ‘extraordinary’ to overcome high concentration levels.” (quoting *Heinz*, 246 F.3d at 721-22)).

Second, merging parties in highly concentrated markets face a heightened evidentiary burden when seeking – almost always in vain¹⁰⁶ – to prove efficiencies. According to *Heinz*, “the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties... to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.”¹⁰⁷

Combined, these two effects are greater than the sum of their parts. Because markets have narrowed, a defendant that previously could have carried its burden by showing efficiencies must now prove “extraordinary efficiencies” under a particularly “rigorous analysis.” In other words, as markets narrow and market shares increase, defendants must produce stronger proof of much larger efficiencies. The obligation, if actually applied this way, likely forecloses an efficiencies defense in many narrow market cases.¹⁰⁸

B. Competitive Overlaps

The extent to which relevant product markets have narrowed also has implications for other aspects of merger analysis. Consider two that cut in opposite directions.

First, narrower markets can make it more likely that two firms competing in the same broad market – like “retail supermarkets” or “coal” – are not viewed as horizontal competitors. For example, one firm may fall out of the market entirely. This result may be particularly likely in dynamic markets. In these markets, competitors often seek to “leapfrog” each other by

¹⁰⁶ Indeed, the recent T-Mobile challenge may well be the first case in which efficiencies played a determinative role. *See* *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 208 (S.D.N.Y. 2020) (concluding “the efficiencies are sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the *prima facie* case”).

¹⁰⁷ *H.J. Heinz*, 246 F.3d at 721.

¹⁰⁸ Of course, demonstrating cognizable efficiencies remains an uphill battle for merging parties. *See, e.g.*, Christine S. Wilson, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, Address at the Bates White Antitrust Webinar, June 24, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-final.pdf.

introducing products with new and different features. In the short run, an entrant’s product may be differentiated from existing products sold by others. Yet incumbents may – and in these markets often do – quickly “catch up” by introducing similar features to their own products. Therefore, in some cases narrower markets may result in relatively *less* aggressive antitrust enforcement, at least in theory.¹⁰⁹

Second, while in some cases narrowing the product market will exclude one of the merging firms, in other cases it will exclude some of their competitors. If the merging parties are in the same relevant market, excluding rivals will increase the merging parties’ combined market share. Because market shares are an input in many economic models used to measure anticompetitive effects, like diversion ratios, economic models may be more likely to find harm in narrow markets.

C. The Structural Presumption

Narrow markets may also be more likely to trigger a structural presumption of unlawfulness, which has been characterized as “critical for effective horizontal antitrust enforcement.”¹¹⁰ The structural presumption, which is the total market share at which a transaction becomes presumptively unlawful, is embodied in both the caselaw and the Horizontal Merger Guidelines.¹¹¹ When triggered, it shifts the burden from the plaintiff and requires the

¹⁰⁹ As described immediately below, in some cases the result may be the same level of antitrust enforcement. For example, if the broad market includes the merging parties and 8 significant competitors, while a narrower market includes only one of the merging parties, then the transaction is likely lawful under either definition.

¹¹⁰ Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1997 (2018).

¹¹¹ See, e.g., *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990) (“By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.” (citing *United States v. Citizens & Southern Nat’l Bank*, 422 U.S. 86, 120-22 (1975); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963))); 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 7, §§ 2.1.3, 5.3 (explaining “mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed [by the Agencies] to be likely to enhance market power” and setting out specific thresholds).

defendant to prove that the transaction is lawful.¹¹² As the Supreme Court recognized in *Philadelphia National Bank*, the very case that established the presumption, the size of the relevant market can affect the market share calculations.¹¹³ When product markets shrink, the number of competitors declines and the market share of each remaining firm in the market increases. Because the structural presumption is triggered whenever certain market share thresholds are met, the presumption is more likely to apply when markets are narrow. Perhaps ironically, the structural presumption is a product of the broad market era generally,¹¹⁴ and of a case in which the courts defined a broader market than either party sought.¹¹⁵

The relationship between market breadth and the structural presumption was clearly explained in the recent *Peabody* case, another FTC merger challenge involving Arch Coal. There, the district court explained that its “task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market... because potential harms to competition will likely be less apparent in a broader, less concentrated market than in a narrower included market.”¹¹⁶ The court then defined both a broad energy fuel market that included coal, natural gas, and renewable resources, and a narrower, overlapping market for

¹¹² See, e.g., Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).

¹¹³ See *Phila. Nat'l Bank*, 374 U.S. at 361 (endorsing a market definition approach that “avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant” or “so narrowly as to place appellees in different markets”).

¹¹⁴ See, e.g., Hovenkamp & Shapiro, *supra* note 110, at 1997 (“Since the Supreme Court’s landmark merger decision in *United States v. Philadelphia National Bank*, challengers have mounted prima facie cases against horizontal mergers that rest on the level and increase in market concentration caused by the merger.”).

¹¹⁵ See *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 363 (E.D. Pa. 1962) (rejected both the litigants’ proffered (and narrower) markets as attempts to “subdivide a commercial bank into certain selected services and functions,” which if “carried to the logical extreme, would result in many additional so-called lines of commerce” but serve “no useful purpose), *aff'd*, 374 U.S. 321, 356 (1963) (affirming the district court’s finding of a relevant product market for “the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking.’”).

¹¹⁶ *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317, at *23 (E.D. Mo. Sept. 28, 2020).

Southern Powder River Basin coal. The narrower market triggered a structural presumption of illegality.¹¹⁷

Narrowing markets also increase the probability of triggering a corollary to the structural presumption: “the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.”¹¹⁸ If narrowing markets means that there are fewer other firms in the market, it becomes more likely, all else equal, that a given merger will combine the first- and second-largest firms in the relevant market.¹¹⁹ The *Whole Foods* case illustrates both of these dynamics. The FTC argued a narrow product market for premium, natural, and organic supermarkets and the defendant urged a broader market that included conventional supermarkets. As both the district court and the court of appeals noted, the “case hinged—almost entirely—on the proper definition of the relevant market.”¹²⁰ If the market was narrow, then concentration was high, the structural presumption applied, and the transaction was likely unlawful. If the market was broad, then concentration was low and the structural presumption did not apply. Moreover, the FTC rested its entire case on the structural presumption and its corollary,¹²¹ and these were the controlling considerations in the final judgment of the D.C. Circuit.¹²²

¹¹⁷ *Id.* at *55-56.

¹¹⁸ *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1043 (D.C. Cir. 2008) (Tatel, J.) (quoting *FTC v. Whole Foods, Inc.*, 502 F. Supp. 2d 1, 8 (D.D.C. 2007)); *FTC v. Sysco, Inc.*, 113 F. Supp. 3d 1, 88 (D.D.C. 2015) (quoting *Whole Foods*, 548 F.3d at 1043); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 138 (D.D.C. 2016) (quoting *Sysco*, 113 F. Supp. 3d at 138 (quoting *Whole Foods*, 548 F.3d at 1043)); *see also* *FTC v. Wilhelm Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 59 (D.D.C. 2018) (quoting *Whole Foods*, 548 F.3d at 1043, in a parenthetical); *Peabody*, 4:20-cv-00317, at *74 (likewise quoting *Whole Foods*, 548 F.3d at 1043, in a parenthetical).

¹¹⁹ This is particularly true today given the Guidelines’ focus upon close substitutes and differentiated products.

¹²⁰ *Whole Foods*, 548 F.3d at 1043 (Tatel, J., concurring) (internal citations and quotation marks omitted).

¹²¹ *Id.* at 1037 (Brown, J.) (“Because of the concentration in the supposed PNOS market, the FTC urged the district court to hold the merger ‘presumptively unlawful,’ and this was its sole reason for blocking the merger.”).

¹²² *See id.* (discussing the presumption of unlawfulness); *id.* at 1043 (Tatel, J., concurring) (“I agree with the district court that this case hinges—almost entirely—on the proper definition of the relevant product market, for if a separate natural and organic market exists, there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.”) (internal citations and quotation marks omitted).

CONCLUSION

Depending on your perspective, narrowing markets may be cause for either celebration or worry. Compared to their 1960s counterparts, market definitions today are the product of more coherent economic thinking, which makes the analysis more consistent and predictable. Yet that consistency also means litigants are left to debate whether markets are narrow or very narrow. And narrowing markets, in turn, have significantly altered the way in which courts apply bedrock merger rules like the structural presumption and efficiencies analysis.

The realization that markets have narrowed, and substantive antitrust rules have changed as a result, may also inform antitrust policy. First, proposals to return to earlier merger rules should be consistent. If enforcers should return to 1960s-era concentration thresholds,¹²³ presumably they should also return to 1960s-era product markets. Second, because markets have narrowed substantially, we may need to reconsider the way we think about overlaps and efficiencies. For example, courts applying the *Philadelphia National Bank* rule against out-of-market efficiencies have failed to recognize that the Supreme Court in that case rejected precisely the kind of narrow product markets that are now routine. In other words, the Supreme Court envisioned an efficiencies analysis fundamentally different than what the courts apply today.

I hope these remarks and the article on which they are based will provide some factual fuel for discussion of the application of antitrust law to M&A. Thanks again to the Berkeley Center for Law and Business for inviting me to share my thoughts with you today.

¹²³ See *supra* note 1.

Appendix

Table 1: Product Markets Defined by the Supreme Court in § 7 Cases and More Recent Equivalents

Case	Year	Relevant Product Market(s)	More Recent Equivalents
Du Pont (GM)	1957	(1) automotive finishes and (2) automotive fabrics	“automotive refinishing paint” (Compl. ¶ 39, <i>In re Automotive Refinishing Paint Antitrust Litigation</i> (E.D. Pa. filed 2004))*
Brown Shoe	1962	(1) all men’s shoes (2) all women’s shoes (3) all children’s shoes	“the manufacture and sale of national brand canvas shoes” (Compl. ¶ 19, <i>United States v. Converse</i> (D. Mass. 1972) (consent)) “sales of athletic shoes” (Business Review Letter to the Apparel Industry Partnership) (Oct. 31, 1996)
Banking Cases (7 in all)	1963 - 1975	“[T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking.’”	Separate product markets for savings, checking, and trust accounts, as well as several separate markets for commercial loans. <i>United States v. CoreStates</i> (1998) (consent); <i>United States v. BB&T</i> (2020) (consent)
El Paso	1964	“production, transportation, and sale of natural gas”	“natural gas pipeline transportation” (Compl. ¶ 9, <i>DTE Energy Co.</i> (F.T.C. 2019) (consent)); “sale of natural gas to G and SG LDC’s for system supply, plus alternate fuels and energy conservation, with a submarket of indirect sale of natural gas to residential/commercial customers, plus alternate fuels and energy conservation” (<i>State of Ill ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.</i> , 730 F. Supp. 826 (C.D. Ill. 1990)).
Penn-Olin	1964	production and sale of sodium chlorate	“the manufacture and sale of sodium chlorate” in “North America” (Compl. ¶¶ 24, 27, <i>Superior Plus Corp.</i> , No. 9371 (F.T.C. filed June 27, 2016))
Continental Can	1964	“the combined glass and metal container industries and all end uses for which they compete”	“[1] standard 12-ounce aluminum beverage cans (‘Standard Cans’), and [2] specialty aluminum beverage cans (‘Specialty Cans’), which come in a variety of dimensions that differ from Standard Cans.” (Compl. ¶ 5, <i>Ball/Rexam</i> (F.T.C. 2016)) (1) “the manufacture and sale of glass containers to Brewers”; and (2) “the manufacture and sale of glass containers to Distillers” (Compl. ¶ 30, <i>FTC v. Ardagh Group S.A.</i> (D.D.C. filed July 13, 2013) (subsequently settled)) “foodservice glassware” (<i>FTC v. Libbey, Inc.</i> , 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (stipulated market))
Alcoa (Rome Cable)	1964	(1) “insulated aluminum conductor and insulated copper conductor” (2) “aluminum conductor (bare and insulated)” (3) copper and alum. submarkets	“the electrical conduit market” (<i>Allied Tube v. Indian Head, Inc.</i> , 486 U.S. 492 (1988) (Section 1 case)) “copper building wire” (Compl. ¶ 6, <i>U.S. v. Essex Group</i> (1978))*
Consolidated Foods	1965	“the markets for [1] dehydrated onion and [2] [dehydrated] garlic”	“the U.S. dehydrated-onion business” (Compl., <i>McCormick & Co., Inc.</i> , filed 1993) (see also 1995 petition in case no. C-3468) “the manufacture and sale of branded seasoned salt products,” which “include any dry branded product or product formulation (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices, and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt” (Compl. ¶ 8, <i>McCormick & Co., Inc.</i> , No. C-4225 (F.T.C. filed July 30, 2008))
Beer Cases - Pabst - Falstaff	1966 1973	“production and sale of beer”	“Producer and Seller of Beer” (<i>DeHoog v. Anheuser-Busch InBev SA/NV</i> , 899 F.3d 758 (9th Cir. 2018)) “Beer” (Compl. ¶ 30, <i>United States v. Anheuser-Busch InBev</i> (D.D.C. 2016) (SABMiller acquisition)) (but complaint also notes segments within market); Compl. ¶ 31, <i>United States v. Anheuser-Busch InBev</i> (D.D.C. 2013) (Grupo Modelo acquisition)
Von's Grocery	1966	“the retail grocery market”	“the retail sale of food and other grocery products in supermarkets” (Compl. ¶ 8, <i>Koniklijke Ahold, N.V.</i> , No. C-4588 (F.T.C. 2016) (consent); Compl. ¶ 10, <i>Cerberus Institutional Partners V, L.P.</i> , No. C-4504 (F.T.C. 2015) (Alberton’s/Safeway consent)) “Premium natural and organic supermarkets” (<i>FTC v. Whole Foods Markets</i> , 548 F.3d 1028, 1037-41 (D.C. Cir. 2008)) “Supermarkets” (<i>California v. American Stores</i> , 495 U.S. 271 (1990))
Ford Motor	1972	(1) “original equipment spark plugs” (2) “aftermarket spark plugs”	(1) “original equipment” and (2) “replacement” spark plugs (<i>Stitt Spark Plug Co. v. Champion Spark Plug Co.</i> , 840 F.2d 1253 (5th Cir. 1988)) “spark plugs” (<i>Information, United States v. NGK Spark Plug Co., Ltd.</i> , No. 2:14-cr-20949 (E.D. Mich. filed Aug. 19, 2014))*

General Dynamics	1974	“interfuel competition” among coal, natural gas, oil, uranium, “and other forms of energy”**	“an economically significant submarket of SPRB coal only” (FTC v. Peabody (E.D. Mo. 2020)) “SPRB [Southern Powder River Basin] coal” (FTC v. Arch Coal (D.D.C. 2004))
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Note: When litigated cases were not available (or sufficiently recent), we rely upon the plaintiff’s allegations (e.g., in price-fixing cases) or a complaint accepted as part of a consent order. We recognize that these latter sources may be less reliable than a litigated finding of fact, but believe they are still probative, particularly when taken as a whole.

* Price-fixing cases. Under the *per se* rule, these cases do not require the definition of a market, but they often include analogous allegations about market shares or volumes of commerce.

** District court finding. The Court did not reach the question on appeal, though the dissent would have defined both a broad “energy market” and a narrower “coal” submarket. *See General Dynamics*, 415 U.S. at 513-15.

Table 2: Summary Statistics

Product Market	Count by		Industries
	Cases	Industries	
Narrowed	12	6	Banking; Beverage Containers; Coal; Grocery Stores; Shoes; Seasonings
Constant	7	6	Automotive Finishes; Beer; Electrical Conductors; Natural Gas; Sodium Chlorate; Spark Plugs
Broadened	0	0	
Total	19	12	