Bureau of Competition
Office of the Director

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Guideline 2: The Importance of Direct Indicators of Competition in Merger Review

Remarks of Henry Liu
Crowell and Bates White 13th Annual Luncheon
April 11, 2024

Thank you for the warm introduction. I appreciate the invitation to speak here today, and a special thanks to my team—in particular, Albert Teng—for assisting with these remarks. Before I begin, I'll offer the standard disclaimer that I am here speaking solely for myself; I do not speak for the Commission or staff at the FTC.

A lot has been said about the new 2023 Merger Guidelines and I won't take your entire lunch hour rehashing those discussions. But I will say that—now that we're four months into the new Guidelines—one thing is clear: they are working. The new Guidelines better reflect the reality of how competition occurs, and they provide real transparency into how the agencies are thinking about whether mergers present sufficient competitive risk to warrant an enforcement action.

Today, I wanted to focus on one particular part of the new Guidelines—Guideline 2—which states that "Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms."[1] This is a simple and obvious sentence and captures the concept of unilateral effects in the 2010 Horizontal Merger Guidelines. But the intent of Guideline 2 is broader—it reflects the fact that we are prioritizing direct indicators of competition between the merging parties over potentially superfluous and unnecessary fights about market definition. In other words, where there is direct evidence that a merger may substantially lessen competition, we may choose not to rely on market definition and structural presumptions to make our case.

Realities of Competition vs. Market Definition

Let me start with a hypothetical. Imagine a merger between two Silicon Valley companies hiring entry-level, fresh out of college, computer science majors. Some estimates

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2 (2023).

indicate that there are over 100,000 new computer and information science graduates in the United States each year,[2] and it would not be a stretch to argue that the overall market for recent college graduates is "unconcentrated"—with hundreds, if not thousands, of companies hiring.

Under a merger analysis approach centered on market definition, we might struggle to define a relevant market that is concentrated. The merging parties' market shares in any market for computer science graduates in Silicon Valley would undoubtedly be small. And intuitively, without more information, it would be challenging to convince a court that the merger would be presumptively unlawful in a labor market—college graduates probably have any number of options in California and elsewhere.

But what if the evidence tells a different story? Imagine that ordinary course emails demonstrate strong head-to-head competition—for example, showing that the companies are competing head-to-head on salaries, benefits, and working conditions for new graduates and tracking each other's new hires. And the econometrics show that the merging companies are typically the top two options for computer science graduates. In short, notwithstanding the number of options for college graduates, there is good evidence that the companies are each other's closest competitors for entry level hires.

This is a scenario we see time and again in merger review. The ordinary course evidence suggest that the merging parties view each other as key competitors, but we nonetheless hear arguments about how our proposed market is incorrectly defined. There is some irony in those arguments: the agencies are often criticized for relying on structural evidence in litigation, but when the agencies confront merging parties with direct evidence of meaningful head-to-head competition, we hear arguments about how market shares are low if one looks at the "right market." Evidence about how companies *actually compete* is often just as—if not more—probative than debates about the appropriate boundaries of a relevant market.

The Focus on Market Definition

The rigid march through market definition is a familiar exercise. Antitrust litigants often spend enormous amounts of time, energy, and money debating the boundaries of the relevant market and litigating the hypothetical monopolist test and *Brown Shoe* factors. It is hard to think of a merger case today that does not feature an extensive discussion of market definition, necessitating countless hours of attorney and expert time in litigation.

This focus on market definition in certain cases as the "threshold" or "gating" issue is often unnecessary. Market definition is referred to in court cases as a structural indicator of the effect on competition.[3] But despite this modest characterization, it continues to be the *central*

---

[2] *Degrees in computer and information sciences conferred by postsecondary institutions, by level of degree and sex of student: Academic years 1964-65 through 2020-21*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d22/tables/dt22_325.35.asp.

[3] *See, e.g.*, *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) ("[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share

focus of merger litigation—not because it is the only tool for evaluating the merger's effects on competition, but because it has become a make-or-break issue for courts.

The focus on market definition has frustrated enforcement efforts and can be, at least in some cases, analytically backwards. For example, when a court does not accept the agencies' market, it may end the inquiry and decline to consider qualitative and economic evidence of harm to the competitive process.[4] But this cannot be the right result since the entire purpose of market definition is to provide a tool by which to analyze competitive harms from the merger.

Nor is this the right result under the Clayton Act. Section 7 forbids acquisitions where "the effect of such acquisition *may be substantially to lessen competition*, or to tend to create a monopoly."[5] Section 7's text says nothing about market shares, concentration levels, or the hypothetical monopolist test. Indeed, for more than 30 years after the Clayton Act's passage, the term "relevant market" was completely absent from court decisions.[6]

Market Definition in the Merger Guidelines

This brings us back to Guideline 2. For a long time, this focus on defining relevant markets was also embedded in the agencies' guidance. The 1992 Horizontal Merger Guidelines, for example, set out a "road map" analysis, suggesting that market definition is a first and necessary step to considering competitive effects.[7] Courts were in a similar boat as the 1992 Guidelines: as one federal court noted in 2001, "proper definition of the relevant product market is the first step in this case [and] is also the key to ultimate resolution . . . ."[8]

The 2010 Horizontal Merger Guidelines moved the ball forward in their discussion of unilateral effects. Those now-withdrawn Guidelines said that "the elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."[9] Market definition was not the end all be all of merger review, but rather only one of several tools to evaluate a merger's possible competitive harms. And indeed, the agencies now often use econometric tools that are agnostic to market definition—for instance, diversion ratios, willingness to pay, and upward pricing pressures.

Yet, despite the 2010 Guidelines, the over-emphasis on market definition continues to persist—in large part because courts applying the 2010 Guidelines seemed to consider evidence of unilateral effects as *bolstering* a structural presumption as opposed to an *independent* basis for

---

within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 85 n.35 (D.D.C. 2011) ("[i]dentifying a market and computing market shares provide an indirect means for measuring market power.") (citations omitted)

[4] *See, e.g.*, *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 557-58 (E.D. Pa. 2020).

[5] 15 U.S.C § 18 (emphasis added).

[6] Herbert Hovenkamp, *Markets in Merger Analysis*, 57 ANTITRUST BULL. 887 at pp. 3-4 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2897&context=faculty_scholarship.

[7] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 0.2, 1 (1992).

[8] *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001).

[9] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6 (2010).

finding liability.[10] Even where there was significant evidence of unilateral effects, courts continued to view that evidence as subordinate to the question of market definition and market structure.

Guideline 2 of the 2023 Merger Guidelines takes a more explicit view of the role of direct evidence in the agencies' prima facie case. It states that, "[i]f evidence demonstrates substantial competition between the merging parties prior to the merger, that *ordinarily suggests that the merger may substantially lessen competition*." (emphasis added). In other words, if there is evidence of head-to-head competition between merging firms, the merger would eliminate that competition—which can itself be reason to find a merger unlawful. Guideline 2 further states that "an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm *independent from an analysis of market shares*." (emphasis added).

Collectively, this language makes clear the agencies' view that evidence of competition between the merging parties can be grounds to declare a merger illegal—regardless of market shares and market concentration figures.

How the FTC Intends to Apply Guideline 2

Let me say a word about how we intend to operationalize Guideline 2 in practice. Many cases we bring will involve Guideline 2 in some way—given its fidelity to the statutory language and because the goal of merger review is to evaluate the competitive harms of a merger. That is not to say that market shares and market concentration figures are irrelevant—far from it. As Guideline 1 says, "[m]arket concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition." And in many cases, a Guideline 2 theory will be asserted in our cases alongside Guideline 1's structural presumption.

But there will be certain cases more amenable to a standalone Guideline 2 theory. That is because there are many competitive harms—such as innovation—that are not yet always amenable to detection through traditional market definition tools. Generally, when we think that a close-quarter battle on market definition will not be illuminating, we will not hesitate to assert a standalone Guideline 2 claim and define broad markets with little to no focus on market shares or the Herfindahl-Hirschman Indexes ("HHIs").

Cases that might be appropriate for standalone Guideline 2 treatment might include those where, under the economics and case law, we see defining markets that properly illuminate the effects on competition as very difficult or unnecessarily distracting in light of direct evidence.

A standalone Guideline 2 case might be appropriate where there is direct evidence of competition between merging parties, but data limitations—as there can be in innovation and

[10] *See, e.g.*, *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 213 (D.D.C.) ("plaintiffs' evidence of price effects bolsters the presumption created by the market shares and market concentration evidence . . . .").

other markets—make market definition difficult, or industry recognition of an appropriate market is scarce. For instance, in innovation markets like pharmaceuticals and technology, it can be difficult to precisely define market boundaries and calculate shares as products are differentiated and market participants are evolving.[11] In those cases, we will have a razor-sharp focus on the potential elimination of head-to-head competition—whether it concerns innovation, prices, quality, or any other dimension of competition.

Another instance in which a Guideline 2 standalone case might be appropriate is the hypothetical I opened with—where a merged firm will likely have market power but shares in a market likely to be recognized by a judge are not an accurate indicator of that power. This is the perfect example of a case we will bring despite difficulties in obtaining a structural presumption. And it is the right result—the effects of this transaction are the same regardless of market definition.

We should and will not let hurdles to defining a narrow market be a barrier to bringing this sort of case. We will be guided instead by the Clayton Act's directive that mergers whose effect "*may be substantially to lessen competition*" are illegal.

---

[11] *See* Susan Athey & Aviv Nevo, *DOJ and FTC Chief Economists Explain the Changes to the 2023 Merger Guidelines*, ProMarket (Dec. 19, 2023), https://www.promarket.org/2023/12/19/doj-and-ftc-chief-economists-explain-the-changes-to-the-2023-merger-guidelines/.