MARKET MAYHEM: GUIDELINES' MARKET DEFINITION OVER THE YEARS

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This paper tracks how the various Merger Guidelines prepared by the federal antitrust agencies have addressed the critical issue of market definition. It addresses the many achievements as well as the analytical errors that have appeared from time to time. Following the first Guidelines in 1968, the next several iterations – 1982, 1984, 1992/1997, and 2010 – focused on market power under the hypothetical monopolist test as framing the rule of reasonable interchangeability identified by the courts. And while market definition is never even close to precise, the HMT provided valuable consistency in methodology for those many years. All that seemed to end in 2023.

Market definition is often a dispositive issue. Defining a relevant product and geographic market is an essential element of any claim that a merger or acquisition is illegal under section 7 of the Clayton Act. It is also essential to establish monopoly power under section 2 of the Sherman Act. And it is critical also in assessing a claim of market power in a rule of reason case under section 1 of the Sherman Act. The 2023 Guidelines do not reject market definition (for the most part) but they part company with case law over the past 45 years in the appropriate methodology. They relegate the HMT to the last of four methodologies to prove the relevant market. They reject the "smallest market principle" and purport to authorize multiple markets, including "submarkets," in a single case, mostly independent of the HMT. The fundamental objective is to allow the agencies significantly greater freedom to bring cases than the legal precedents allow.

Much remains to be seen. Assuming that the Trump agencies follow the 2023 (Biden) version, what will the courts do? Will they go back to 1960s era case law, or follow the cases from the prior five decades? So far, it seems to be the latter.

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The U.S. Supreme Court said almost 70 years ago that "[d]etermination of the relevant market is a necessary predicate to a finding of [an antitrust] violation . . . because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."[1] The Court has not deviated from that proposition in all the many years since.[2] The market definition issue arises in all merger cases and in Sherman Act cases under the rule of reason or involving allegations of actual or attempted monopolization;[3] and defining the market often dictates the outcome of the case. But determining the relevant market is no simple task even when the standards are clear. And when the standards themselves are unclear, the task is especially hard.

The Department of Justice, joined by the Federal Trade Commission since 1992, has been issuing and revising *Merger Guidelines* since 1968. The *Guidelines* have evolved and changed, often significantly, in the 58 years since. But one constant is that they have always included a section on market definition. This

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

[2] *E.g.*, Ohio v. American Express Co., 585 U.S. 529, 530 (2018); United States v. Marine Bancorp., 418 U.S. 602, 618–19 (1974).

[3] *See* 2B PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 500 (5th ed. 2022).

paper traces the history of market definition under the various *Guidelines*, addresses the changes, and suggests a methodology going forward. Specifically, market definition should be based on the hypothetical monopolist test based on the evidence available. In circumstances where there are insufficient data to conduct the test econometrically, it is sound to rely on other information bearing on *substitution* and effective *constraints* so as to assess the reasonable interchangeability that informs the Hypothetical Monopolist Test (hereinafter "HMT"). What will not do is defining a market based on various of the "*Brown Shoe* factors" that do not inform the market power inquiry.[4]

I. HISTORY OF MARKET DEFINITION UNDER THE *GUIDELINES*

There were no *Merger Guidelines* before 1968. But in the wake of the 1950 Celler-Kefauver amendment to section 7 of the Clayton Act,[5] the Supreme Court ruled in favor of the Government in every case, leading Justice Stewart to remark that "[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins."[6] One famous example was the *Von's Grocery* case in 1966, where the Court ruled for the government in a context where the post-merger market share was a whopping 7.5 percent.[7] Another was the *Pabst* case, finding several geographic "submarkets" and condemning the merger in all, including one where the post-merger share was just 4.49 percent.[8] These cases came to Court under the "Expediting Act," which permitted direct appeals to the Supreme Court in Justice Department antitrust cases.[9] The Act was

[4] This paper's primary focus is on horizontal mergers. Vertical mergers raise different issues, but the market definition exercise should not be very different.

[5] Clayton Act § 7, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

[6] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). *See also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (significantly narrowing the ability of private competitors to enforce section 7). *Cargill* arose out of a consummated merger, but the analysis focused on private antitrust injury and standing, not the legality of the merger as such. *Id.*

[7] *Von's Grocery*, 384 U.S. at 272–73.

[8] United States v. Pabst Brewing Co., 384 U.S. 546, 551-52 (1966).

[9] 15 U.S.C. § 28 (repealed 1984).

effectively repealed in 1974,[10] and the Court has not heard a substantive merger case since 1975, over 50 years ago.[11]

Under the Hart-Scott-Rodino Act ("HSR") regime that has been in place since the late 1970s, closing most significant deals without litigation is contingent upon government clearance.[12] Firms rarely if ever want to see their sale (or purchase) held up for years in appeals and certiorari, so most litigated cases are resolved in the district courts with occasional review by courts of appeals. As mentioned, *none* have reached the Supreme Court. This persistent absence of Supreme Court guidance has elevated the importance of the Department of Justice *Merger Guidelines*, and at the same time has inhibited the Supreme Court from revisiting these early precedents in light of developments in economics and legal scholarship.

A. *The 1968 Merger Guidelines*

The first generalized antitrust merger guidelines were the *Merger Guidelines* issued in 1968.[13] The purpose of the *1968 Guidelines* was to reassure the business community that there were mergers that would not be challenged regardless of decisions like *Von's* and *Pabst*. Justice Department staff were opposed to the issuance of any guidelines.[14] Staff preferred not to be boxed in and to enjoy the freedom to challenge basically any merger.[15] The Assistant Attorney General ("AAG") at the time was the famous Donald Turner, on leave from Harvard. His view—consistent with a directive from President Johnson a few years earlier—was that the business

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[10] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974).

[11] *See* Rooney et. al., *Law In a Time Capsule: Should the 1960's Merger Cases be Affirmed Today?,* 1 COLUM. BUS. L. REV. 1, 34 (2025).

[12] *Premerger Notification and the Merger Review Process*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process [https://perma.cc/8GUS-4PBG] (last visited May 12, 2026).

[13] U.S. DEP'T OF JUST., MERGER GUIDELINES (1968) (hereinafter "1968 Merger Guidelines"). The FTC was not idle prior to 1968; it had issued a few earlier industry-specific guidelines.

[14] *See* Gregory J. Werden, *The 1968 Guidelines: In Praise of Committing to Restraint*, 53 REV. INDUS. ORG. 445, 449 (2018).

[15] *Id.*

community needed at least some guidance and reassurance, and that view of course prevailed.[16] The new *Guidelines* were careful, however, to clarify that they represented Antitrust Division policy only.[17]

The *1968 Guidelines* had a very brief section on market definition, relying almost entirely on the "reasonable interchangeability" standard from the 1957 *duPont/Cellophane* case.[18] "Submarkets" were never mentioned.[19] To describe "concentrated" markets, the *Guidelines* used the then-current four-firm concentration ratio (or CR4), which looks at the market shares of the top four firms. If the CR4 exceeded 75 percent, the market was considered "highly concentrated." In highly concentrated markets, mergers would not be subject to challenge if the merging parties had market shares that were smaller than the following[20]:

Acquiring Firm	**Acquired Firm**
4%	4% or more
10%	2% or more
15% or more	1% or more

The 1968 version had a number of other provisions, some quite novel at the time. There was a failing company provision, nascent competitor and maverick provisions (by other names), and sections on vertical and conglomerate mergers. The text threw a lot

[16] In 1965, President Johnson instructed Attorney General Katzenbach to direct the Antitrust Division to issue guidelines so that the business community would have a better sense of what mergers would not be challenged. *See id.* at 446.

[17] 1968 Merger Guidelines, *supra* note 13 at 1 ("these guidelines are announced solely as a statement of current Department policy, subject to change at any time without prior notice, for whatever assistance such statement may be in enabling interested persons to anticipate in a general way Department enforcement action under Section 7").

[18] *Id.* at 3; United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957).

[19] *But see,* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Keith Klovers and I address the erroneous "submarket" concept in *The Overlapping Markets Fallacy*. *See* Keith Klovers & Jonathan Jacobson, *The Overlapping Markets Fallacy*, 86 ANTITRUST L.J. 365 (2024).

[20] 1968 Merger Guidelines, *supra* note 13, at 6.

of very cold water on efficiencies arguments, making clear that efficiencies would only count in exceptional circumstances.

B. *The 1982 Merger Guidelines*

President Reagan appointed William F. Baxter of Stanford as his first antitrust AAG. One of Prof. Baxter's early initiatives was reviewing merger policy, and of course the *Guidelines*. Key aides Tad Lipsky, Tyler Baker, and Larry Wright helped the Division revise the *Guidelines* considerably. Economist Greg at the Antitrust Division also had a major role in these and all the other *Guidelines* until the 2023 version.

The *1982 Guidelines* injected a significant dose of modern economics. The Justice Department explained that: "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."[21] The most significant and enduring change was to adopt and refine the hypothetical monopolist test for market definition. The Department also began to use the Herfindahl-Hirschman Index ("HHI") to calculate market concentration, assessing highly concentrated markets as those with an HHI in excess of 1800.[22] In highly concentrated markets, mergers increasing the HHI by less than 50 points would likely not be challenged; for increases of 50 to 100 points, challenges would be likely only if a variety of non-share factors identified indicated a competitive problem; and for increases greater than 100, challenges were "likely."[23] This version of the *Guidelines* continued the skepticism of efficiencies arguments. It added the prospect of "price discrimination markets," albeit subtly, saying "the Department will consider defining additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power."[24]

These *Guidelines* made clear that market definition would be based only on demand substitution, rather than cross-elasticity of

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[21] U.S. DEP'T OF JUST., MERGER GUIDELINES 2 (1982) [hereinafter "1982 Merger Guidelines"].

[22] *Id.* at 12.

[23] *Id.* at 14-15.

[24] *Id.* § III. Although, until 2023, the *Guidelines* never suggested submarkets as such, price discrimination markets can be viewed as a type of submarket.

supply. This limitation was mitigated considerably, however, by section II.B, which explained that, "[i]f a firm has existing productive and distributive facilities that could easily and economically be used to produce and sell the relevant product" quickly in response to a price increase, those sales would be included in the market for purpose of calculating markets shares.[25] This configuration – markets defined by demand, participants by supply – has prevailed in the various *Guidelines* ever since.[26]

The *1982 Guidelines* changed the Division's analytical approach to mergers. It was originally feared that the HMT would result in exceptionally broad markets, and that the HHI increase metrics would allow huge, anticompetitive mergers.[27] Both concerns were mistaken, as later developments proved quickly.

Notably, the *1982 Guidelines* were the first to be issued after the Hart-Scott-Rodino Act of 1976.[28] The HSR Act requires parties seeking to merge (or tender offerors) to notify the FTC and DOJ of any proposed merger meeting minimum threshold requirements before closing the transaction. The size-of-transaction minimum for 2026 is $133.9 million. Prior to HSR, the agencies almost always had to sue, if at all, after the deal had closed – and would only find out about the transaction by reading about it in a newspaper or by receiving a complaint.

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[25] *Id.* at 7.

[26] Although most courts have followed this approach, not all have agreed. *See, e.g.,* Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) ("But defining a market on the basis of demand considerations alone is erroneous. . . A reasonable market definition must also be based on 'supply elasticity.'") (citations omitted); *see also Brown Shoe,* 370 U.S. at 325 n.42 ("The 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.") (citations omitted).

[27] *See, e.g.*, Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws*?, 71 CALIF. L. REV. 575, 587 (1983); Gordon B. Spivack, *New Merger Guidelines are Substantially Different*, LEGAL TIMES 38 (Aug. 2, 1982).

[28] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435 (codified as amended in scattered sections of 15 U.S.C.).

C. *The 1984 Guidelines*

Just two years later, the Antitrust Division revised the *Guidelines* yet again, this time clearly to make it easier to merge.[29] This version made efficiencies a somewhat more relevant factor in the review, rather than consideration only in "extraordinary cases." The 1984 changes also included greater consideration of imports.[30] While the 1984 *Guidelines* still used the same HHI concentration thresholds, they placed less weight on them. Other factors, such as ease of entry and the financial stability of the acquired firm, would be considered even when the 1800/100 HHI level was met.[31]

Notwithstanding the dictum in *Brown Shoe*[32] and the holding of cases like *Pabst,* submarkets were not mentioned. The 1984 version said that "the Department generally will consider the relevant product market to be the smallest group of products [or geographic area] that satisfies [the HMT] test."[33] This "smallest market principle" under the HMT was a *Guidelines* fixture until modified slightly in 2010, and was an implicit rejection of submarkets.[34] The principle was eliminated entirely in the *2023 Guidelines* which, as discussed below, enthusiastically embrace submarkets.

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[29] *See generally* U.S. DEP'T OF JUST., MERGER GUIDELINES (1984) [hereinafter "1984 Merger Guidelines"] (noting, for example, that "mergers generally play an important role in a free enterprise economy").

[30] *Id.* at 17.

[31] Although the *Guidelines* have always said that they should not be considered binding against the agencies in court, the Second Circuit said in United States v. Waste Management, Inc., 743 F.2d 976, 983-84 (2d Cir. 1984): "If the Department of Justice routinely considers ease of entry as relevant to determining the competitive impact of a merger, it may not argue to a court addressing the same issue that ease of entry is irrelevant."

[32] Submarkets were dictum in *Brown Shoe* because none was actually found. *See* Brown Shoe Co. v. U.S., 370 U.S. 294, 325 (1962).

[33] 1984 Merger Guidelines, *supra* note 29, at 4.

[34] In 2010, the passage was modified to say "when the Agencies rely on market shares and concentration, they *usually* do so in the smallest relevant market satisfying the [HMT]." U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 4.1.1 (2010) [hereinafter "2010 Merger Guidelines"] (emphasis added).

D. *The 1992/1997 Merger Guidelines*

The first guidelines to be issued jointly by the Justice Department and Federal Trade Commission came out in 1992 (under the first Bush administration) and were modified in one respect in 1997. These *Guidelines* concerned horizontal mergers only.[35] After the 1984 version, there were no vertical guidelines until 2020.

The *1992 Guidelines* aimed to be more pragmatic, focusing on economic incentives. The focus was on those mergers that raise prices, reduce output, or lower quality to customers – the consumer welfare standard.[36] These *Guidelines* provided a more developed and eventual primary focus on "unilateral effects," with concerns over concentration in a separate section addressing "coordinated effects." [37] "Price discrimination markets" were given more prominence, with the affected firms now called "targeted customers." This, coupled with the focus on unilateral effects, would potentially lead to very narrow markets.[38]

The only change made in the 1997 version was to suggest greater consideration of efficiencies.[39]

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[35] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) [hereinafter "1992 Guidelines"]. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997) [hereinafter "1997 Guidelines"].

[36] Steven C. Salop, *The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 339 (2009). In a buyer or monopsony case, the calculation is *lowered prices*, reduced output, or diminished quality. *See* Jonathan Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, THE ANTITRUST SOURCE (Dec. 2013), https://www.wsgr.com/a/web/173/jacobson-1213.pdf [https://perma.cc/5TL2-69WR].

[37] 1992 Guidelines, *surpa* note 35, at §§ 2.1, 2.2.

[38] The *1992 Guidelines* provided a methodology for defining price discrimination markets: "If a hypothetical monopolist can identify and price differently to those buyers ('targeted buyers') who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers." *Id.* § 1.12.

[39] 1997 Guidelines, *supra* note 35, at § 10.

E. *The 2010/2020 Guidelines*[40]

Many mergers well above the numeric thresholds in the 1997 *Guidelines* had gone unchallenged and the bar believed that those provisions were outdated and unreliable – not a good look for a "guideline." This led the agencies in 2006 to issue a *Commentary on the Horizontal Merger Guidelines* that was designed to help explain what the agencies were actually doing.[41] Four years later, the *2010 Guidelines* were focused more on actual agency practice. They marked a significant change in focus from prior *Guidelines*, now looking primarily at unilateral effects, with high concentration (coordinated effects) pushed to the rear. The main issue was no longer increases in HHI, but changes in the merged firm's competitive incentives. Championed by Economics DAAG Carl Shapiro and FTC Economics Director Joe Farrell, they announced a "gross upward pricing pressure index" ("GUPPI") to measure the potential for a merger to raise prices without losing sales to the acquired firm. It now helped more than ever to be a math major:

> The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. *Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.* If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[42]

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[40] 2010 Guidelines, *supra* note 34.

[41] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES at v (2006).

[42] 2010 Guidelines *supra* note 34, at § 6.1 (emphasis added).

At least on paper, the revised *Guidelines* had major implications for market definition. Most importantly, defining a relevant market was no longer essential. Instead:

> The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis. Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.[43]

Notably too, the "smallest market principle" was watered down to a "usually" proposition. "Price discrimination markets" and "targeted customers" were given even more prominence. The *1982, 1984*, and to a lesser extent, the *1992 Guidelines,* had been based in part on an approach incorporating some of the views of the "Chicago School" of competition economics recommending substantially less agency intervention.[44] The *2010* version injected significant "post-Chicago" economic thinking.[45] Overall, the *2010 Guidelines* reflected a more interventionist approach to merger enforcement.

Ten years later, the agencies issued their *Vertical Merger Guidelines*, addressing vertical mergers for the first time since 1984.[46]

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[43] *Id.* at § 4. Notwithstanding this push, no court has condemned a merger without proof of a relevant market.

[44] *See generally* ROBERT H. BORK, ANTITRUST PARADOX (1978); *see also* Oliver E. Williamson, *Review of* The Antitrust Paradox: A Policy at War with Itself *by Robert H. Bork*, 46 U. CHI. L. REV. 526 (1979) (book review) ("Part Three is a summation in which Bork offers views on how the law ought to be enforced and remarks on incentives that encourage enforcement agencies to extend, or attempt to extend, the reach of the law in ways that, viewed with detachment, are often unwarranted.").

[45] *See generally* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 1 COLUM. BUS. L. REV. 257 (2001) (providing an analysis of the Post-Chicago school of antitrust economics as compared to the Chicago school).

[46] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020) [hereinafter "2020 Guidelines"].

These *Guidelines* were quite general, in sharp contrast to the *2010* horizontal version. For market definition, they simply stated "Agencies generally use the methodology set forth in Sections 4.1 and 4.2 of the [*2010*] *Horizontal Merger Guidelines* to define relevant markets for vertical mergers."[47]

F. *The 2023 Guidelines*

At the instigation of Senator Warren, President Biden installed Columbia professor Tim Wu as his White House aid for competition policy.[48] The result was very aggressive agency heads, Lina Khan at the FTC and Jonathan Kanter at Justice. In 2023, they issued new *Guidelines* designed to take us back to 1960s-era enforcement policy. Those *Guidelines* are discussed in the next section.

II. THE *2023 GUIDELINES*

The *2023 Merger Guidelines*,[49] at least as originally intended, represented an effort to discourage mergers across the board. They were issued not long before significant changes were made to the HSR pre-merger notification form.[50] The purpose of this double-shot was to make it more costly and difficult for firms to merge—regardless of any effect on competition. The *2023 Guidelines* reflected the strong desire for increases in antitrust enforcement[51]

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[47] *Id.* at 5.

[48] Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, THE NEW YORK TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html [https://perma.cc/99RX-8F84].

[49] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023) [hereinafter "2023 Guidelines"].

[50] *See HSR Form Changes Q&A*, FED. TRADE COMM'N (May 12, 2025), https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/hsr-form-changes-qa [https://perma.cc/JLE9-LAWG]; Conor Reidy, et al., *New, More Burdensome HSR Form Now in Effect*, WINSTON & STRAWN COMPETITION CORNER BLOG (Feb. 13, 2025), https://www.winston.com/en/blogs-and-podcasts/competition-corner/new-more-burdensome-hsr-form-now-in-effect [https://perma.cc/KZ6E-54H4].

[51] *See e.g.* 2023 Guidelines, *supra* note 49, at 2–3 (containing guidelines which aim to curb anticompetitive tendencies in their incipiency).

articulated by the majority staff of the House Judiciary Committee in 2022,[52] reflecting the so-called "neo-Brandeisian" view of competition policy. Economics was downplayed. *Guidelines* since 1982 had always said that the "unifying theme" was to prevent those transactions that were likely to "create, enhance, or entrench market power or to facilitate its exercise."[53] That key passage was removed in the 2023 version. In the view of some, this meant that the *Guidelines* had abandoned the consumer welfare standard that has successfully governed antitrust over the past 40 years.[54]

The prior focus on *market power* in prior *Guidelines* as the key metric for market definition (and merger law generally) was both important and correct for several reasons. First, market power, when exercised, worsens the terms of trade for consumers. This can be by raising price, lowering quality, reducing incentives to innovate, or other tactics. If one adheres to the consumer welfare standard, these are precisely the harms the law should prevent. Second, market power provides an *objective* basis for defining markets, in contrast to the ad hoc methods in use prior to 1982. As the Supreme Court said almost 50 years ago in *Sylvania*, "an antitrust policy divorced from market considerations would lack any objective benchmarks."[55] Market definition under the *Brown Shoe* factors, without resort to the construct of the HMT, left far too much discretion to reach results "divorced from market considerations." Relatedly, the HMT is administrable. It provides a relatively clear basis for decision-making and allows the parties to exclude

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[52] Press Release, House Committee on the Judiciary, Judiciary Committee Publishes Final Report on Competition in the Digital Marketplace (July 19, 2022), https://democrats-judiciary.house.gov/media-center/press-releases/judiciary-committee-publishes-final-report-on-competition-in-the-digital-marketplace [https://perma.cc/P5L5-WNX4].

[53] *See e.g.* 1984 Guidelines, *supra* note 29, at § 3.4.

[54] *See* CARL SHAPIRO, WHY DROPPING MARKET POWER FROM THE MERGER GUIDELINES MATTERS, PROMARKET DRAFT MERGER GUIDELINES SYMPOSIUM (Aug. 7, 2023), https://faculty.haas.berkeley.edu/shapiro/whymarketpowermatters.pdf [https://perma.cc/TD7P-J79T]; *see* Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015), https://www.wsgr.com/a/web/170/jacobson-0815.pdf [https://perma.cc/T5TF-KHN9].

[55] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21 (1977).

irrelevant criteria from the analysis. This is not to say that market definition under the HMT is easy. It isn't. But it is far more predictable than the throw-a-finger-in-the-air approach that had prevailed.

The changes in market definition methodology in the *2023 Guidelines*, as published, were significant and reflected a reduced focus on market power and economics more broadly.[56] The new version allowed for submarkets for the first time in any *Merger Guideline*.[57] The HMT was de-emphasized. It became just one of four ways, stated in the disjunctive, the Agencies said markets should be defined. The others were: (1) "[d]irect evidence of substantial competition between the merging parties"; (2) "[d]irect evidence of the exercise of market power"; and (3) "practical indicia" such as industry recognition.[58] The HMT was listed last.[59]

Let's unpack these a bit. Direct evidence of competition between the merging companies can be important in any number of respects. But it cannot alone define a relevant market. Market definition requires consideration of the constraints imposed by *other* firms. While a *lack* of competition between the merging firms may be dispositive in a horizontal merger case, the existence of such competition is just the beginning of the inquiry into whether a challenge is warranted. The fact of substantial competition between the merging firms, without more, does not mean an absence of constraints by other competing firms.

The second methodology is more complicated. Many well-respected economists have been saying for years that market definition is not essential in merger analysis, and that market power can be proven directly.[60] But what is "direct evidence" of market

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[56] *See* Gregory J. Werden, *Market Definition under the New Merger Guidelines: Gerrymandering Redux*, *in* THE 2023 U.S., MERGER GUIDELINES: A REVIEW (Sean Sullivan ed., 2024).

[57] 2023 Guidelines, supra note 49, at § 4.3 ("Within a broad relevant market, however, effective competition often occurs innumerous narrower relevant markets," citing the dictum in *Brown Shoe*.).

[58] *Id.* at 40–41.

[59] *Id.* at 41.

[60] *E.g.,* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 730–31 (2010); Ben Remaly*, Liu: market definition not necessary for merger challenges*, GLOBAL COMPETITION REV. (April 12, 2014), https://globalcompetitionreview.com/gcr-usa/article/liu-market-definition-not-necessary-merger-challenges [https://perma.cc/H6VT-JVRN].

power? If the merged firm is likely to impose a price increase on *its* products, that is certainly relevant, but does it mean that the *market price* has been raised (significantly and in a non-transitory manner)? That requires the analysis of alternatives that market definition should be designed to achieve. The same is true of output or quality. If output is restricted, what output? If just the merged firm's, that cannot conclude the analysis. Some tools, such as the Lerner Index, can provide better insights, but the data needed to conduct the analysis are rarely available and the focus on the merged firm's *own* price elasticity renders the constraints imposed by other firms less important in the analysis.[61]

What about the third methodology, *Brown Shoe*'s "practical indicia"?[62] As discussed further below, courts continue to cite and rely on the *Brown Shoe* factors. But there are problems with these factors, as addressed in part IV below following a short trip to the new case law.

III. THE *2023 GUIDELINES* IN THE COURTS[63]

Despite the major and sometimes questionable changes made by the *2023 Guidelines*, they continue to be cited – as courts have been accustomed to over the now 58-year history of the *Guidelines*. Tracking the most significant merger challenges since the *2023 Guidelines* came into effect shows continued use of the HMT and *Brown Shoe* factors, but not the agencies' two other methodologies. The upshot is a continued focus on market power and the use of economics, consistent with the past many years.

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[61] *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939–43 (1981). The Lerner Index is calculated as the percentage markup of price above marginal cost. It does not ignore constraints from other firms, but it renders them somewhat less important. Market definition in the courts has been based on cross-price elasticity, not own price elasticity even since the *duPont-Cellophane* case in 1957.

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

[63] Because of my work for Google over the years, I will not address the two Justice Department cases against it.

- *FTC v. IQVIA Holdings*[64]: The court preliminarily enjoined the acquisition of "DeepIntent" by Iqvia. The product market was defined as health care professional programmatic advertising, citing both the HMT and the *Brown Shoe* factors. The court cited the *2010 Guidelines*. The *2023* version had been released just recently and the hearing preceded it.
- *United States v. Jet Blue Airways*[65] also was tried before the *2023 Guidelines* were released, and the court relied extensively on the *2010 Guidelines*, noting the existence of the new version in a footnote. The court enjoined Jet Blue's proposed merger with Spirit, agreeing with the Justice Department that the market was limited to the routes in which the two airlines compete.
- *Tevra Brands LLC v. Bayer HealthCare LLC*[66]denied summary judgment on Tevra's exclusive dealing claim against Bayer. Tevra successfully defended, for summary judgment purposes, a market defined as "sales of imidacloprid spot-on flea and tick treatments by manufacturers to wholesale customers in the United States." The court cited the *2023 Guidelines* but the analysis was limited to the HMT.
- *FTC v. Community Health Systems*,[67] a hospital merger case, resulted in a denial of the FTC's motion for a preliminary injunction. The court defined the relevant market as "the cluster of inpatient general acute care services provided by [the two parties]" in the "Center City/Northern Charlotte" area of North Carolina. The court cited the *2023 Guidelines* but just for the HMT.
- *FTC v. Tapestry, Inc.*[68] enjoined a proposed merger of Tapestry (Coach, Kate Spade, Stuart Weitzman) and Capri Holdings (Michael Kors, Jimmy Choo, Versace). The product market was a key issue, and was ultimately defined as "accessible-luxury handbags." The court applied both the HMT and the *Brown*

[64] 710 F. Supp. 3d 329 (S.D.N.Y. 2024).

[65] 712 F. Supp. 3d 109, 151 n.50 (D. Mass. 2024), *appeal dismissed,* No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024).

[66] No. 19-CV-04312-BLF, 2024 WL 1909156 (N.D. Cal. May 1, 2024).

[67] 736 F. Supp. 3d 335 (W.D.N.C. June 5, 2024), *vacated as moot sub nom*. Fed. Trade Comm'n v. Novant Health, Inc., No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024).

[68] 755 F. Supp. 3d 386 (S.D.N.Y. 2024).

Shoe factors, citing the *2023 Guidelines* extensively and rejecting as incorrect a criticism that the 2023 version had not been cited as persuasive authority in any previous cases.[69]

- *Pennsylvania v. Centre Lane Partners*[70] declined to enjoin the closure of an acquired glassware plant. In evaluating the acquisition, the court cited the *2023 Guidelines* and applied both the HMT and the *Brown Shoe* factors.
- *FTC v. Kroger Co.*[71] granted a preliminary injunction to block Kroger's merger with Albertsons. The court adopted the FTC's "traditional supermarkets and supercenters" market, relying both on the HMT and the *Brown Shoe* factors. The court rejected an attack on the *2023 Guidelines* and relied on them, as well as the 2010 version, in issuing its decision.
- *FTC v. Meta Platforms.*[72] The FTC's challenge to Facebook's acquisitions of Instagram and WhatsApp came to cross-motions for summary judgment, both of which were largely denied. The court concluded that, for summary judgment purposes (with some skepticism), the market was personal social networking services as the Commission had alleged. The court endeavored to apply both the HMT and *Brown Shoe* but determined that an HMT in zero-price market case would overlap substantially with type of analysis that *Brown Shoe* already requires. The court cited and relied on the *2023 Guidelines* but just for the HMT and *Brown Shoe* factors in denying summary judgment.
- Later, however, after trial in *Meta*, the court rejected the FTC's case, largely on market definition grounds.[73] The court again recognized that the HMT was the "leading way" used for market definition, and again relied on the *Brown Shoe* factors in an effort to replicate HMT analysis.[74] There was no use of the *2023 Guidelines* two other criteria. Concluding that TikTok and YouTube are reasonable substitutes for Facebook and Instagram, as they

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[69] *Id.* at 412 n.3.
[70] No. 2:24-CV-1501, 2024 WL 4792043 (W.D. Pa. Nov. 14, 2024).
[71] No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024).
[72] 775 F. Supp. 3d 16 (D.D.C. 2024).
[73] Fed. Trade Comm'n v. Meta Platforms, Inc., 811 F. Supp. 3d 67 (D.D.C. 2025).
[74] *Id.* at 96–97.

"compete fiercely over a meaningful share of Meta's business,"[75] the court determined that the relevant market could not exclude those rivals – meaning that Meta was not a monopolist as the FTC had alleged.

These cases show a continued reliance on the *Guidelines*, new or old, and a distinct reluctance to accept criticisms of the 2023 version. But notably, none of the cases upheld or even considered markets defined on two of the *2023 Guidelines* market definition criteria: substantial competition between the merging parties and "direct" evidence of the exercise of market power. Market definition instead was confined to the same *Brown Shoe* factors and HMT the courts have been using for decades. At bottom, all of these recent plaintiff wins and all the losses would have come out the same way without the *2023 Guidelines*. Whether that remains true over the next several years remains to be seen.

IV. PROBLEMS WITH THE *BROWN SHOE* FACTORS

Brown Shoe listed the "practical indicia," now known as the "*Brown* Shoe factors," 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."[76] Some of these factors can be highly relevant. Others have been decried as misleading, irrelevant, or just wrong.[77] As the Areeda and Hovenkamp treatise points out, it is important to remember that a challenged vice in *Brown Shoe*, and the focus of the parties' briefing, was that the Kinney acquisition would make the merged company strong enough to *lower* prices to consumers, quite the opposite of what we look at today.[78] As a result,

[75] *Id.* at 105.

[76] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (citing BETTY BOCK, MERGERS AND MARKETS: AN ECONOMIC ANALYSIS OF CASE LAW 25-35 (1960)).

[77] *E.g.,* Herbert Hovenkamp, *Antitrust Market Definition: the Hypothetical Monopolist and Brown Shoe* (U. Pa. Inst. for L. & Econ. Rsch. Paper No. 24-13, 2024).

[78] AREEDA & HOVENKAMP, *supra* note 3, at ¶ 530a. The case had vertical aspects too, and one of the concerns was potential foreclosure.

"identification of a grouping of sales capable of being monopolized," which should be the point of market definition, "was never intended to be the purpose of the *Brown Shoe* decision. The decision never stated the goals of merger policy in terms of prohibiting mergers threatening reduced output and higher prices."[79]

Some of the *Brown Shoe* factors—especially "sensitivity to price changes" —can bear indirectly on the key issues on which the HMT focuses. Others cannot. Sometimes, the data may not be available to conduct an econometric HMT analysis. Because the HMT is conceptual, extensive data are not essential, but a conceptual-only HMT without hard data is likely to face challenges in court, and will depend on the quality and type of evidence available.

In the absence of a rigorous HMT, one can use those *Brown Shoe* factors that help illuminate the market power inquiry and allow an analysis of whether a SSNIP would be profitable. That task must be done with care so that the focus remains on identifying a group of sales and associated geography that can be monopolized. So, for example, "peculiar characteristics and uses" can bear on substitutability; a "peculiar use" may mean that other products cannot be substituted. If "distinct customers" means in a given case the same thing as "targeted customers," that can help identify a price discrimination market. "Distinct prices" is not an especially useful criterion by itself but can be important when paired with sensitivity to price changes. Similarly, "specialized vendors" is generally unhelpful unless paired with evidence that other vendors cannot make products that constrain the parties' prices.

Why do the courts continue to rely on these factors? The main reason of course is that lower courts believe that precedent requires it. But, in addition, all too frequently the data necessary to conduct an HMT may not be available, especially in high technology markets. If the products are zero-priced, a SSNIP is

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[79] *Id.* The Areeda-Hovenkamp treatise identifies another issue: "One problem with the *Brown Shoe* factors is that they do not consider the margins at which 'interchangeability' occurs. As a result, they often define markets that are too broad for the purpose at hand, which is to identify markets capable of sustaining monopoly prices"; thus, the "*Brown Shoe* factors are best regarded as presenting testable issues of fact from which the definition of a proper relevant market can be drawn. By themselves, they are usually not sufficient to establish a market." *Id.*

impossible by definition as there is no price to increase. As discussed further below, one can arguably try a SSNIP variant by looking at output (which would be SSNDO), or with even greater difficulty at product quality (SSNDQ), but the courts have generally shied away from such efforts. Other methodologies, like price correlation[80] (or output or quality correlation) are difficult too, arguably do not work, and have not caught on. As for zero-priced markets, Judge Boasberg put it this way in the FTC's *Meta Platforms* case: "Any HMT would thus require evaluation largely of non-price data, such as 'quality, service, capacity investment, choice of product variety or features, or innovative effort.'"[81] Those data are almost equally hard to determine and quantify. Consequently, the courts have almost been required to rely on *Brown Shoe*. When they do, the better-reasoned decisions use *Brown Shoe* factors to identify potential market power in a manner designed to approximate the HMT.

V. GOING FORWARD

All too frequently we are seeing market definition allegations that barely pass the laugh test. My personal favorite *upheld* markets are "droplet-based genetic analysis products," from *Bio-Rad Labs. v. 10X Genomics*,[82] and "sales of imidacloprid spot-on flea and tick treatments by manufacturers to wholesale customers in the United States" from the *Tevra* case.[83]

But as Judge Boasberg said in the *Meta Platforms* case:

> [T]his case [is] an awkward fit with many of this nation's antitrust precedents, which have confronted anticompetitive practices mostly in markets subject to more traditional price and output effects. While that unusual aspect of this suit does

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[80] *See* George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 558–59 (1985).

[81] Fed. Trade Comm'n v. Meta Platforms, Inc., 775 F. Supp. 3d 16, 46 (D.D.C. 2024) (citing 2023 Guidelines, supra note 49, at § 4.3B).

[82] Bio-Rad Lab'ys, Inc. v. 10X Genomics, Inc., 483 F. Supp. 3d 38, 57 (D. Mass. 2020).

[83] Tevra Brands LLC v. Bayer HealthCare LLC, No. 19-CV-04312-BLF, 2024 WL 1909156 at * 4 (N.D. Cal. May 1, 2024).

> not relieve Plaintiff of its burden to put forth evidence sufficient to support a relevant product market to trial, it does call for greater flexibility in evaluating that evidence, particularly at the summary-judgment stage.[84]

But conducting an HMT in these types of markets, while very difficult, is usually possible, and can be achieved by focusing on such factors as quality, output, and innovation incentives:

> "Even with zero-price products, however, a monopolist can increase the 'quality-adjusted price' by degrading the quality of the product while keeping prices constant (at zero). The FTC argues that consumers of Meta's products generally 'pay' by watching advertisements and providing their personal information. An increase in the quality adjusted price of Meta's products thus might be shown through an increased 'ad load' — or 'the percentage of advertisements served to users as a fraction of total items shown' — a decrease in privacy, or other indications of declining quality."[85]

Similarly, an HMT variant at least in theory can be conducted based on output: if the merged firm (or alleged monopolist) restricted its output, would other firms increase theirs by diverting capacity or otherwise? If not, that would be an indication of a relevant market. Understandably, given the difficulty, courts have not tried to conduct an HMT on any variable other than price. But doing so should be possible, and advocates need to be sensitive to the possibility.

Court decisions today typically start with an effort to apply the HMT. When that proves too difficult, the courts resort to the *Brown Shoe* factors. Sometimes a court will use both methodologies. What we have not seen is much use of the "substantial competition between the merging firms" or "direct evidence of market power"

[84] *FTC v. Meta Platforms*, 775 F. Supp. 3d at 36–37.
[85] *Id.* at 42 (citations omitted).

criteria. The district court decisions are thus largely consistent with recent circuit court precedent.

When the courts do resort to *Brown Shoe*, they cite and rely on those factors from which they can simulate the result that would come from using the HMT. That should continue to be the best course to take going forward. First, see if an HMT is possible using price. Failing that, try an HMT based on output or some *objective* measure of quality (such as ad load in the *Meta* case). If that cannot be done reliably, then utilize the *Brown Shoe* factors in a manner designed to achieve the same result as an HMT. Apart from my suggested HMT based on non-price factors, this is largely what the courts have done for over three decades. While it is possible, maybe even easy, to criticize the results in some of the cases, overall, it has been a job well done.