DEFINING MARKETS: A GUIDE FOR THE PERPLEXED

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To present the context for the 2025 Taft Lecture, this article addresses the role of market definition under the antitrust laws, including with respect to standing, mergers, concerted restraints of trade and monopolization. The article also addresses some of the "perplexities" of the legal criteria for market definition, focusing on Supreme Court and subsequent case law, the FTC and DOJ 2023 Merger Guidelines, and recent merger cases. We address the relevance of Brown Shoe's "practical indicia" as well as of "core" and "marginal" consumers to market definition.

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INTRODUCTION

When the government or a private party brings an antitrust case—whether it involves an agreement among competitors, a firm accused of monopolizing an industry, or a merger that might eliminate competition—a central question is often: which transactions have been (or will be) affected? This analysis is known as market definition and involves the process of drawing boundaries around the relevant products or services so that a court can evaluate whether competition has been (or is likely to be) harmed.

Although market definition has been described as factually intensive, relevant facts must be assessed within a legal framework. The 2025 Taft Lecture explored how courts should identify the governing legal criteria for market definition.

The case law and enforcement guidance over the last sixty years offer a variety of standards for market definition. They include a focus on core versus marginal customers, the so-called "practical indicia" from *Brown Shoe Co. v. United States*,[1] reasonable interchangeability and cross-elasticities of demand and supply, and the hypothetical monopolist test (HMT) as implemented by assessing the effect of a small but significant and non-transitory increase in price or worsening of terms (SSNIPT).

The confusion wrought by the numerous means of defining markets has been compounded by the periodic use by courts of "venues" to define product markets rather than the services or products sold in those venues. Left unaddressed is whether such venue markets, to the extent they consider reasonable interchangeability, contemplate complete substitution away from the venue or substituting away from only some products within the venue.

The issue is perhaps most acutely presented in the merger review context, where virtually every case challenging a merger requires a relevant market to be defined, and the merger guidelines published by the enforcement agencies since 1968 have addressed methodologies and criteria for market definition.

As we will discuss below, the Federal Trade Commission's ("FTC") case against the acquisition of Wild Oats by Whole Foods presents an example in which differing legal criteria for market

[1] 370 U.S. 294, 325 (1962).

definition yielded *contradictory* outcomes under Section 7 of the Clayton Act. Such market definition criteria cannot be called benignly "alternative." One criterion must be right and the other wrong, just as the Whole Foods acquisition of Wild Oats was either anticompetitive or not.

The object of the 2025 Taft Lecture was to evaluate, disentangle, and clarify the proper legal criteria for defining markets under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Here we provide the relevant background to engage in that debate.

I. THE REQUIREMENT OF MARKET DEFINITION: FITTING THE TOOL TO THE TASK

Market definition serves as a means to an end—it is a method of identifying market power and assessing competitive effects. In cases where direct evidence of anticompetitive harm and market power is available and convincing, courts have explicitly excused the requirement of market definition, recognizing that the exercise of delineating product and geographic boundaries add little when the competitive harm is apparent from the record.[2] Where such evidence is absent, however, market definition provides the framework within which competitive effects can be evaluated and quantified. The challenge for courts and litigants often lies in determining how to make such an assessment and what methods and tools are the right fit.[3]

A plaintiff setting out to fulfill its *prima facie* burden in an antitrust case will need to consider several factors in determining the scope of its market definition task: the type of antitrust claim asserted, the nature of the competitive harm alleged, and the stage

[2] *E.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotations omitted).

[3] Interestingly, direct evidence of harm to competition often comes in the form of proof of elevated prices in a distinct area or over a distinct set of products, which would seem to be the same evidence that would sustain the definition of a geographic and product market. *See id.* at 451. The SSNIPT test itself contemplates a non-transitory and significant increase in price or worsening of terms over the relevant area or product set.

of litigation, among others. The requirement is not uniform: it varies across categories of antitrust violation, from rule of reason claims under Section 1 of the Sherman Act to monopolization claims under Section 2. And even within these categories, the rigor of the requirement may depend on the evidentiary demands of a specific dispute.

The following cases illustrate how courts have varied the requirements across different categories of antitrust claims.

A. *When Antitrust Injury Is Contested*

If defendants put antitrust injury at issue, then market definition may be required to resolve it, regardless of what type of substantive violation plaintiffs allege. The antitrust injury doctrine demands that a plaintiff's harm flow from the anticompetitive dimension of the defendant's conduct. A plaintiff who suffers harm in a different market from the one where the restraint operates may lack standing to sue, even if the harm is real and connected to the defendants' conduct. Market definition, in this context, serves a gatekeeping function: it ensures that antitrust remedies are sought by those whose injuries are sufficiently proximate to the anticompetitive conduct at the core of the claim.

The Ninth Circuit's decision in *FTC v. Qualcomm Inc.*[4] illustrates this principle. *Qualcomm* involved allegations that the chipmaker leveraged its market power in the sale of cellular modem chips to extract elevated licensing royalties from smartphone manufacturers for its standard-essential patents.[5] The Ninth Circuit reversed the district court's finding of antitrust liability on multiple grounds, but central to its analysis was the principle that in assessing alleged antitrust injuries, courts must focus on anticompetitive effects "in the market where competition is [allegedly] being restrained."[6] It explained that the district court erred in assuming that customers who paid elevated royalties were experiencing antitrust injury because Qualcomm's allegedly prohibited conduct was to monopolize the market for cellular modem chip sales.[7]

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[4] 969 F.3d 974 (9th Cir. 2020).

[5] *Id.* at 986–87.

[6] *See id.* at 992–93 (quoting Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999)).

[7] *See id.*

Quoting its earlier decision in *American Ad Management, Inc. v. General Telephone Co. of California*, the court underscored the critical corollary that "[p]arties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury."[8]

Qualcomm thus shows that market definition can become essential at the threshold of any antitrust case, not only to assess the merits of the substantive violation, but to determine whether the plaintiff has suffered the right kind of injury in the right market.

B. *Merger Cases (Clayton Act Section 7)*

The Supreme Court has long established that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."[9] This requirement flows directly from the statute's text. Section 7 of the Clayton Act addresses mergers and acquisitions whose effect "may be substantially to lessen competition,"[10] and "[s]ubstantiality can be determined only in terms of the market affected."[11]

Additionally, courts and agencies cannot determine the merging parties' combined market share or evaluate the degree of market concentration without identifying the boundaries of the area of effective competition (both product and geographic elements). Market definition thus remains a firmly established practice in merger cases that rely on concentration to prove that harm is likely. The stakes of market definition in these cases are particularly acute because mergers raise a presumption of illegality when they significantly increase concentration or result in a highly concentrated market.[12] Defining the market too broadly may prevent this presumption from arising; defining it too narrowly may

[8] *Id.* at 993 (quoting Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999)).

[9] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974).

[10] 15 U.S.C. § 18.

[11] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

[12] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362–67 (1963); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 5–6 (2023) [hereinafter 2023 MERGER GUIDELINES].

overstate the competitive significance of the merger. Either way, market definition is often where the battle is won or lost in Clayton Act Section 7 challenges.

C. *Sherman Act Section 1 Cases*

Sherman Act Section 1 violations divide into two categories: restraints on competition that are per se illegal (such as price-fixing agreements) and restraints on competition that are incidental to a larger agreement and may or may not be reasonable (called "rule of reason" cases). The market definition requirement operates very differently across these categories, creating a spectrum that ranges from no requirement at all to a full-fledged obligation to define a relevant market and show harm to competition within it.

Restraints like price-fixing, bid-rigging, and market divisions are so likely to cause harm that they are per se illegal, and a plaintiff alleging such conduct does not need to establish that the harm actually occurred in order to win its case. The rationale is simple: these categories of conduct have been found so inherently unreasonable that no amount of market context could redeem them. A price-fixing agreement has no benefit to the market and therefore is illegal whether the defendants control ninety percent of the market or five percent. Thus, courts have found plaintiffs' failure to allege a relevant market not fatal to those claims. For instance, in *Campfield v. State Farm Mutual Auto Insurance Co.*, the Tenth Circuit stated plainly, "Horizontal price fixing and group boycott, however, are per se violations, so Mr. Campfield's failure to allege a relevant market is not fatal to these claims." [13]

Rule of reason cases, on the other hand, typically require market definition and proof of competitive harm. Yet even these cases may proceed without precise market definition when direct evidence of anticompetitive effects is available. The relevant authority is *FTC v. Indiana Federation of Dentists*, in which the Supreme Court held that "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason" because "[p]roof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry

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[13] Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008).

into market power, which is but a surrogate for detrimental effects."[14]

The Supreme Court's 2018 decision in *Ohio v. American Express Co.*[15] provided further important clarification of how market definition operates in the Section 1 context. The Court distinguished between horizontal and vertical restraints for market definition purposes. Because "*horizontal restraints* involve agreements between competitors not to compete in some way," the Court held that it did not "need to precisely define the relevant market to conclude that these agreements were anticompetitive."[16] At least in some horizontal cases, then, precise market definition is not necessary.[17] By contrast, "*vertical restraints* often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market."[18]

D. *Sherman Act Section 2 Cases*

To establish monopolization under Section 2 of the Sherman Act, a plaintiff must prove both the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[19] In discussing the requirement of monopoly power, courts often talk about proper market definition as necessary in Section 2 cases. As the Fourth Circuit put it in *E.I. duPont de Nemours & Co. v. Kolon Industries*, "'dismissals [of monopolization cases] at the pre-discovery, pleading stage remain

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[14] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460–61 (1986). Importantly, this case was later classified as a quick look rule of reason. *See* Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999) ("[A]n observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.").

[15] 585 U.S. 529 (2018).

[16] *Id.* at 543 n.7 (emphasis added).

[17] The sentence preceding the Court's footnote in *American Express Co.* states that "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market," so the footnote could be taken to apply only in the quick look rule of reason cases cited in the footnote itself, such as *Ind. Fed. Of Dentists*. *See id.* at 543.

[18] *Id.* at 543 n.7 (emphasis added).

[19] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

relatively rare and are generally limited to' certain types of 'glaring deficiencies,' such as failing to allege a relevant market."[20] This assumption seems to follow from the fact that many plaintiffs offer proof of monopoly power in the form of high market shares, or from evidence that customers cannot easily substitute away to other products that might be considered in the same market.

Some courts, however, have acknowledged the possibility of proving monopoly power through direct effects. The court in *Re/Max International v. Realty One, Inc.* recognized that "an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."[21] This is similar to the approach recognized in Section 1 rule of reason cases like *FTC v. Indiana Federation of Dentists*, where market power was seen as a "surrogate for detrimental effects."[22]

Additionally, conspiracy to monopolize claims may be treated more like Section 1 claims with respect to the market definition requirement. As the First Circuit recognized in *Fraser v. Major League Soccer*, "a majority of courts that have touched the issue have said, in general terms and often without analysis, that proof of a relevant market, and hence, market power, is not required in a conspiracy to monopolize claim."[23] This is because conspiracy to monopolize claims focus on the existence of a conspiracy, specific intent to achieve monopoly, and overt acts in furtherance of that goal, rather than on competitive effects or the present state of the market at the time of the offense. The market definition analysis is therefore less central to the key inquiry.

Today, market definition is often the central battleground in Section 2 litigation, particularly in technology markets where competitive boundaries are fluid and contested. As Professor Herbert Hovenkamp has observed, the government's heavy reliance on Section 2 monopolization theories in the Big Tech cases

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[20] E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 637 F.3d 435, 444 (4th Cir. 2011) (quoting Allen v. Dairy Farmers of Am., Inc., 748 F.Supp.2d 323, 339 (D. Vt. 2010)).

[21] Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1018 (6th Cir. 1999).

[22] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460–61 (1986).

[23] Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 67 (1st Cir. 2002).

has, as a practical matter, saddled them with a demanding market definition burden that they have struggled to carry—as the FTC's loss in its case against Meta and Amazon's successful narrowing of the claims against it both illustrate.[24] Questions of when and how to prove market definition are thus more timely than ever.

II. THE PERPLEXITIES OF MARKET DEFINITION: NAVIGATING CONFLICTING LEGAL CRITERIA

A. *The* Brown Shoe *Framework*

Brown Shoe provides the foundational framework for defining relevant markets in contemporary antitrust law. The Court first stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[25] In citing the rule of reasonable interchangeability, the Court followed the precedent in *United States v. E. I. du Pont de Nemours & Co.*, where the Court held:

> [W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. To accept the Government's argument, we would have to conclude that the manufactures

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[24] *See* Herbert Hovenkamp, *The Antitrust Agencies' Focus on Monopolization Claims Against Big Tech Dilutes the Meaning of Monopoly*, PROMARKET (Mar. 13, 2024), https://www.promarket.org/2024/03/13/the-antitrust-agencies-focus-on-monopolization-claims-against-big-tech-dilutes-the-meaning-of-monopoly/ [https://perma.cc/US6A-ADMN]. Both cases remain pending; the case against Meta is currently being appealed, and the case against Amazon continue in litigation, with a trial currently scheduled for early 2027. *See* Jody Godoy, *How Big Tech is faring against US antitrust lawsuits*, REUTERS (Nov. 18, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/how-big-tech-is-faring-against-us-antitrust-lawsuits-2025-09-02/ (on file with Columbia Business Law Review). [Should we not offer the F.Supp. cites for the final decision in the Meta case [which is provided beloe] and the motion to dismiss in the Amazon case? We can keep the Godoy article but we should probably add the proper cites of the judicial decisions to which we refer.]

[25] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

> of plain as well as moistureproof cellophane were monopolists, and so with films such as Pliofilm, foil, glassine, polyethylene, and Saran, for each of these wrapping materials is distinguishable. These were all exhibits in the case. New wrappings appear, generally similar to cellophane, is each a monopoly? What is called for is an appraisal of the 'cross-elasticity' of demand in the trade. The varying circumstances of each case determine the result. *In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal.*[26]

The *Brown Shoe* Court appended a footnote to the end of its first sentence regarding market definition that acknowledged that "[t]he cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed."[27] As an initial matter, *Brown Shoe* thus adopted as the first criterion for defining markets reasonable interchangeability on both the demand and supply sides.

In the sentence that followed its acknowledgement of the rule of reasonable interchangeability, the *Brown Shoe* Court observed that "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[28] In support of its reference to "submarkets," *Brown Shoe* cited not the *du Pont* cellophane monopolization case of 1956 quoted above but the 1957 case against du Pont and General Motors in which the Department of Justice sought the divesture of du Pont's shareholding in General Motors under the Sherman and Clayton Acts.

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[26] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394–95 (1956) (emphasis added) (citations omitted).

[27] *Brown Shoe*, 370 U.S. at 325 n.42. The *Brown Shoe* Court cited United States v. Columbia Steel Co., 334 U.S. 495, 510–511 (1948) and United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 592 (S.D.N.Y. 1958) in reference to supply-side substitutability as "an important factor in defining a product market." *Id.*

[28] *Brown Shoe*, 370 U.S. at 325.

The 1957 *du Pont* case did not use the term, "submarkets," but it did reject the defendants' argument that the relevant market consisted of all industrial finishes and fabrics.[29] The Court rather found "that *automotive* finishes and fabrics have sufficient peculiar characteristics and uses" to constitute a "line of commerce" under the Clayton Act.[30] The 1957 *du Pont* case thus concluded "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."[31]

Brown Shoe next itemized the "practical indicia" that may be "examined" to determine "the boundaries of such a submarket."[32]

> The boundaries of such a submarket may be determined by examining such 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.[33]

The two sentences quoted above from *Brown Shoe* regarding the possible existence of "submarkets" within the "broad market" defined by reasonable interchangeability and the practical indicia that may determine the boundaries of such a submarket have been the source of great debate about the proper criteria for market definition. Some, like Judge Robert Bork, have argued that the *Brown Shoe* practical indicia are "evidentiary proxies for direct proof of substitutability."[34]

> These indicia seem to be evidentiary proxies for direct proof of substitutability. *Brown Shoe* said as

[29] *See* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593–94 (1957).

[30] *Id.* (emphasis added).

[31] *Id.* at 594–95.

[32] *Brown Shoe*, 370 U.S. at 325.

[33] *Id.*

[34] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986).

> much: "Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." That view of submarket analysis is also mandated by the purpose of the antitrust laws: the promotion of consumer welfare. When submarket indicia are viewed as proxies for cross-elasticities they assist in predicting a firm's ability to restrict output and hence to harm consumers.[35]

The sentence from *Brown Shoe* quoted by Judge Bork immediately follows the sentence in *Brown Shoe* that identifies the practical indicia. By requiring submarkets to be "economically significant" and placing the practical indicia in service of the objective of Section 7, any market—regardless of its name—apparently must include products or services that are reasonably interchangeable with those of the defendants. If reasonably interchangeable products, or if suppliers that do or reasonably can produce the subject product, are excluded from the relevant market, so Judge Bork would argue, the court could not determine whether the merged entity will have the power to substantially lessen competition by restricting output and raising price throughout the relevant market.[36]

Two district court decisions recently endorse an interpretation of the practical indicia as evidentiary factors that are to be used to assess reasonable interchangeability. In *FTC v. Tempur Sealy International*, the court observed, while assessing evidence relating to the practical indicia, that "the ultimate point of the inquiry" is "reasonable interchangeability."[37] More recently, in the final district court decision dismissing the FTC's monopolization

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[35] *Id.* at 218–19 (citations omitted).

[36] *See id.*

[37] Fed. Trade. Comm'n v. Tempur Sealy Int'l, Inc., 2025 WL 384493, at *17 (S.D. Tex. 2025) ("Nor should the ultimate point of the inquiry be forgotten—reasonable interchangeability.").

case against Meta, the court followed Judge Bork's guidance in Rothery Storage. There, Judge Boasberg stated that:

> [The *Brown Shoe* factors] do not set out a separate inquiry from the one the Court has already been performing. The controlling question remains which firms belong in the product market, and that depends on which apps are *reasonably interchangeable* with Facebook and Instagram. The *Brown Shoe* factors approach that same question via a different path, using qualitative evidence as "evidentiary proxies" for whether consumers would in fact substitute between products.[38]

Judge Boasberg continued to clarify that a "submarket" is not a venue that is smaller than a cognizable product market defined by reasonable interchangeability:

> [T]he Court will avoid some confusing language that these [practical indicia] factors have invited. Courts typically explain that the *Brown Shoe* factors pick out distinct "submarkets," which implies that a product market can be further split into cognizable niches. That impression would be misleading. The only relevant concept is the product market, indivisible as an atom. By definition, the product market is already the smallest grouping of products on which a hypothetical monopolist could profitably impose a SSNIPT. If a subcomponent of that market meets that test, then it is not a "submarket" but a product market in its own right. If a subcomponent flunks that test, then it is legally

[38] Fed. Trade Comm'n v. Meta Platforms, Inc., 811 F.Supp.3d 67, 109 (D.D.C. 2025) (emphasis added) (citations omitted) (quoting *Rothery*, 792 F.2d at 218), appeal pending in the United States Court of Appeals for the District of Columbia Circuit, docket number**:** 26-5028. [I am not sure of the proper Blue Book format for citing the pendency of appeals, but I do think we should cite the pendency. I am sure the CBLR will confirm the accuracy of the citation and correct my citation format. Thank you.]

> irrelevant, and dignifying it with the name "submarket" adds only confusion.[39]

Judge Boasberg's comments on "submarkets" apply equally to the so-called "narrowest market" principle that Judge Boasberg himself applied in his summary judgment decision in the *Meta* case:

> "[M]arket definition is guided by the 'narrowest market' principle." In other words, "[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." The relevant product market is "the *most narrowly-defined* product or group of products sold by the merging firms" that is supported by the pertinent evidence.[40]

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[39] *Id.* (citations omitted) (quoting *Brown Shoe*, 370 U.S. at 325). Judge Boasberg did not offer a similar clarification of the *Brown Shoe* submarket factors in his summary judgment opinion. Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F.Supp.3d 16, 36 (D.D.C. 2024). Indeed, he seemed to invoke the practical indicia to support the plausibility of the FTC's proposed narrow market of personal social networking core functionality: "'[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.' Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997); *see* Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1040 (D.C. Cir. 2008) (Brown, J.) (similar). Rather, '[w]ithin a general product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."' Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1121 (9th Cir. 2018) (quoting *Brown Shoe*, 370 U.S. at 325). That means, as relevant here, that competition between Meta and other social-media firms for users' time and attention does not necessarily make them part of the same relevant product market. *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 26 (D.D.C. 2015)." Id. at 36. [I do not know if I have corrected this citation properly and ask CBLR to confirm. The entire quotation comes from page 36 of the summary judgment opinion.]

[40] Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F.Supp.3d 16, 36 (D.D.C. 2024) (first quoting Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp 3d 1, 26 (D.D.C. 2015); then quoting Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953); and then quoting Fed. Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (emphasis added)).

Under the master principle of reasonable interchangeability, according to Judge Boasberg's clarifying remarks on submarkets in his final dismissal of the FTC's case, all markets must be defined by a *proper* application of the SSNIPT test, not either a "narrow" or a forgiving application of that test. To invoke a "narrowest market" principle invites the same confusion that Judge Boasberg identified with respect to submarkets—cognizable markets are not "narrow" or "broad"; they are simply properly defined.

At the time of this writing, Judge Boasberg's final opinion is on appeal at the D.C. Circuit.[41] We thus may soon receive appellate guidance on the proper interpretation of the practical indicia, submarkets, and the narrowest market principle.

B. *The 2023 Merger Guidelines*

The 2023 Merger Guidelines ("2023 Guidelines"), as have all earlier merger guidelines published by the Department of Justice or the Federal Trade Commission, identify a methodology for defining markets. Jonathan Jacobson provides a helpful review of those methodologies in his Taft Lecture.[42] Of interest here are the four *disjunctive* criteria for identifying a relevant market in the 2023 Guidelines. They state that "[t]he Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on *any one or more* of the following to identify a relevant antitrust market."[43]

That introductory sentence is followed by the following four criteria:

> A. Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger,

[41] *See* Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F.Supp.3d 16, 36 (D.D.C. 2024), *appeal docketed*, No. 26-5028 (D.C. Cir. Jan. 26, 2026).

[42] See Jonathan Jacobson, *Market Mayhem: Guidelines' Market Definition Over the Years*, Vol. 2026 COL. BUS. L. REV. No. 1 at 35, 46–49 (2026).

[43] 2023 MERGER GUIDELINES, *supra* note 12, at 40 (emphasis added).

even if the metes and bounds of the market are only broadly characterized.

B. Direct evidence of the exercise of market power can demonstrate the existence of a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

C. A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Various practical indicia may identify a relevant market in different settings.

D. Another common method employed by courts and the Agencies is the hypothetical monopolist test. This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price.[44] An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers.[45]

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[44] For a discussion of the emergence of the Hypothetical Monopolist paradigm, including its acceptance by courts as a framework for thinking about market definition, *see* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

[45] 2023 MERGER GUIDELINES, *supra* note 12, at 40–41 (footnote omitted).

> The 2023 Guidelines criteria for market definition can be summarized as (1) direct evidence of substantial competition between the merging parties; (2) direct evidence of the exercise of market power; (3) *Brown Shoe*'s practical indicia of submarkets; and (4) the HMT accompanied by the application of a SSNIPT. Although the criteria are expressly presented as disjunctive, the fourth criterion, *by its terms*, arguably governs the preceding three criteria, as it "examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price."[46] The "proposed market" that must be examined for reasonable interchangeability under the HMT would seem to include markets proposed by virtue of the first three criteria—the elimination of direct competition, direct effects, and the practical indicia.

C. *The* Whole Foods *Debate*

1. *Core versus Marginal Customers*

The D.C. Circuit's decision in *FTC v. Whole Foods Market* provides a vivid illustration of the fragmented and, worse, contradictory methods of defining markets that burden the courts today.[47] As we will see, Judges Brown and Tatel concluded that, as a matter of law, core customers should be the focus of market definition pursuant to *Brown Shoe's* practical indicia.[48] In contrast, Judge Kavanaugh and District Judge Friedman concluded that, as a matter of law, marginal customers, pursuant to the rule of reasonable interchangeability, should control.[49] Judges Brown and Tatel concluded that judgment should be issued reversing the district court. Judges Kavanaugh and Friedman concluded that the merger should be permitted to proceed. Both views cannot be correct.

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[46] *Id.* at 41.

[47] Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

[48] *See id.* at 1037–41 (Brown, J.); *see id.* at 1044–49 (Tatel, J., concurring).

[49] *See id.* at 1053–63 (Kavanaugh, J., dissenting); Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 502 F.Supp.2d 1, 33–36, 49–50 (D.D.C. 2007).

Following a motion for en banc review of the *Whole Foods* decision by the three-judge panel, Judge Tatel changed his opinion to concur only in the judgment of the court of appeals to reverse the district court.[50] At the time of the denial of the petition for rehearing, no two judges concurred in any opinion, thus leaving the judgment of the court of appeals without an opinion of the court and depriving either of the opinions supporting the judgment of precedential force. The decision of the court ends with this statement: "I concur in the denial of rehearing en banc because, there being no opinion for the Court, that judgment sets no precedent beyond the precise facts of this case."[51]

Although *Whole Foods* had no opinion of the court, and consequently effectively no precedential force, courts continue to cite *Whole Foods* as the law of the District of Columbia Circuit and an otherwise authoritative precedent.[52] For that reason and because *Whole Foods* illustrates the importance of clarifying the law of market definition, we address the decision in some detail below.

Judge Brown begins her discussion of market definition by declaring that District Judge Friedman erred *as a matter of law* by defining the relevant market according to the behavior of marginal customers instead of core customers:

> As the FTC presented its case, success turned on whether there exist core customers, committed to [premium, natural, and organic supermarkets ("PNOS")], for whom one should consider PNOS a relevant market. The district court assumed "the 'marginal' consumer, not the so-called 'core' or 'committed' consumer, must be the focus of any

[50] Thomas A. Lambert, *The D.C. Circuit Re-Disappoints in Whole Foods: An Analysis of the Amended Opinions*, TRUTH ON THE MARKET (Dec. 4, 2008), https://truthonthemarket.com/2008/12/04/the-dc-circuit-re-disappoints-in-whole-foods-an-analysis-of-the-amended-opinions/ [https://perma.cc/JBT5-HY6Y].

[51] *Whole Foods*, 548 F.3d at 1063 (Ginsburg, J., concurring in denial of rehearing en banc) (citing King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("without implicit agreement" among a majority of the judges "we are left without a controlling opinion")).

[52] *See, e.g.*, Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F.Supp.3d 16, 45 (D.D.C. 2024); Fed. Trade Comm'n v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016, at *7 (D. Or. Dec. 10, 2024).

> antitrust analysis.' To the contrary, core consumers can, in appropriate circumstances, be worthy of antitrust protection. The district court's *error of law* led it to ignore FTC evidence that strongly suggested Whole Foods and Wild Oats compete for core consumers within a PNOS market, even if they also compete on individual products for marginal consumers in the broader market.[53]

Although Judge Brown acknowledged the rule of reasonable interchangeability, she then averted to the *Brown Shoe* text regarding submarkets and practical indicia:

> A broad market may also contain relevant submarkets which themselves "constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such 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."[54]

Judge Brown then elaborated on the basis for her view that core customers can determine a market, focusing on their need for the "whole package" and an asserted price discrimination between core and marginal consumers:

> In appropriate circumstances, core customers can be a proper subject of antitrust concern. In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom "*only [that*

[53] *Whole Foods*, 548 F.3d at 1037 (emphasis added) (citation omitted) (quoting *Whole Foods*, 502 F.Supp.2d at 17).

[54] *Id.* at 1037–38 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)). [Please note the need for a close parenthesis.]

package] will do." What motivates antitrust concern for such customers is the possibility that "fringe competition" for individual products within a package may not protect customers who need the whole package from market power exercised by a sole supplier of the package. Such customers may be captive to the sole supplier, which can then, by means of price discrimination, extract monopoly profits from them while competing for the business of marginal customers. Not that prices that segregate core from marginal consumers are in themselves anticompetitive; such pricing simply indicates the existence of a submarket of core customers, operating in parallel with the broader market but featuring a different demand curve. Sometimes, for some customers a package provides "access to certain products or services that would otherwise be unavailable to them." Because the core customers require the *whole package*, they respond differently to price increases from marginal customers who may obtain portions of the package elsewhere. Of course, core customers may constitute a submarket even without such an extreme difference in demand elasticity. After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by "settled consumer preference."[55]

[55] *Id.* at 1038–39 (emphasis added) (citations omitted) (first quoting United States v. Grinnell Corp., 384 U.S. 563, 574 (1966); then quoting *id.*; and then quoting United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360 (1970); lastly quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963)). Although not concurring in Judge Brown's opinion, Judge Tatel appears to have agreed with the conclusion of Judge Brown: "I believe the district court overlooked or mistakenly rejected evidence supporting the FTC's view that Whole Foods and Wild Oats occupy a separate market of "premium natural and organic supermarkets." *Id.* at 1042 (Tatel, J., concurring). Judge Tatel relied, in part, on the *Brown Shoe* practical indicia. *Id.* at 1045–46 (Tatel, J., concurring).

Judge Kavanaugh disagreed with Judge Brown on the legal significance of marginal customers and the meaning of price discrimination for market definitional purposes:

> I respectfully disagree with Judge Brown's emphasis on core customers. For a business to exert market power as a result of a merger, it must be able to increase prices (usually by five percent or more) while retaining enough customers to make that price increase profitable. If too many "marginal" customers are turned off by a price hike, then the hike will be unprofitable even if a large group of die-hard "core" customers remain active clients. Therefore, a focus on core customers alone cannot resolve a merger case. The question here is whether Whole Foods could increase prices by five percent or more without losing so many marginal customers as to make the price increase unprofitable. As discussed above, the FTC has not come close to making that showing. Moreover, there is no support in the law for that singular focus on the core customer. Indeed, if that approach took root, it would have serious repercussions because virtually every merger involves some core customers who would stick with the company regardless of a significant price increase. So under this "core customer" approach, many heretofore permissible mergers presumably could be blocked as anticompetitive. That cannot be the law, and it is not the law.[56]
>
> In a related vein, Judge Brown repeatedly suggests that Whole Foods and Wild Oats engage in "price discrimination"—more specifically, Judge Brown asserts that organic supermarkets "discriminate on price between their core and marginal customers, thus treating the former as a distinct market." *But this assertion has no factual support in the record. For*

[56] *Id.* at 1062 (Kavanaugh, J., dissenting) (citations omitted).

> *antitrust purposes, price discrimination normally involves one seller charging different prices to different customers for the same product*. If there is price discrimination in an industry, then under certain circumstances a relevant market may be defined to include only those customers who pay the higher price. In this case, however, neither Judge Brown nor the FTC has pointed to any evidence suggesting either that price discrimination occurred before this merger or that the merged entity will be able to price-discriminate. In other words, there is no reason to think that "core" as opposed to non-core customers ever pay higher prices for the same products in organic supermarkets.[57]

We thus have a dichotomy between Judge Brown and Judge Kavanaugh: are marginal customers or core customers determinative in market definition and can price discrimination be used to define a market when the seller cannot distinguish core customers from marginal customers and charge the former more than the latter? The lawfulness of the Whole Foods / Wild Oats merger lay in the balance.

2. *Special Treatment of Venue*

The debate between Judges Brown and Kavanaugh raised another issue that has become prevalent in market definition: can a *venue* instead of a *product or collection of products* constitute a market? Judge Brown said that core customers wanted the "whole package" that Whole Foods offered, thereby justifying the PNO *supermarkets* as the relevant "*product*." "Because the core customers require the whole package, they respond differently to price increases from marginal customers who may obtain portions of the package elsewhere."[58] To apply the rule of reasonable interchangeability to the core-customer paradigm with the *PNOS itself as the relevant market*, one presumably must ask whether, upon the imposition of a SSNIPT on *all products* in the PNOS, the PNOS customer would

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[57] *Id.* at 1062-63 (Kavanaugh, J., dissenting) (emphasis added) (citations omitted) (quoting *id.* at 1041).

[58] *Id.* at 1039.

abandon the PNOS *altogether* for another product in another market (e.g., supermarkets) and move all his or her purchases to one or more non-PNOS food retailers.

Judge Kavanaugh (and Judge Friedman), however, asked the question differently. If the product market consists of *products* in the PNOS, then the SSNIPT must be imposed *on all products in the PNOS*. To apply the rule of reasonable interchangeability, one asks whether a PNOS customer would move the purchase *of a sufficient number of PNOS products* to a non-PNOS food retailer to render the PNOS SSNIPT unprofitable. Under the Kavanaugh-Friedman view, the customer need not abandon the PNOS *altogether* and shift *all food purchases* to a non-PNOS food retailer. If indeed the PNOS SSNIPT is unprofitable due to the movement of a *sufficient number* of PNOS individual-product purchases, the PNOS SSNIPT will not be sustained, and even the core customers will be saved from competitive harm.

Judge Kavanaugh thus quotes Judge Friedman's assessment of the evidence, which focuses on cross-shopping and the movement of "more purchases" away from a PNOS to other food retailers, not the abandonment of a PNOS altogether:

> The evidence before the [district] Court demonstrates that conventional or more traditional supermarkets today compete for the customers who shop at Whole Foods and Wild Oats, particularly the large number of cross shopping customers—or customers at the margin—with a growing interest in natural and organic foods. Post-merger, all of these competing alternatives will remain. Based upon the evidence presented, the [district] Court concludes that many customers could and would readily *shift more of their purchases* to any of the increasingly available substitute sources of natural and organic foods. The [district] Court therefore concludes that the FTC has not met its burden to prove that "premium natural and organic supermarkets" is the

> relevant product market in this case for antitrust purposes.[59]

The same debate has recently occurred in district court cases grappling with market definition: the court deciding the FTC's enforcement action to block Kroger/Albertsons confronted similar issues in the merger context, and the court deciding a summary judgment motion against the FTC in its case against Meta analyzed similar issues in a monopolization case. As we will see, however, Judge Boasberg seemed to take a different approach in his final judgment.

a. *Kroger*

The court deciding the Kroger-Albertson proposed merger similarly adopted a venue market, there conventional supermarkets and supercenters, and thereby eliminating other food retailers. The *Kroger* court observed that precedent exists for such a venue market, citing *Whole Foods*.[60] *Kroger*, citing to Judge Brown's opinion, reported (erroneously) that:

> [T]he Court of Appeals for the District of Columbia Circuit found that plaintiff properly defined the relevant submarket of "premium, natural, and organic stores" [] which differentiated themselves from other grocery retailers through an appeal to customers' interest in organic, healthy, and ecologically sustainable products, a larger selection of natural and organic products, and a greater concentration of perishable products than conventional supermarkets.[61]

The primary predicate for *Kroger's* market definition of conventional supermarkets and supercenters was a set of customers

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[59] *Id.* at 1062–63 (Kavanaugh, J., dissenting) (emphasis added) (quoting Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 502 F.Supp.2d 1, 36 (D.D.C. 2007).

[60] Fed. Trade Comm'n v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016, at *7 (D. Or. Dec. 10, 2024).

[61] *Id.*

that desired the "one-stop shopping" that conventional supermarkets provide:

> Defining features of supermarkets include the variety and depth of fresh and non-perishable food products and household goods, a "one-stop-shopping" experience, and size and brand selection, including both national and private label brands. Plaintiffs argue that supermarkets have a distinct store layout that accounts for their relatively large number of SKUs and staffed departments such as a deli, bakery, or seafood, and offer a distinct customer experience with a greater customer service orientation and product displays. Finally, plaintiffs argue that supermarkets offer a distinct pricing scheme and price primarily based on price checks against other supermarkets.[62]

Kroger did not identify any product or group of products that could not be purchased in other retail venues or any evidence that consumers do not check prices across grocery retailers. Rather, *Kroger* found that conventional supermarkets and supercenters offered a collection of services in a single venue that was attractive to customers who value one-stop grocery shopping.

> Supermarkets are distinct from other grocery retailers. Supermarkets offer a larger selection of fresh and non perishable items, a one-stop shopping experience that appeals to a particular consumer's preference to meet all their grocery needs in one location, and a customer service focus with deli, bakery, meat, and other specialized departments.[63]

In response to defendants' argument that customers cross-shop among a variety of food retailers, shifting purchases among them based upon price and quality, the *Kroger* court, again relying on *Whole Foods* as precedent, concluded summarily to the contrary:

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[62] *Id.* at *6 (citations omitted).
[63] *Id.* at *11.

> The defendants in *Whole Foods Market* also raised the argument that grocery shoppers cross-shop between PNOS and other stores and that PNOS shoppers check prices against conventional supermarkets. In that case, the court found no reason to discredit the PNOS submarket on the basis of cross-shopping, noting that "[of] course" cross-shopping occurs, as no store carries comprehensive inventory, and "[t]he fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market."[64]

Kroger, thus on the authority of *Whole Foods*, adopted the core-customer legal criterion for market definition, relying on *Brown Shoe* practical indicia, and adopted as the relevant product market the venue of conventional supermarkets and supercenters predicated upon one-stop shoppers' preferences. *Kroger,* with *Whole Foods*, would require other food retailers to abandon their current retail format and adopt that of a conventional supermarket or supercenter to count as a competitor. To apply the rule of reasonable interchangeability, the court would presumably ask whether the conventional supermarket one-stop shopper would abandon the supermarket *altogether* and switch to another food retailer for all his or her grocery purchases if the conventional supermarket imposed a storewide, or market-wide, SSNIPT.

The *Kroger* court, however, did not describe how a conventional supermarket could identify customers who so value one-stop shopping that they would not abandon conventional supermarkets despite a SSNIPT on all products in all available conventional supermarkets. Nor did *Kroger* address how a conventional supermarket could know whether its customers *who do cross-shop* among retail food formats would shift a sufficient number of purchases (not just purchases of gum) in response to a SSNIPT on all products in all conventional supermarkets to render the SSNIPT unprofitable.

[64] *Id.* at *10 (quoting *Whole Foods*, 548 F.3d at 1040).

Based on the opinions of Judges Kavanaugh and Friedman, they would likely respond to the *Kroger* court by asserting that, in the absence of an assessment of the quantity of supermarket purchases that would be shifted to non-supermarket grocery retailers in response to a SSNIPT, the rule of reasonable interchangeability simply cannot be applied. They would probably further contend that the relevant market must be expressed in terms of *the products sold by conventional supermarkets and not in terms of the venue itself.*

If the *collection*, or *cluster*, of items that is sold by conventional supermarkets is the product of interest, as the *Kroger* court found, then that *cluster* must be sufficiently cohesive and attractive, as a singular product, to sustain a profitable SSNIPT. The SSNIPT must be imposed on all products sold by conventional supermarkets (i.e., the entire cluster) and sustained on a sufficient number of those products, notwithstanding diverted purchases by customers who are not so enamored of one-stop shopping, for the SSNIPT to be profitable and a proper market to be defined.

b. *Meta*

The same issue arose, again on the purported authority of *Whole Foods*, in the parties' motions for summary judgment in the FTC's case against Meta for monopolization based upon Meta's 2012 acquisition of Instagram and 2014 acquisition of WhatsApp. We will review the summary judgment opinion even though the court significantly changed direction in its final judgment for Meta following trial. The two opinions illustrate how different conclusions follow from reading the law on market definition differently. The case, however, is not over, as the FTC has appealed the district court final judgment dismissing the FTC's case for failure to prove a relevant market in which Facebook or Instagram possesses monopoly power.[65]

Of course, the Meta court would observe that the standard to survive summary judgment required the FTC only to raise a genuine issue of material fact pertinent to the motion—here monopoly power in a relevant market. A finding of liability required

[65] *See* Press Release, Fed. Trade Comm'n, FTC Appeals Ruling in Meta Monopolization Case (Jan. 20, 2026) (on file with Columbia Business Law Review).

the FTC to prove with a preponderance of the evidence that the Meta in fact possessed monopoly power in the proposed relevant market. Still, as we will see, the court interpreted *Whole Foods* more broadly on summary judgment than in its final liability decision.

i. *Meta* on Summary Judgment

The FTC proposed, and the court sustained for purposes of Meta's summary judgment motion, a relevant market consisting of the venue of social media platforms whose "core functionality" is personal social networking.[66] Although the court first seemed to report the FTC as urging a "services" market, the court ultimately sustained on summary judgment a platform (or venue) market that was defined by a "core functionality."

At the beginning of the court's market-definition discussion on summary judgment, the court reported that the "FTC continues to argue that the market here comprises [personal social-networking "PSN"] *services* in the United States, which it defines as online services that possess the 'core functionality' of 'maintaining relationships and sharing with friends and family in a shared space.'"[67] When, however, the court acknowledged that Meta challenged the definition on the ground that other social media platforms that were allegedly not in the relevant market offered similar services, the court cited the FTC's emphasis on the core functionality of the platform itself:

> The FTC first defends its market definition by disputing Meta's premise. Because a sports clip watched on Facebook is "integrated" within a social graph focused on friends and-family sharing, the agency argues, it is a fundamentally different experience from watching that same clip on YouTube or TikTok. . . . Perhaps sensing the difficulties of that path, the Commission tries another sortie: even accepting that a Reel on Instagram, like a rose by another name, would smell as sweet as a TikTok video, Plaintiff argues that

[66] *See* Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F.Supp.3d 16, 48 (D.D.C. 2024).

[67] *Id.* at 35 (emphasis added).

> Meta's monopoly power stems from its dominance over a "core" service that it offers alongside many other services—namely, friends-and-family sharing.[68]

Like *Kroger*, the *Meta* court turned to *Whole Foods* and Judge Brown's opinion to support its summary judgment opinion:

> For this point, the Commission relies on *Whole Foods*, where the D.C. Circuit held that Whole Foods competed in a relevant product market for premium, natural, and organic supermarkets (PNOS), even though it also competed in a broader market of conventional supermarkets. Recognizing that "cross-shopping [with conventional supermarkets] is entirely consistent with the existence of a core group of PNOS customers," Judge Brown wrote for the court that a "core group of particularly dedicated, distinct customers, paying distinct prices, may constitute a recognizable submarket, whether they are dedicated because they need a complete cluster of products, because their particular circumstances dictate that a product is the only realistic choice, or because they find a particular product uniquely attractive." Because Plaintiff has proffered evidence that only PSN applications offer "a core use and functionality that serves the demand for" friends-and-family sharing, the Court agrees that it has met its burden to show that other applications are not reasonable substitutes, notwithstanding the presence of "non PSN" activity on PSN applications.[69]

The relevant market in *Meta* that was sustained on summary judgment thus consisted of platforms with a PSN "core functionality," not the *PSN services that were provided by that platform*. The distinction, like that in *Kroger* and *Whole Foods*, is that the type of venue—the PNOS in *Whole Foods*, the supermarket in *Kroger*, and

[68] *Id.* at 44 (citations omitted).
[69] *Id.* (citations omitted).

the social media platform with PSN services as its "core functionality" in *Meta* on summary judgment—constituted the relevant market, not the goods or services offered within those venues or on those platforms. Other suppliers that offered organic groceries, supermarket products, or PSN services were excluded from the relevant market because of their customer-facing configuration.

As a result, in *Meta* on summary judgment, time spent on Facebook and Instagram by users not engaging in PSN was credited to Facebook's and Instagram's PSN market share. Similarly, the PSN services that TikTok, X, and YouTube offered by permitting users to restrict to designated recipients the distribution of content that users share on those platforms were credited with no market share:

> The [FTC's market share] statistics would seem to capture all time spent on Meta's products — *i.e.*, not just time spent on its asserted core use case of friends-and-family sharing, but also any time spent watching highlight reels of the Red Sox game on Instagram or buying an antique table from a stranger on Facebook Marketplace.[70]

Though sustaining the FTC's market definition for purposes of summary judgment, the court acknowledged:

> Significant unresolved questions remain over the ultimate viability of the agency's apparent position that *all time spent on PSN applications relates to PSN services* (even passive consumption of a video or buying a table from a stranger), *while none of the time spent on applications like YouTube, TikTok, or X does so (even sharing a TikTok with a friend in-app)*.[71]

The adoption of the PSN *platform*, and not *services*, as the relevant market produced additional complexities with respect to supply responses. For TikTok, X, or YouTube to become a competitor of Facebook or Instagram, TikTok, X, and YouTube

[70] *Id.* at 49.
[71] *Id.* (emphasis added).

would have to *adopt as the core functionality of their platforms* the provision of PSN services, to which the court identified several barriers.[72] Even if TikTok, X, and YouTube are famously popular and allow their users to share their equally popular content with a select group of recipients (say, "friends and family"), TikTok, X, and YouTube were thus deemed to exert no competitive constraint on Facebook and Instagram in the PSN venue market in which Facebook and Instagram possess monopoly power.[73]

The court found in its opinion accompanying its final judgment that TikTok and YouTube exerted considerable competition against Facebook and Instagram even though neither TikTok nor YouTube had changed the fundamental configuration of its platform or its core functionality.

ii. Opinion in Support of Final Judgment in *Meta*

Although Judge Boasberg decided in his summary judgment opinion that PSN core functionality could be the defining characteristic of the relevant market in which Facebook and Instagram had monopoly power, after trial, he rejected that proposed market. The difference between the summary judgment and final opinions in *Meta* can be attributed to a full review of the factual record. Still, in the final decision, the court interpreted *Whole Foods* differently from its treatment on summary judgment.

To wit, when the court in its final decision revisited *Whole Foods* as the proposed basis for the FTC's proposed market limited to PSN core functionality, the court recognized that Judge Brown was "[w]riting only for herself"[74] in *Whole Foods*, that her opinion was not adopted the D.C. Circuit, and that the merger context of the decision limited its legal relevance under Section 2 of the Sherman Act:

> Never mind that Judge Brown's opinion did not command a majority. Set aside the fact that it has never been adopted by the D.C. Circuit. And ignore the obstacle that because the *Whole Foods* court was

[72] *See id.* at 50–52.

[73] *See id.* at 44–45, 48–52.

[74] Fed. Trade Comm'n v. Meta Platforms, Inc., 811 F.Supp.3d 67, 117 (D.D.C. 2025).

> not statutorily authorized to decide whether the proposed merger would actually violate the antitrust laws, Judge Brown's opinion would have held only that the FTC had raised serious enough "questions going to the merits . . . as to make them fair ground for" a more "thorough investigation."[75]

As to the merits of the FTC's proposed market, the court concluded that, "[t]aking all the evidence together, it shows that personal social networking is not a separate product market. Instead, Meta competes in the market for social media, and that market includes—at minimum—TikTok and YouTube as well."[76] The court also rejected the FTC's proposal that, as in *Whole Foods*, "a *subset* of users cares especially about friend sharing, they have no substitute for Facebook and Instagram, and Meta exploits this smaller group by targeting them with a higher ad load."[77]

Judge Boasberg rejected the FTC's contention that "friend sharing," apparently the current iteration of PSN core functionality, constitutes a market.[78] According to the master principle of reasonable interchangeability, "friend sharing" must be able to sustain a SSNIPT, which the FTC claims is imposed on friend-sharing by a higher ad load than is imposed on users of other aspects of Facebook and Instagram. Judge Boasberg found no material increase in ad load on the friend-sharing function of either platform, and thus concluded, after diminishing the importance of *Whole Foods* again, that no such market was supported by the evidence:

> Judge Brown's *Whole Foods* opinion is nonbinding and tentative, and the Court doubts that marginal differences in ad load add up to significant differences in quality-adjusted price. Even setting those doubts aside, the evidence shows that Meta does not discriminate against users who value friend

[75] *Id.* (quoting Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008)).

[76] *Id.*

[77] *Id.*

[78] *Id.* at 117–18.

> content. This last FTC rebuttal thus falls by the wayside."[79]

In the end, Judge Boasberg seems to have adopted the reasoning of Judges Kavanaugh and Friedman in *Whole Foods*. All three appear to hold that a relevant market must, always and everywhere, be defined according to the master principle of *reasonable interchangeability of products or services* as applied by the SSNIPT test, whether based on empirical evidence, natural experiments, or the application of the *Brown Shoe* practical indicia as qualitative and evidentiary factors.

As noted, however, the Meta case continues, as the FTC has appealed Judge Boasberg's final judgment to the D.C. Circuit.

* * * * *

The legal criteria for market definition through which the facts of a given case are interpreted thus can lead to conflicting outcomes in merger litigation and, without much additional inference, in Sherman Act cases as well. The result is perplexity for antitrust lawyers, their clients, and judges. The Taft Lecture aspires to bring some coherence to a currently confused area of the law.

[79] *Id.* at 119.