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POLICY BRIEF

The Rule of Law and the Draft Merger Guidelines

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On July 19, 2023, the federal antitrust agencies—the US Department of Justice (DOJ) and the Federal Trade Commission (FTC)—released draft Merger Guidelines (dMGs) for public comment.[1] Once these guidelines are finalized, they will be the official statement of US antitrust enforcement policy toward corporate mergers. This policy brief explains that the dMGs do not promote the rule of law, as prior merger guidelines did, because the dMGs fail to indicate which mergers will be challenged and which mergers will not be challenged.

THE AGENCIES' ROLE IN UPHOLDING THE RULE OF LAW

The rule of law was first articulated by Aristotle[2] and named by Samuel Rutherford in the 17th century.[3] "Stripped of all technicalities," Friedrich A. Hayek argued, the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances."[4] A just and efficient legal system respects the rule of law.[5]

According to law professor Robert A. Stein, the rule of law means, in particular, that "the law must be known and predictable so that persons will know the consequences of their actions."[6] Promoting the rule of law in this manner yields concrete benefits: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[7]

Congress makes the laws, but the other branches of government help make them known and predictable. As Supreme Court Justice Antonin Scalia explained, courts construct "a law of rules."[8] And courts have had a lot to do with antitrust law because Congress framed the relevant statutes in vague and undefined terms.[9]

Early antitrust statutes did not specifically address mergers, but in 1950, Congress amended section 7 of the Clayton Act to prohibit acquisitions when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[10] The DOJ and the FTC then began challenging mergers at a prodigious pace. Before the Supreme Court first interpreted this prohibition in 1962, the agencies had launched more than 100 challenges.[11]

In 1963, the Supreme Court took a big step toward making merger law known and predictable. It did so by creating a presumption of illegality for certain horizontal mergers (i.e., mergers between direct competitors). The court declared 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.[12]

Over the next few years, however, the Supreme Court identified no mergers that failed to trigger the presumption. Columbia University law professor Milton Handler declared that the court had given the DOJ and the FTC a "blank check," and he implored the agencies to "exercise their awesome administrative discretion with prudence and objectivity."[13]

Reportedly acting on instructions from President Lyndon B. Johnson, Attorney General Nicholas Katzenbach sought to reassure the business community in a speech delivered May 8, 1965.[14] He observed that the DOJ challenged only about 1 percent of mergers, and he explained that the agency had resolved to "clarify" which mergers would be challenged. He announced that the DOJ had "begun seeking to shape policy guidelines." He expressed a hope that this effort would be "accelerated" by Harvard professor Donald Turner, who had just been nominated as the assistant attorney general in charge of DOJ's Antitrust Division.

On August 10, 1965, Assistant Attorney General Turner stated his rationale for merger guidelines: "People wishing to comply with what the Government thinks the law is can only do so if the Government's views are made known."[15] Turner had trained as an economist, but he did not seek to complicate merger enforcement; he preferred simple rules based on market shares. Attorney General Ramsey Clark released the first Merger Guidelines (MGs) on May 30, 1968.[16]

Producing the MGs took three years partly owing to the pendency of merger cases decided by the Supreme Court in 1966 and 1967.[17] In *United States v. Von's Grocery Co.*, the court found a horizontal merger unlawful even though the relevant market remained highly unconcentrated.[18] In *United States v. Pabst Brewing Co.*, the court suggested that the government need not actually prove the relevant market it alleges.[19] And in *FTC v. Procter & Gamble Co.*, the court held a merger unlawful, in part, because the merging firms might have competed.[20]

Assistant Attorney General Turner could have consolidated these court victories in enforcement guidelines. Over the opposition of career DOJ lawyers,[21] he instead forswore merger challenges that would have been successful. Using market share and market concentration thresholds, the 1968 MGs indicated which mergers the DOJ would challenge and which mergers it would not challenge.

The 1968 MGs remain a shining example of promoting the rule of law by promising restraint,[22] but they did not make merger enforcement entirely predictable. The 1968 MGs did not usefully explain how the DOJ would define the "relevant market," the part of commerce within which competition was examined and shares assessed. Consequently, merging firms could not know what market shares the DOJ would assert.

In the mid-1970s, the Supreme Court surrendered the development of merger law to the circuit courts of appeals. This surrender mattered because merger law had not matured and circuit courts had no power to reject immature Supreme Court precedents. Guidance from the federal enforcement agencies became the best source of updated rules of merger law.

The first antitrust assistant attorney general under President Ronald Reagan was Stanford law professor William Baxter. Issuing new MGs was one of his priorities, and he did so in 1982. Baxter's successor, J. Paul McGrath, issued a minor revision to the MGs exactly two years later. The 1982 MGs and their 1984 revision (the 1982/84 MGs) arguably were the most successful law enforcement guidelines ever.

The 1982/84 MGs based standards for horizontal mergers on the Herfindahl-Hirschman Index (HHI) of concentration, which is constructed by summing the squared shares of market participants. For example, if the market shares are 40, 30, 20, and 10, the HHI is 3,000 (1,600 + 900 + 400 + 100). When firms merge, the increase in the HHI is twice the product of their shares, so the merger of the two smallest firms in this example produces an increase in the HHI of 400 (2 × 20 × 10) and a post-merger HHI of 3,400.

The 1982/84 MGs established a quasi safe harbor when the post-merger HHI was less than 1,000 or the HHI increase was less than 100. They stated that the DOJ was likely to challenge mergers when the post-merger HHI exceeded 1,800 and the HHI increase exceeded 100. In between, the DOJ determined whether to challenge a merger on the basis of a variety of factors, including the HHI and the HHI increase.

DOJ enforcement under the 1982 MGs adhered strictly to the stated HHI thresholds. With strict thresholds applied to reproducible relevant markets, the 1982 MGs made merger law known and predictable. The 1982 MGs were deeply rooted in the structural approach developed by the Supreme Court, and courts came to treat the 1982/84 MGs as persuasive authority[23] because the Supreme Court had not recently issued a merger decision.

Early in the George H. W. Bush administration, FTC Chair Janet Steiger and Assistant Attorney General James Rill agreed that the agencies should have joint guidelines for horizontal mergers, which accounted for the vast majority of challenges. Joint Horizontal Merger Guidelines (HMGs) were issued in 1992 and revised in 1997 and 2010.

The 1992/97 HMGs retained the 1982/84 MGs' HHI thresholds despite a major easing of merger enforcement in the second Reagan administration. The announced intention of the 2010 revision of the HMGs was to address the gap between the 1992/97 HMGs and enforcement practice.[24] In the end, the gap was narrowed but not closed. If the post-merger HHI was less than 1,500 or the increase in the HHI was less than 100, a merger was in a quasi safe harbor. A merger was presumed likely to enhance market power if the HHI exceeded 2,500 and the HHI increase exceeded 200.

ABSENCE OF LONG-STANDING PRINCIPLES

Since 1982, all MGs and HMGs have articulated consistent principles that formed the foundation of merger enforcement, but these principles are absent from the dMGs. Nor do the dMGs articulate alternative principles. This omission raises significant questions about what is animating merger enforcement.

The 1982/84 MGs stated, "While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral."[25] The 1992/97 HMGs contained the same language, apart from substituting "Agency" for "Department."[26] And the 2010 HMGs stated, "The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[27]

The policy of limited interference is reflected in the enforcement record. Firms involved in large mergers are required to notify the DOJ and the FTC in advance so that the agencies can investigate and, if appropriate, challenge mergers before they are consummated.[28] When a proposed merger raises significant competitive concerns, the DOJ or the FTC investigates further by issuing a "second request" for information. In the annual data for 2002–2021, the agencies issued second requests for 1.9–4.5 percent of the notified transactions.[29]

The 1984 MGs and 1992 HMGs additionally observed that the "primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers."[30] And the 1997 HMGs noted that

> mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed

transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.[31]

An appeals court paraphrased this passage.[32]

The 2010 HMGs similarly stated that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[33]

The dMGs do not acknowledge that mergers can be efficient and procompetitive, and they do not state that the DOJ and the FTC strive to avoid interfering with procompetitive and competitively neutral mergers. From a policy perspective, the dMGs are disheartening because they imply that the DOJ and the FTC are comfortable with impeding lawful, beneficial mergers. From a rule of law perspective, however, it is the silence of the dMGs on this subjects that is problematic.

The 1982/84 MGs stated, "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."[34] The 1992/97 HMGs included the same statement without the internal quotation marks.[35] The 2010 HMGs phrased the idea this way: "The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[36]

The dMGs articulate no unifying theme, and the portion of the dMGs that describes the competitive concerns animating enforcement does not mention market power. The dMGs suggest that the DOJ and the FTC are prepared to challenge mergers that pose no immediate threat to create, enhance, or entrench market power.

ABSENCE OF STANDARDS

All prior MGs and HMGs articulated how the agencies would identify which mergers they challenge and which mergers they do not challenge, but the dMGs do not. The opening sentence accurately states that the dMGs explain how the DOJ and the FTC "identify potentially illegal mergers." But the agencies do not challenge most "potentially illegal" mergers, and the dMGs do not describe the winnowing process. Thus the dMGs do not promote the rule of law.

The main body of the dMGs consists of 13 propositions, termed *guidelines*. Guidelines 1–8 are "frameworks" for assessing "the risk that a merger's effect may be substantially to lessen competition or to tend to create a monopoly." Guidelines 9–12 "explain issues that often arise when the Agencies apply those frameworks in several common settings."

The eight framework guidelines are bases of concern. Each is accompanied by an explanatory text describing how the agencies identify potentially illegal mergers, but the explanatory texts attached to most of the frameworks go no further. They do not state that the agencies are likely to challenge every identified merger. They do not state that the agencies will treat all such mergers as presumptively unlawful. And they do not state how the agencies winnow the "potentially illegal" mergers down to the relative few mergers that are actually challenged.

TENSION WITH CASE LAW

The press release accompanying the dMGs declared that one of their "core goals" was to "reflect the law as written by Congress and interpreted by the highest courts."[37] But the dMGs are in tension with both the text of the governing statute and its interpretation by the highest courts.

As noted above, section 7 of the Clayton Act prohibits mergers when the effect "may be substantially to lessen competition, or to tend to create a monopoly."[38] Of the framework guidelines, only guideline 5 incorporates this test. The others suggest that the agencies ask whether competition is lessened at all rather than whether competition is lessened substantially. Guidelines 1 and 8 suggest that the agencies are concerned about market structure for its own sake.

Guideline 1 states that "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets." The explanatory text states that, when the post-merger HHI exceeds 1,800, an HHI increase exceeding 100 points triggers a "structural presumption that the merger may substantially lessen competition or tend to create a monopoly." The dMGs cite cases in support of the thresholds, but the HHI increase in all of them exceeded 500.[39]

The case law does support a "structural presumption" of illegality when a merger would significantly increase concentration,[40] but a 100-point HHI increase is not significant. The difference between perfect competition and monopoly is 10,000 HHI points, and economics provides ample reasons to view the likely harm from a merger as roughly proportional to the increase in the HHI resulting from the merger. A merger that takes a market just 1 percent of the way to monopoly is not significant.

The merger of two small firms can give rise to a "structural presumption" under guideline 1. Consider a relevant market composed of seven firms with shares of 25, 20, 16, 14, 10, 8, and 7. The merger of the two smallest firms increases the HHI by 112 points, to 1,802. The Supreme Court never condemned a merger between two of the smallest firms in a market.

Guideline 2 states that "Mergers Should Not Eliminate Substantial Competition Between Firms." The explanatory text asserts that a merger substantially lessens competition if there is "substantial competition between the merging parties prior to the merger" and identifies vague indicators of "substantial competition." An appendix mentions quantitative measures but provides no assurances that they will be used, nor does it provide significance thresholds.

Guideline 3 states that "Mergers Should Not Increase the Risk of Coordination." The explanatory text asserts that "by reducing the number of firms in a market, a merger increases the risk of coordination."[41] The text further asserts that markets "are presumptively susceptible to coordination" when the HHI exceeds 1,800 and that the presumption can be overcome only on the basis of "barriers to coordination unique to the industry." But the dMGs rely on a case in which the post-merger HHI was 5,300, and the court nevertheless required only that the barriers to coordination be "much greater" than average.[42]

Guideline 4 states that "Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market." The explanatory text says nothing about when eliminating a potential entrant produces a substantial lessening of competition and indicates that the agencies are prepared to challenge mergers on the basis of the mere possibility that competition will be lessened.

The Supreme Court endorsed condemning a merger when the "acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and [its] presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."[43] These facts have never been proved to the satisfaction of a court, so the agencies instead assert that it is enough to show that "a current market participant could reasonably consider the firm to be a potential entrant." The Supreme Court held that this demonstration was insufficient in the case the agencies rely on.[44]

Appeals courts endorsed condemning a merger when the merging firms soon would compete in the relevant market but for the merger. When it is clear that a firm would compete but for the merger, however, the agencies and courts treat the merger as a merger of incumbents.[45] Guideline 4 is directed at less clear cases, and the text suggests that agencies are prepared to challenge mergers when competition between the merging firms is merely plausible. The courts have demanded more certainty.[46]

Guideline 6 states that "Vertical Mergers Should Not Create Market Structures That Foreclose Competition." The idea of guideline 6 is that vertical integration by merger is presumptively unlawful when the firms have substantial market shares, and this idea finds no support in case law. The only modern appellate decision on this point held that "the government cannot use a short cut to establish a presumption of anticompetitive effect" from a vertical merger.[47]

The agencies cite three cases in which vertical mergers were condemned, but in all three, the courts relied on actual effects from mergers that were completed before trial.[48] Assessing likely competitive effects from vertical mergers requires fact-intensive, case-by-case analysis. Vertical mergers can intensify competition by solving supply-chain problems, facilitating planning, and pairing complementary assets in ways that enable the merged firms to provide new products and services.

Guideline 7 states that "Mergers Should Not Entrench or Extend a Dominant Position." The explanatory text indicates that the agencies are concerned about this when the acquiring firm's share is just 30 percent, which is far short of what case law deems a dominant position. In the agencies' best case, Clorox was found to have a dominant position with 48.8 percent of national sales, while the second-place firm had 15.7 percent.[49]

The agencies suggest that a merger involving a firm with a dominant market position might enable a firm to "extend that dominant position." They cite a case concerning Ford's 1961 acquisition of its spark plug supplier.[50] But Ford did not dominate the automobile industry, and there was no possibility that it would dominate spark plugs. Both General Motors and Chrysler produced their own spark plugs. Ford just wanted to compete to supply replacement spark plugs for Ford cars.

Guideline 7 states that "Mergers Should Not Further a Trend Toward Concentration." This framework is supported by 1960s Supreme Court decisions, but these decisions were undermined by a 1974 decision neglected by the dMGs. The Supreme Court noted a pronounced trend toward concentration and observed that the Justice Department made out a prima facie case of the merger's illegality. But the court upheld the district court's conclusion that the merger nevertheless was lawful.[51] Since 1974, no appellate decision has cited a trend toward concentration as a significant factor supporting a conclusion that a merger violated section 7.

Another clear tension with the case law is seen in the dMGs' treatment of rebuttal arguments offered by the merging firms. The dMGs assert that the Supreme Court has not accepted the argument that one of the merging firms is in a "poor or weakening" position, but that is precisely what the Supreme Court did in the case just mentioned,[52] and appellate courts subsequently did the same.[53]

In substance, a weakened-competitor defense is an efficiencies argument. Cognizable, merger-specific efficiencies are generated when an acquirer provides the acquired firm with something important to competition that it had lacked, when other ways to address the problem were infeasible or competitively objectionable. Such an efficiency is highly relevant to the legality of the merger and must be considered by the agencies.

CONCLUSION

The purpose of law enforcement guidelines is to make the law known and predictable and thus promote the rule of law. In the case of merger enforcement, enforcement criteria cannot be reduced entirely to simple, objective factors because the facts are complicated and tools for predicting the competitive effects of mergers have limited power. Nevertheless, past merger guidelines have minimized uncertainty by articulating controlling principles and consistent standards. But the dMGs do not do this. The federal antitrust enforcement agencies appear intent on instilling fear in the minds of businesspeople contemplating mergers.

ABOUT THE AUTHOR

Gregory J. Werden is a visiting scholar at the Mercatus Center at George Mason University. After earning a PhD in economics at the University of Wisconsin in 1977, he worked in the Antitrust Division of the US Department of Justice until 2019. He is the only Antitrust Division employee who has been recognized with the department's Mary C. Lawton Lifetime Service Award. Werden has nearly 200 published works, and nearly half concern the competitive effects of mergers and their assessment. Werden was deeply involved in preparing the 1982 Merger Guidelines, and he was involved, in varying capacities, in preparing all subsequent merger guidelines through 2019.

NOTES

1. US Dep't of Justice and Fed. Trade Comm., Merger Guidelines (draft for public comment, July 19, 2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.
2. "Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement." Aristotle, *Politics*, trans. Ernest Barker (Oxford: Oxford University Press, 1946), book 3, chap. 11, § 19.
3. Samuel Rutherford, *Lex, Rex: The Law and the Prince; A Dispute for the Just Prerogative of King and People* (London, 1644), 237.
4. F. A. Hayek, *The Road to Serfdom: Text and Documents,* definitive ed., ed. Bruce Caldwell (1944; repr., Chicago: University of Chicago Press, 2007), 112.
5. Tom Bingham, *The Rule of Law* (London: Penguin, 2010).
6. Robert A. Stein, "What Exactly Is the Rule of Law?," *Houston Law Review* 57 (2019): 194.
7. Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994).
8. Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175–88.
9. Section 1 of the Sherman Act of 1890 prohibited every "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade." 15 U.S.C. § 1. Section 2 of the Sherman Act made it unlawful "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." 15 U.S.C. § 2. Section 5 of the 1914 FTC Act prohibited "unfair methods of competition." 15 U.S.C. § 45(a).
10. Celler-Kefauver Act, chap. 1184, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18).
11. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
12. United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
13. Milton Handler, "Some Misadventures in Antitrust Policy Making—Nineteenth Annual Review," Yale Law Journal 76 (1966): 108 (address delivered September 27, 1966).
14. Nicholas deB. Katzenbach, "Remarks by Attorney General Nicholas deB. Katzenbach" (remarks prepared for delivery before the Business Council, Hot Springs, Virginia, May 8, 1965), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/05-08-1965.pdf; see also "Business Assured on Trust Actions," *New York Times,* May 9, 1965, 36.
15. Donald F. Turner, "Some Misadventures in Antitrust Policy Making—Nineteenth Annual Review," *Yale Law Journal* 76 (1966): 92, 108.
16. Links to the 1968 MGs, as well as all successors, can be found at https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

17. On the preparation of the 1968 MGs, see Donald I. Baker, "Donald Turner's Merger Guidelines as an Antitrust Watershed," *Review of Industrial Organization* 53 (2018): 435–44.

18. 384 U.S. 270 (1966). The post-merger HHI (see below) was about 250.

19. 384 U.S. 546 (1966).

20. 386 U.S. 568 (1967).

21. See Mark J. Green, Beverly C. Moore Jr., and Bruce Wasserstein, *The Closed Enterprise System* (New York: Grossman, 1972), 86–87.

22. See Gregory J. Werden, "The 1968 Merger Guidelines: In Praise of Committing to Restraint," *Review of Industrial Organization* 53 (2018): 445–52.

23. See Steven A. Newborn and Virginia L. Snider, "The Growing Judicial Acceptance of the Merger Guidelines," *Antitrust Law Journal* 60 (1992): 849–56.

24. See Christine A. Varney, "An Update on the Review of the Horizontal Merger Guidelines" (remarks prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, January 26, 2010), https://www.justice.gov/atr/file/518236/download.

25. US Dept. of Justice, Merger Guidelines (1982) § I, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf; US Dept. of Justice, Merger Guidelines (1984) § 0.1, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

26. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1992) § 1.0, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf; US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1997) § 1.0, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf.

27. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (2010) § 1.0, https://www.justice.gov/media/810916/dl?inline. With clear guidance from the DOJ and the FTC, merger antitrust law is largely self-enforcing. When firms contemplating merger determine that their merger would be challenged, few go forward with merger plans. If there were no antitrust law directed at mergers, significantly anticompetitive mergers would be common.

28. Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

29. Federal Trade Commission and US Department of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2021,* 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; Federal Trade Commission and US Department of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2011,* 5, https://www.ftc.gov/sites/default/files/documents/reports_annual/34th-report-fy2011/2011hsrreport_0.pdf.

30. US Dept. of Justice, Merger Guidelines (1984) § 3.5, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf; US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1992) § 4, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf.

31. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1997) § 4, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf.

32. FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).

33. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (2010) § 10, https://www.justice.gov/media/810916/dl?inline. Two appeals courts quoted this statement. St. Alphonsus Medical Center–Nampa v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789 (9th Cir. 2015); ProMedica Health System, Inc. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014).

34. US Dept. of Justice, Merger Guidelines (1982) § I, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf; US Dept. of Justice, Merger Guidelines (1984) § 0.1, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

35. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1992) § 1.0, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf; US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (1997) § 1.0, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf.

36. US Dept. of Justice and Fed. Trade Comm., Horizontal Merger Guidelines (2010) § 10, https://www.justice.gov/media/810916/dl?inline.
37. Department of Justice, "Justice Department and FTC Seek Comment on Draft Merger Guidelines," press release 23-778, July 19, 2023.
38. Celler-Kefauver Act, chap. 1184, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18).
39. The smallest HHI increase was 510. United States v. Baker Hughes Inc., 908 F.2d 981, 983 n.3 (D.C. Cir. 1990). Among the cited cases, 630 was the only other HHI increase under 1,000. FTC v. University Health, Inc., 938 F.2d 1206, 1211 n.12 (11th Cir. 1991).
40. The structural presumption was established in the *Brown Shoe* case mentioned above.
41. The reverse can be true. Mergers make noncoordinated interaction more lucrative and can thereby make it preferable to coordination. See Gregory J. Werden and Michael G. Baumann, "A Simple Model of Imperfect Competition in Which Four Are Few but Three Are Not," *Journal of Industrial Economics* 34 (1986): 331–35. Moreover, mergers can reduce the risk of coordination by increasing the asymmetry among firms that would have to coordinate. See Helder Vasconcelos, "Tacit Collusion, Cost Asymmetries, and Mergers," *RAND Journal of Economics* 36 (2005): 39–62.
42. See FTC v. H.J. Heinz Co., 246 F.3d 708, 711, 724 (D.C. Cir. 2001).
43. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624–25 (1974).
44. The court remanded the case for further fact-finding, although it was obvious that the acquiring firm was viewed as a potential entrant by incumbents. United States v. Falstaff Brewing Corp., 410 U.S. 526, 533 (1973). The trial court then ruled against the government because "Falstaff exerted no influence on the level of prices." United States v. Falstaff Brewing Corp., 383 F. Supp. 1020, 1025 (D.R.I. 1974).
45. See Polypore International, Inc. v. FTC, 686 F.3d 1208, 1213–16 and n.10 (11th Cir. 2012).
46. See Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982), which required proof that competition "likely" would have occurred; Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (8th Cir. 1981), which required proof that competition "probably" would have occurred; FTC v. Atlantic Richfield Co., 548 F.2d 289, 294 (4th Cir. 1977), which required "clear proof" that competition would have occurred.
47. United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019); see also Fruehauf Corp. v. FTC, 603 F.2d 345, 352–54 and n.9 (2d Cir. 1979), which rejected the FTC's proposed "per se approach" and the proposition "that any vertical foreclosure lessens competition."
48. Brown Shoe Co. v. United States, 370 U.S. 294, 303–4, 334, 371 n.6 (1962); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 596, 605 (1957); U.S. Steel Corp. v. FTC, 426 F.2d 592, 599–601 (6th Cir. 1970).
49. FTC v. Procter & Gamble Co., 386 U.S. 568, 571–72 (1967). In another case relied on by the agencies for this point, the court opined that a dominant firm "is one in which a single large firm supplies 60% of the market and no other seller supplies a significant portion of the demand." Stanley Works v. FTC, 469 F.2d 498, 504 n.15 (2d Cir. 1972).
50. Ford Motor Co. v. United States, 405 U.S. 562 (1972).
51. United States v. General Dynamics Corp., 415 U.S. 486, 494–98 (1974).
52. General Dynamics Corp., 415 U.S. 486, 506–8 (1974).
53. See FTC v. University Health, Inc., 938 F.2d 1206, 1221 (11th Cir. 1991); FTC v. National Tea Co., 603 F.2d 694, 699–700 (8th Cir. 1979); United States v. International Harvester Co., 564 F.2d 769, 774–76, 779 (7th Cir. 1977).