



## **Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement**

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The 2023 Merger Guidelines were released on December 18, 2023, by the US Federal Trade Commission (FTC) and the Department of Justice (DOJ), the two federal agencies that enforce the US antitrust laws. These guidelines replace all prior versions of the agencies' various merger guidelines. The new guidelines describe 11 fact patterns intended "to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action."<sup>1</sup> Whether courts will agree with these guidelines is an open question, because the list includes theories of antitrust harm that are very similar to those the agencies argued in recent cases in which courts rejected the agencies' antitrust challenges.

The new guidelines justify the agencies' new enforcement policies by citing older case law, mostly from cases decided more than 50 years ago and antitrust rulings that were inconsistent from one case to the next. As then Supreme Court Justice Potter Stewart famously said in 1966, the only consistency in the merger enforcement policy of the 1960s was that "the government always wins."<sup>2</sup>

Since the first merger guidelines were published in 1968, their stated purpose has been to advise businesses about what types of mergers the DOJ (and later the FTC) will challenge in court so that companies can have a reasonably good idea about whether the merger they are considering will be legal, illegal, or pressing the limits of what is legal. While the 2023 Merger Guidelines make superficial claims that they are intended to give such advice, as a practical matter the new guidelines expand the category of mergers the agencies say they may potentially challenge. In doing so, the new guidelines do less to give guidance and more to empower the agencies to pick and choose the criteria they will apply from case to case. This is because the very cases cited in the 2023 Merger Guidelines are the ones that created confusion about the state of merger law in the 1960s and led to Justice Stewart's admonition that merger law was anything the government wanted it to be.

The FTC and the DOJ are taking the wrong lesson from Justice Stewart’s admonition. Rather than seeing “the government always wins” as a criticism of merger enforcement in the 1960s, the agencies appear to be looking at the new guidelines as their self-created license to make up the rules as they go along and stop any mergers they choose on the basis of whatever criteria they want to apply at the time.

The FTC has not fared well in court recently with its merger challenges, indicating that the federal courts have not been very impressed by the antitrust agencies’ theories of antitrust liability. The 2023 Merger Guidelines contain an expanded list of ways the agencies could bring antitrust cases and then describe in detail what the agencies will not consider as merger defenses. The result is that the new guidelines offer less real guidance than their recent predecessors on the state of antitrust law.

Even if courts ultimately reject the theories of antitrust violations described by the two agencies and the agencies’ repudiation of merger defenses that have been considered in the past, the new guidelines will still have a cost. Companies now considering mergers that would previously have been deemed procompetitive will have to account for the uncertainty created by the new merger enforcement policy. This will likely lead companies to abandon potentially procompetitive mergers.

## **WHAT IS IN THE NEW MERGER GUIDELINES?**

The 2023 Merger Guidelines are meant to apply to both horizontal and vertical mergers. The general thrust of the new guidelines shows that the federal antitrust agencies are pursuing an agenda that reflects skepticism about the benefits of mergers and acquisitions and a revival of older theories of competitive harm from an era of more aggressive, and highly inconsistent, antitrust enforcement. Here are some of the key changes from the previous merger guidelines:

- *Presumption of illegality based on market shares.* The 2023 Merger Guidelines restore a structural approach to mergers that was used in the merger guidelines from the 1980s and 1990s but was not used in the 2010 Horizontal Merger Guidelines issued during the Obama administration.<sup>3</sup> The new guidelines declare that the federal antitrust agencies will presume a merger is illegal if it will result in a Herfindahl-Hirschman index (HHI)<sup>4</sup> of at least 1,800. The antitrust agencies describe markets with HHIs above 1,800 as having “undue concentration” or being “highly concentrated” markets.<sup>5</sup>
- *Presumption of illegality based on “dominant” market position.* In addition to a return to the structural presumption based on HHI-measured concentration, the merger guidelines add the concept of a *dominant* position. *Dominance* is defined as “approaching monopoly power,” and can be shown either by direct evidence of a firm’s power to raise price or reduce quality or by one of the merging firms having at least a 30 percent market share. When a merging firm has a dominant position, the agencies’ evaluation will be based on whether the merger would entrench or extend that position.<sup>6</sup>

- *Departure from the consumer welfare standard.* The consumer welfare standard has been the guiding principle for antitrust jurisprudence for nearly half a century. This standard evaluates the effects that a particular business practice or merger will have on the consumer, using economic tools and data to assess whether the business practice or merger will raise prices, reduce output, or stifle innovation. As discussed below, the 2023 Merger Guidelines take a more structural approach, similar to the approach taken by older merger guidelines from the FTC and the DOJ. This approach emphasizes market shares more than the impact on consumers.
- *Dismissal of procompetitive effects.* Once the agencies have dismissed the relevance of the consumer welfare standard, they are free to ignore the benefits consumers may receive from mergers. In rather stark contrast to the 2010 Horizontal Merger Guidelines, the 2023 Merger Guidelines express strong skepticism that mergers could ever have procompetitive benefits and raise doubts about whether procompetitive benefits of mergers will be considered by the agencies. The new guidelines justify this stance by relying heavily on a Supreme Court decision from over 50 years ago, before the consumer welfare standard, that downplayed the relevance of efficiency defenses to mergers.<sup>7</sup> Notably, the 2023 Merger Guidelines fail to seriously engage with highly relevant appellate decisions from the past few decades in which merger defenses were considered by courts.
- *Shift of focus to harm to rivals and harm to labor.* Closely related to the consumer welfare standard is the principle that antitrust law protects “competition, not competitors.”<sup>8</sup> Not surprisingly, when the agencies downplay the consumer welfare standard, they also shift their focus away from protecting the competitive process. Focusing on dominance means paying attention to protecting competitors who are being dominated rather than to protecting competition itself. The new guidelines include theories of harm to current and potential competitors. At least three of the guidelines describe theories of harm to competitors or potential competitors that would have been unlikely to be recognized as theories of harm under the 2010 guidelines.<sup>9</sup> The new guidelines also elevate the importance of the impact a merger will have on competition for labor between employers.<sup>10</sup>

All these changes have the effect of raising the bar for prospective mergers and making it easier for the agencies to challenge mergers. The 2023 Merger Guidelines will further widen the scope agencies use as they gather evidence and facts during merger reviews. As agencies demand more information from merging parties than they have in the past, the costs and length of merger reviews will increase.

## **WITHOUT PRINCIPLED ANTITRUST GUIDANCE, ENFORCEMENT IS INCONSISTENT AND POLITICIZED**

The US antitrust agencies have a history of providing guidance to companies to help them evaluate whether their conduct may risk an antitrust challenge. One of the most important methods the

agencies use to inform companies of their enforcement intentions is issuing guidance statements. These statements are often jointly issued by the DOJ and the FTC. As noted earlier, this practice dates back to 1968. In the 55 years since then, the agencies have issued guidance statements on a variety of antitrust topics to describe the current state of the law and how evolving economic learning applies. Before the 2023 guidelines, the most recent guidelines for mergers were the 2010 Horizontal Merger Guidelines, issued during the Obama administration, and the 2020 Vertical Merger Guidelines,<sup>11</sup> issued during the Trump administration. The 2023 Merger Guidelines apply to both vertical and horizontal mergers. Some of the other guidelines issued by the agencies include statements on the licensing of intellectual property,<sup>12</sup> human resources practices,<sup>13</sup> cybersecurity,<sup>14</sup> and international enforcement.<sup>15</sup>

An important reason why merger guidance is needed is that the main substantive antitrust laws all contain language that needs interpreting. The Sherman Act,<sup>16</sup> the Clayton Act,<sup>17</sup> and the Federal Trade Commission Act<sup>18</sup> are very short and contain language that is famously vague, which leaves the courts to decide what the key terms mean. Cases brought under the antitrust laws depend on the judicial interpretation of terms such as “restraint of trade,” “monopolization,” and “unfair methods of competition,” which are not defined in the statutes. For mergers, the key phrase that needs to be interpreted is found in section 7 of the Clayton Act, which prohibits mergers that “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>19</sup>

From 1950, when the relevant amendment to the Clayton Act regarding mergers took effect, until the late 1970s, merger enforcement, as well as the enforcement of the other antitrust statutes, was inconsistent and often unpredictable. A series of merger cases that came before the Supreme Court in the 1960s, before there were any merger guidelines, illustrates how this inconsistency problem allowed government enforcers to reach almost any outcome they desired. It is worth noting that the following cases from the 1960s, with their inconsistent rulings and shifting philosophies, are some of the primary cases the DOJ and the FTC rely on in their 2023 Merger Guidelines.

- In the 1962 case *Brown Shoe Co. v. United States*, the DOJ challenged a merger of Brown Shoe, the third-largest shoe manufacturer in the United States, and Kinney, the eighth-largest. The court blocked the merger on the basis of the two companies’ combined market shares and the recent pattern by Brown Shoe of growing through a series of acquisitions of other shoe manufacturers.<sup>20</sup> As antitrust scholar Herbert Hovenkamp recently pointed out, *Brown Shoe’s* “troublesome doctrine was that antitrust law should be concerned about market concentration without regard to prices. It even indicated approval for the district court’s conclusion that the merger was harmful because it resulted ‘in lower prices or in higher quality for the same price.’”<sup>21</sup>
- The next year, in *United States v. Philadelphia National Bank*, the DOJ challenged the merger of the second- and third-largest commercial banks in Philadelphia. The Supreme Court blocked the merger because the combined firms would have had a post-merger

market share of over 30 percent. The Supreme Court held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”<sup>22</sup>

- Just one year later, in *United States v. Continental Can Co.*, the Supreme Court abandoned its 30 percent test and found that a lower threshold, in a very contrived market, was enough to block a merger. Continental Can, the second-largest producer of metal containers, sought to acquire Hazel-Atlas Glass, the third-largest producer of glass containers. Arguably the two companies were in distinctly different markets. But the court decided that the two companies competed in a combined market for both metal and glass containers, one where their market shares added together were only 25 percent. The court glided right past its decision to lower the market share threshold from the one it had used in the previous year’s *Philadelphia National Bank* case, saying, “Where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.”<sup>23</sup>
- The following year, the court abandoned all pretense of using the 30 percent test and appeared to find that almost any market share increase is enough to block a merger that is challenged by the antitrust agencies. In *United States v. Von’s Grocery Co.*, the Supreme Court prohibited a merger of two grocery store chains with combined shares of 1.4 percent of the grocery stores and 7.5 percent of the grocery sales in Los Angeles, citing a desire to stop increases in concentration in their incipiency.<sup>24</sup>
- The Supreme Court next fully embraced preventing increases in concentration regardless of their economic impact in *United States v. Pabst Brewing Co.* Pabst was the tenth-largest brewery when it acquired Blatz, the eighteenth-largest. The merger made Pabst the fifth-largest, with a market share of 4.5 percent. Pabst completed the purchase of Blatz in 1958, but the DOJ did not challenge the acquisition for more than a year. The litigation moved slowly until finally, after 11 years, Pabst was ordered in 1969 to sell the Blatz assets to another brewery. When the Supreme Court reviewed the case in 1966, it held that antitrust enforcement should “clamp down with vigor on mergers” and that “a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.”<sup>25</sup>
- Then, in 1967, the Supreme Court forced a company into a divestiture where there was no overlap at all in the merging firms’ markets. In *FTC v. Procter & Gamble Co.*, the court agreed with the FTC’s theory that Procter & Gamble should divest itself of Clorox, the leading bleach manufacturer Procter & Gamble had recently acquired, even though Procter & Gamble did not make bleach.<sup>26</sup> The Supreme Court essentially based this decision on a dominance theory, and indeed the 2023 Merger Guidelines cite *Procter & Gamble* to support the FTC and DOJ’s dominance theory of harm while also asserting that Procter & Gamble was

potential competition in the bleach market. In *The Antitrust Paradox*, legal scholar Robert Bork criticizes the Supreme Court and the FTC for condemning this merger, which they did because the merger would likely provide bargaining advantages with suppliers and economies of scale that would make it harder for smaller firms to compete.<sup>27</sup> In other words, the *Procter & Gamble* decision protected competitors rather than competition.

All this was too much for then Justice Potter Stewart. In the absence of meaningful standards for evaluating mergers, merger enforcement had devolved into the courts adopting shifting criteria that resulted in antitrust violations being whatever the government said were violations. Justice Stewart showed his frustration with the lack of consistent standards when he famously wrote in his dissent in *Von's Grocery*, “The sole consistency that I can find is that in litigation under Section 7, the government always wins.”<sup>28</sup>

### **MERGER GUIDELINES AND THE CONSUMER WELFARE STANDARD BRING CLARITY**

Two developments after the “government always wins” cases of the 1960s brought considerable clarity to the standards for merger enforcement. First, to its credit, the DOJ issued the original merger guidelines in 1968. A series of revisions followed in response to refinements in legal standards and economic analysis. Second, the Supreme Court embraced economic analysis through several cases in the late 1970s that led to the adoption of the consumer welfare standard. The consumer welfare standard remains the guiding judicial principle for antitrust analysis today, although there is no mention of the consumer welfare standard in the 2023 Merger Guidelines.

#### The Antitrust Agencies Issue Merger Guidelines

The 1968 Merger Guidelines were issued by the DOJ without the participation of the FTC.<sup>29</sup> The head of the DOJ's Antitrust Division at the time was Donald Turner, who was both an attorney and an economist. Nonetheless, the 1968 guidelines still read much like the 1963 *Philadelphia National Bank* decision, with a heavy emphasis on factors related to market structure and almost no mention of economic efficiency concepts. Still, the 1968 Merger Guidelines are important for establishing the principle that antitrust agencies should be giving guidance to make antitrust enforcement more predictable. They also show the DOJ declining to go to the limits that the Supreme Court had made feasible for enforcement.

The first merger guidelines to move away from the structuralist approach and seriously incorporate economic analysis were the 1982 Merger Guidelines, which were also issued by the DOJ without the participation of the FTC.<sup>30</sup> The head of the Antitrust Division at the time was William Baxter, who appreciated the importance of economic analysis and also was reacting to the Supreme Court's adoption of the consumer welfare standard shortly before. The 1982 Merger Guidelines relied heavily on modern microeconomic analysis and treated competition

and market shares as means to improved outcomes for consumers rather than as the primary goals of merger enforcement. In 2002 Charles James, then head of the Antitrust Division, described the shift:

Looking back over the 20 years since the Baxter Guidelines were announced in June of 1982, it is difficult to fathom the world of merger policy before them. Did we really define markets based almost entirely on circumstantial indications, such as company documents or whether producers of a particular product were all in the same trade association? Did we actually make enforcement decisions based upon little more than four- and eight-firm concentration ratios, without regard to actual shares held by individual firms? Did the courts actually sustain challenges to mergers producing a combined firm with less than five percent of the relevant market? Could it possibly have been the case that merger enforcement policy was blind to the potential competitive significance of entry conditions? Was there really a time in which merger-related efficiencies were viewed with such great skepticism as to be, at best, neutral, and, at worst, potentially harmful, in government merger review? Amazingly, the answer to each of the foregoing questions is a resounding yes.<sup>31</sup>

The merger guidelines were revised again in 1984, 1992 (the first time the FTC participated), 1997, and 2010,<sup>32</sup> and generally reflected the agencies' efforts to keep up with new antitrust case law and improvements in microeconomic analysis. Yet these efforts have been largely thrown out in the 2023 Merger Guidelines, which takes us back to the era before the Baxter guidelines—the era when economic efficiency and the likely impact on customers were pushed aside in favor of structural presumptions.

### The Supreme Court Adopts the Consumer Welfare Standard

The other major development toward addressing the lack of standards for merger enforcement came from the US Supreme Court when it adopted the consumer welfare standard as the guiding principle for all antitrust enforcement, including merger enforcement. In 1977, the court held that business conduct that raises antitrust concerns must be evaluated on the basis of demonstrable economic effects.<sup>33</sup> Two years later, it explicitly described the Sherman Act as a “consumer welfare prescription.”<sup>34</sup>

Under the consumer welfare standard, conduct with an adverse impact on consumers can be challenged, but conduct that is harmful to competitors is considered part of the normal competitive process; moreover, conduct that is not closely related to price and quantity outcomes in a relevant market is generally considered outside the scope of the antitrust laws.<sup>35</sup> The consumer welfare standard focuses the antitrust review on one simple question: Does the conduct make consumers better off or worse off? Abandoning the consumer welfare standard opens the door to a return to the inconsistent and unpredictable antitrust enforcement demonstrated in the merger cases from the 1960s.<sup>36</sup>

## THE NEW MERGER GUIDELINES RETURN TO THE 1960S AND “THE GOVERNMENT ALWAYS WINS”

When Justice Stewart wrote in 1966 that “the sole consistency” he could find in recent antitrust litigation was “the government always wins,”<sup>37</sup> he meant this as a criticism of antitrust jurisprudence. But the current FTC and DOJ leadership appear to be taking the opposite lesson from his admonition. The antitrust agencies’ new guidelines endeavor to make “the government always wins” the guiding principle for antitrust enforcement.

This approach is further demonstrated by FTC chair Lina Khan’s claims that antitrust enforcers can choose the standard for antitrust analysis and need not follow the consumer welfare standard. For example, in a 2022 interview, Chair Khan said:

The word efficiency doesn’t appear anywhere in the antitrust statutes. They’re really written to, in the FTC’s case, allow the FTC to police unfair methods of competition. Implicit in that prescription is the idea that there are illegitimate forms of competition and legitimate forms of competition, and *it’s really up to the FTC to be defining what is fair and what is unfair when it comes to competition.*<sup>38</sup>

Chair Khan was talking about section 5 of the Federal Trade Commission Act, which prohibits “unfair methods of competition.” While the 2023 Merger Guidelines refer to the Clayton Act’s section 7 prohibition of mergers where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly,” the current FTC leadership has asserted that it has powers under section 5 of the Federal Trade Commission Act to condemn a wide range of conduct as “unfair methods of competition.”<sup>39</sup> In an accompanying statement, the three FTC commissioners from the Democratic Party said that these powers extend to condemning mergers as unfair methods of competition, presumably even if the mergers do not violate section 7 of the Clayton Act.<sup>40</sup> This means that merging companies will not only have to follow the FTC compliance requirements for mergers under section 7 but will also have to be prepared to defend their mergers as not “unfair” according to criteria the FTC has described only in rather vague terms.<sup>41</sup>

The danger of making “fairness” the standard is that it won’t take long for political agendas to creep into the enforcement process. As antitrust scholars Ashley Baker and Richard Epstein point out, “The absence of an underlying goal to which these efforts can be anchored has resulted in proposals that create a license for ideologically driven mischief, untether antitrust from economics, and function to weaponize competition policy to reorder large sectors of the economy.”<sup>42</sup>

As discussed earlier, the 2023 Merger Guidelines favor labor interests in ways that are inconsistent with past merger guidelines. Once the leaders of the antitrust agencies begin using this mission creep to advance their own agendas, there is little to restrain them. Already various activists are looking to exploit the antitrust laws to serve other agendas such as reducing market concentration across

the economy, imposing climate change policies, further favoring the interest of labor over management, and combatting racial discrimination.<sup>43</sup> In the absence of principled standards for antitrust policy and limitations on the discretion of antitrust enforcers, antitrust laws may be used to promote almost any policy agenda.

### **WHAT IS THE COST OF THE NEW MERGER POLICIES?**

The new guidelines will take the US back to the long-abandoned, structuralist approach to section 7 merger enforcement. In this way, the 2023 Merger Guidelines do not describe the current state of antitrust law but instead are an attempt to substitute what the agencies believe were the standards from the 1960s merger cases. In effect, the new guidelines attempt to rewrite the antitrust laws in a way that fits the vision of the current leadership of the two antitrust agencies. While previous versions of the merger guidelines have focused on defining the current understandings of merger law and economics, the current guidelines selectively cite outdated cases and economic thinking from the mid-1900s to try to rewrite the law. Doug Melamed, professor of law at Stanford University and the acting head of the DOJ's Antitrust Division during the Clinton administration, pointedly criticized the agencies for their choice of cases to cite and analysis of those cases in the draft version of 2023 Merger Guidelines: "If they want to persuade judges and others of the soundness of their new approach, the way to do it is to engage seriously with the recent cases. Citing only supportive material is like writing a brief and ignoring the other side's arguments."<sup>44</sup>

So far, the antitrust agencies have not fared well in court with merger challenges, indicating that the federal courts have not been very impressed with the theories the agencies espouse in the new guidelines. The antitrust agency losses include some of the most prominent recent merger challenges. For example, the FTC lost soundly in court when it tried to block Microsoft, which sells the Xbox gaming devices but is a small player in gaming software, from acquiring Activision, which offers many leading video game series such as *Call of Duty* and *Candy Crush*.<sup>45</sup> Similarly, the FTC failed to prevent Meta from acquiring Within, a virtual reality game studio known for the virtual reality game *Supernatural*. Meta was the leading seller of virtual reality headsets, but the court found that simply making headsets did not automatically translate into having market power in virtual reality games and that the merger likely offered benefits to consumers.<sup>46</sup>

Judges believe it is their role, and not the role of political appointees at federal agencies, to decide what the law is. But even if courts ultimately reject the theories of antitrust violations created by the FTC and the DOJ, the theories will still have a cost: companies now considering mergers previously deemed procompetitive will have to account for the uncertainty created by the new merger enforcement policy.

Ultimately, the new guidelines are intended to lead to more merger challenges, which increases the burden on companies considering mergers and the likelihood that mergers will be abandoned even

when they would bring benefits to consumers. The FTC and the DOJ are already bragging about how their merger policies are succeeding because the agencies can point to numerous mergers that have been abandoned after the agencies indicated that they were looking to block the mergers.<sup>47</sup>

For example, the *Washington Post* Editorial Board reported in August 2023 that an FTC spokesman claimed “more than 20 wins” for the agency regarding merger challenges, counting 6 mergers blocked and 14 abandoned.<sup>48</sup> In a 2022 interview, FTC chair Khan claimed, while discussing vertical mergers, that “instances in which the FTC’s filing a complaint in these vertical [merger] challenges [is] leading companies to abandon [the merger], I think, shows [sic] remarkable progress.”<sup>49</sup> The fact that these 14 mergers were abandoned, along with others that the DOJ investigated, does not mean that they were necessarily anticompetitive. Indeed, it is more likely that most of them were abandoned because the FTC raised the compliance costs and caused delays that diminished the benefits of the merger.

## CONCLUSION

The 2023 Merger Guidelines do not engage seriously with the main body of merger antitrust case law. Instead, they selectively cite points from some older cases while ignoring nearly all recent cases and older case law that does not support the agencies’ plan to aggressively expand merger enforcement. Indeed, the cases cited the most in the new merger guidelines are the ones from the 1960s that paint an inconsistent and shifting picture of antitrust law—a picture that changes from case to case as the courts contort the law to reach the government’s desired result. Apparently, the 2023 Merger Guidelines are an effort to bypass Congress and the courts and rewrite the antitrust laws to increase the power and discretion of the federal antitrust agencies, granting them the ability to summarily condemn essentially any mergers they want to condemn, including mergers that on balance are beneficial to the merging companies’ customers.

The antitrust agencies have an important role to play in protecting the competitive process and maintaining the proper functioning of markets. But their actions and policies must reflect the state of the law and economic realities. Some mergers do raise legitimate competitive concerns, and they should be stopped when they are likely to lead to harm to consumers. Other mergers, however, are beneficial to consumers, especially when the merger is between two companies that are not direct competitors. A “government always wins” approach, disconnected from actual economic effects, gives politically appointed leaders of the antitrust agencies the license to weaponize merger law to pursue their own agendas, to the detriment of the economy and the competitive process.

## ABOUT THE AUTHOR

Ted Bolema retired at the end of 2022 as executive director of the Institute for the Study of Economic Growth and associate professor of economics at the W. Frank Barton School of Business Administration at Wichita State University. He is currently an Antitrust and Competition Fellow with the Innovators Network Foundation. Bolema previously was a senior fellow with the Free State Foundation, a think tank specializing in telecommunications policy, and director of policy research editing at the Mercatus Center at George Mason University. He also served as a trial attorney with the Antitrust Division of the US Department of Justice, as an antitrust attorney with Weil, Gotshal, and Manges in New York City, and as an adjunct professor at the Antonin Scalia Law School at George Mason University.

## NOTES

1. US Department of Justice and Federal Trade Commission, *Merger Guidelines*, December 18, 2023, 1, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf).
2. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart & Harlan, JJ, dissenting).
3. US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, <https://www.justice.gov/atr/file/810276/download>.
4. The HHI is calculated by adding up the squared market shares of each firm competing in a market. For example, if a market has five firms, each with 20 percent of the market, and two were to merge, the premerger HHI is  $20^2 + 20^2 + 20^2 + 20^2 + 20^2 = 2,000$ , and the post-merger HHI would be  $40^2 + 20^2 + 20^2 + 20^2 = 2,800$ , for a change of 800. For a more detailed description of the Herfindahl-Hirschman index, see Michael Bromberg, "Herfindahl-Hirschman Index (HHI) Definition, Formula, and Example," *Investopedia*, updated December 15, 2023.
5. See 2023 *Merger Guidelines*, guideline 1 ("Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in Highly Concentrated Markets"), guideline 7 ("When an Industry Undergoes a Trend toward Concentration, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly"), and guideline 8 ("When a Merger Is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series").
6. See 2023 *Merger Guidelines*, guideline 6 ("Mergers Can Violate the Law When They Entrench or Extend a Dominant Position"). As will be discussed further below, the 30 percent market share is based on a 1963 Supreme Court case, but has never been included in previous merger guidelines from the agencies. See also guideline 4 ("Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market").
7. See 2023 *Merger Guidelines*, § 3.3, citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967): "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."
8. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).
9. See 2023 *Merger Guidelines*, guideline 5 ("Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals May Use to Compete"), guideline 6 ("Mergers Can Violate the Law When They Entrench or Extend a Dominant Position"), and guideline 10 ("When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers").
10. See 2023 *Merger Guidelines*, guideline 10 ("When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers").

11. US Department of Justice and Federal Trade Commission, *Vertical Merger Guidelines*, June 30, 2020, [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf). In September 2021, the FTC withdrew its *Vertical Merger Guidelines* in favor of a new set of guidance to be developed with the DOJ. Federal Trade Commission, “Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary,” press release, September 15, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>.
12. US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, January 12, 2017, <https://www.justice.gov/atr/IPguidelines/download>.
13. US Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidelines for Human Resource Professionals*, October 2016, <https://www.justice.gov/atr/file/903511/download>.
14. US Department of Justice and Federal Trade Commission, *Antitrust Policy Statement on Sharing of Cybersecurity Information*, April 10, 2014, <https://www.justice.gov/sites/default/files/atr/legacy/2014/04/10/305027.pdf>.
15. US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for International Enforcement and Cooperation*, January 13, 2017, <https://www.justice.gov/atr/internationalguidelines/download>.
16. 15 U.S.C. §§ 1-2.
17. 15 U.S.C. §§ 12-27, with the relevant language on mergers in restraint of trade in § 18.
18. 15 U.S.C. §§ 41-58, with the relevant language on unfair methods of competition in § 45.
19. 15 U.S.C. § 13(a).
20. *Brown Shoe Co. v. United States*, 370 U.S. 294, 346 (1962): “We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipency. . . . In the light of the trends in this industry, we agree with the Government and the court below that this is an appropriate place at which to call a halt.”
21. Herbert Hovenkamp, “Did the Supreme Court Fix ‘Brown Shoe’?,” *ProMarket*, May 23, 2023.
22. *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).
23. *United States v. Continental Can Co.*, 378 U.S. 443, 461-62 (1964).
24. *Von’s Grocery*, 384 U.S. at 277. The majority opinion held that “by using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress’ intent to protect competition against ever increasing concentration through mergers.”
25. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-52 (1966).
26. *Procter & Gamble*, 386 U.S. 568.
27. Bork adds that consumers would be rendered better off not by protecting small firms from dominant firms but rather by allowing mergers that generate efficiencies and thereby force smaller competitors to improve their performance. Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 252-57.
28. *Von’s Grocery*, 384 U.S. at 301 (Stewart & Harlan, JJ, dissenting).
29. US Department of Justice, *1968 Merger Guidelines*, <https://www.justice.gov/archives/atr/1968-merger-guidelines>.
30. US Department of Justice, *1982 Merger Guidelines*, <https://www.justice.gov/archives/atr/1982-merger-guidelines>.
31. Charles A. James, “Remarks of Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, on the Occasion of the Twentieth Anniversary of the *1982 Merger Guidelines*” (speech, Antitrust Division, US Department of Justice, June 10, 2002), <https://www.justice.gov/atr/file/632446/download>.

32. US Department of Justice, *1984 Merger Guidelines*, <https://www.justice.gov/archives/atr/1984-merger-guidelines>; US Department of Justice and Federal Trade Commission, *1992 Merger Guidelines*, <https://www.justice.gov/archives/atr/1992-merger-guidelines>; US Department of Justice and Federal Trade Commission, *1997 Merger Guidelines*, <https://www.justice.gov/archives/atr/1997-merger-guidelines>; US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, <https://www.justice.gov/atr/file/810276/download>.
33. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court held that territorial restraints on franchisees should be evaluated under the rule of reason (rejecting the per se rule in this situation). After recognizing that such restrictions can enable manufacturers to compete more effectively against other manufacturers, the court declared that the rule of reason standard must be based on demonstrable economic effects (433 U.S. 36 [1977]).
34. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).
35. Under the consumer welfare standard, conduct is considered to be anticompetitive “only when it harms both allocative efficiency and raises [*sic*] the price of goods above competitive levels or diminishes their quality.” *Rebel Oil Company v. Atlantic Richfield Company*, 51 F.3d 1421, 1433 (9th Cir. 1995).
36. A more complete discussion of the intellectual foundation for the consumer welfare standard can be found in Elyse Dorsey et al., “Consumer Welfare & the Rule of Law: The Case against the New Populist Antitrust Movement,” *Pepperdine Law Review* 47, no. 4 (June 2020): 874–77.
37. *Von’s Grocery*, 384 U.S. at 301 (Stewart & Harlan, JJ, dissenting).
38. Lina Khan, “Q&A with FTC Chair Lina Khan: ‘The Word “Efficiency” Doesn’t Appear Anywhere in the Antitrust Statutes,’” interview by Guy Rolnik, *ProMarket*, June 3, 2022.
39. Federal Trade Commission, “Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act,” November 10, 2022, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).
40. Lina M. Khan, Rebecca Kelly Slaughter, and Alvaro M. Bedoya, “Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act,” Federal Trade Commission, November 10, 2022.
41. For more on the implications of the FTC’s new section 5 unfair competition policy, see Ted Bolema, “What Does the New Federal Trade Commission Policy Statement Mean for Antitrust?” (Federal Policy, Center for Growth and Opportunity, Logan, Utah, September 5, 2023).
42. Ashley Baker and Richard Epstein, “What Is the Goal of Antitrust?” *Pairagraph*, December 20, 2021, <https://www.pairagraph.com/dialogue/fcc700e3d2f4485a8789b46d566d6c7a/4>.
43. See, e.g., Tim Wu, “After Consumer Welfare, Now What? The ‘Protection of Competition’ Standard in Practice” (Columbia Public Law Research Paper No. 14-608, Columbia Law School, 2018), 2; Ben Steinberg and Adam Mendel, “US Antitrust Regulators Should Foster Climate Collaboration,” Robins Kaplan Newsletter, April 13, 2021, <https://www.robinskaplan.com/-/media/pdfs/publications/us-antitrust-regulators-should-foster-climate-collaboration.pdf?la=en>; Eric Posner, “The Rise of the Labor-Antitrust Movement,” *Competition Policy International*, November 29, 2021, <https://www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement/>; Joshua P. Davis et al., “Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic ‘Isms’),” *Antitrust Bulletin* 66, no. 3 (May 2021): 359–83.
44. Doug Melamed (@dougmelamed), Twitter, July 19, 2023, 3:50 p.m., <https://twitter.com/dougmelamed/status/1681753420087062529?s=20>.
45. *FTC v. Microsoft Corp.*, Case No. 23-cv-02880-JSC (N.D. Cal. 2023), [https://storage.courtlistener.com/recap/gov.uscourts.cand.413969/gov.uscourts.cand.413969.305.0\\_4.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cand.413969/gov.uscourts.cand.413969.305.0_4.pdf).
46. *FTC v. Meta Platforms, Inc.*, Case No. 5:22-cv-04325-EJD (N.D. Cal. 2023), <https://www.documentcloud.org/documents/23598337-ftc-vs-meta-within-ruling?responsive=1&title=1>.

47. See, e.g., Leah Nylén and Michelle F. Davis, “Antitrust Enforcers Are Chilling Big Mergers,” *Bloomberg*, May 10, 2023: “The US government’s aggressive stance on antitrust is chilling merger activity among the country’s biggest companies, with some deals never making it past the boardroom as executives fear lengthy and expensive approval.”
48. Quoted in Editorial Board, “Lina Khan’s FTC Wants to Transform Antitrust. Is There a Better Way?,” *Washington Post*, August 14, 2023.
49. Khan, “Q&A with FTC Chair Lina Khan.”