An analysis of the DoJ/FTC's draft revised Merger Guidelines

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On 19 July 2023, the United States Federal Trade Commission (FTC) and the Department of Justice (DoJ) released a draft update of the Merger Guidelines. The FTC and DoJ use the Merger Guidelines as an internal reference when evaluating the potential competitive impact of a proposed transaction. It also serves as a policy statement to the public regarding their enforcement priorities. The draft Guidelines differ dramatically from prior guidance issued in 2010 in the Horizontal Merger Guidelines, and from the Vertical Merger Guidelines released more recently in 2020. This article analyses the key changes in the draft Guidelines and what they may mean for US merger enforcement going forward.

Background

The Merger Guidelines are a fixture of US merger enforcement policy. Issued and periodically updated by DoJ and FTC, the Guidelines serve multiple roles. First, they are a guide for DoJ and FTC staff analysing the antitrust implications of proposed transactions. Second, they signal the DoJ and FTC's merger enforcement priorities to the public. Third, they can be a reference for courts presiding over cases challenging proposed transactions. In this particular vein, the decision whether to consult the Guidelines at all (and the weight they are to be given) is left to the court's discretion; as such, in any particular proceeding, the Guidelines may be anywhere from persuasive to irrelevant.

The Guidelines published by DoJ and FTC on 19 July 2023 are a draft update. The Guidelines must undergo a public comment period, after which DoJ and FTC will review any public comments and publish final updated Guidelines.

Analysis of the 2023 revisions

Market definition

The draft Guidelines attempt to de-emphasise the hypothetical monopolist test, which has become *de rigeur* in market definition analysis over the past few decades, in favour of the factors announced in *Brown Shoe Co v United States.*[1]

The *Brown Shoe* test is a factual and evidence-based analysis used to identify likely product and geographic markets, which are prerequisites under Section 7 of the Clayton Act (the US federal antitrust law applicable to proposed transactions). The Supreme Court explained that the 'outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it'.[2] These boundaries are:

> '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'.[3]

The *Brown Shoe* factors are often used in market definition analysis outside of the merger enforcement context, and are commonly employed in cases under sections 1 and 2 of the Sherman Act.[4]

Under the hypothetical monopolist test, the analysis turns on whether a hypothetical monopolist of the product and its proposed substitutes could successfully impose a 'small but significant and non-transitory price increase' (SSNIP). The test was first announced in the 1982 Guidelines, and tweaked slightly in 1984 and 1992. The hypothetical monopolist test relies on economic data to identify proposed markets. Multiple calculations, such as critical loss analysis (an estimation of the amount by which a firm could raise prices without losing so much revenue from sales as to make

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1 FTC–DoJ Merger Guidelines (Draft for Public Comment) (DoJ/FTC, 19 July 2023), available at: www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf (Draft Guidelines); *Brown Shoe Co v United States*, 370 US 294, 346 (1962) (*Brown Shoe*).

2 *Ibid*, at 325.

3 *Ibid*.

4 See eg, Mem Op, *Federal Trade Commission v Surescripts, LLC*, Civ No 19-1080 (DDC Mar 30, 2023); *In re American Express Anti-Steering Rules Antitrust Litig*, 361. F. Supp. 3d 324 (EDNY 2019).

the increase unprofitable), have been developed over time to apply the hypothetical monopolist test.[5] The hypothetical monopolist test has enjoyed wide acceptance,[6] and has been repeatedly endorsed by US regulators and courts as the primary tool for market definition in merger matters.[7]

The draft Guidelines, however, embrace the test set out in *Brown Shoe*, which looks to the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it'.[8] These changes arguably bring the draft Guidelines more in line with some recent Clayton Act Section 7 decisions that continue to use the *Brown Shoe* factors in market definition.[9]

The draft Guidelines do not expressly disavow the hypothetical monopolist test. Instead, it is presented in Appendix 3 as an alternative method of defining a relevant market.[10] The implication from this positioning is that the *Brown Shoe* factors should take precedence as the primary market definition analysis, while allowing for the use of the hypothetical monopolist test where appropriate. The pivot back to the more fact-based *Brown Shoe* test may be in part due to some emerging judicial scepticism of the role of economic expert analysis in antitrust analyses.[11]

Recent statements by Assistant Attorney General Jonathan Kanter, head of the DoJ's Antitrust Division, also echo some reservations about the prominence of economic data in merger enforcement.[12] Whether this shift will eventually marginalise the hypothetical monopolist test – and to some degree the importance of data-driven economic analysis to market definition – remains to be seen and will evolve over the coming months and years.

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5 Malcolm B Coate and Jeffrey H Fischer, 'Critical Loss: Implementing the Hypothetical Monopolist Test' (*Global Competition Policy Magazine*, 2008).

6 Gregory J Werden, 'The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm' [2003], 71 *Antitrust Law Journal*, 253.

7 See eg, *Federal Trade Commission v Advocate Health Care Network*, 841 F.3d 460 (7th Cir 2016).

8 Draft Guidelines, at 29–30, citing *Brown Shoe*, 370 US, 325.

9 See eg, *United States v Sabre Corp*, 452 F. Supp. 2d 97, 139 (D Del 2020) (applying *Brown Shoe* reasonable interchangeability test); *United States v Energy Sols, Inc*, 265 F. Supp. 3d 415, 436 (D Del 2017) (same).

10 Draft Guidelines, Appendix 3.

11 See Jeff Bliss & Curtis Eichelberger, 'Comment: In Anthem-Cigna, Aetna-Humana Rulings, Judges Favor Documents Over Economics' (*Mlex*, 3 March 2017): 'You have a PhD from Chicago saying 'tomato' and a PhD from Stanford saying 'tomahto' and both are equally qualified, and what's a judge supposed to do? . . . The economists tend to cancel each other out'.

12 Ben Remaly, 'Kanter Underscores Scepticism of Antitrust Economics' (*Global Competition Review*, 7 October 2021), available at: https://globalcompetitionreview.com/gcr-usa/article/kanter-underscores-scepticism-of-antitrust-economics.

The structural presumption

The draft Guidelines reduce the market shares and concentration figures necessary to obtain the structural presumption. The structural presumption, first announced in *Philadelphia National Bank*,[13] creates a rebuttable presumption of illegality when a proposed combination of two firms would increase the concentration of an already-concentrated market by a certain amount. As a result, if the draft Guidelines are adopted as currently drafted and accepted by courts, it could become relatively easier for DoJ and FTC to block horizontal combinations.

Market concentration is assessed using the Herfindahl-Hirschman Index (HHI), which adds up each participant's market share, squared, to arrive at a single number. The HHI threshold was first introduced in the 1982 Merger Guidelines, which stated that mergers would be deemed presumptively illegal if they occur in a market whose HHI is at least 1,800 and would increase HHI by 100 points or more. The 1,800 level was adopted in subsequent Section 7 judicial decisions.[14]

The 1,800 level remained in place until 2010, at which point revised Horizontal Merger Guidelines were issued that raised the presumption threshold to 2,500 and required an HHI increase of 200 points or more to warrant the structural presumption.[15] Combinations that occurred in markets with HHIs between 1,500 and 2,500, and increased HHI by 100 to 200 points, were deemed to 'potentially raise significant competitive concerns and often warrant scrutiny'.[16]

The draft Guidelines would return the presumption to the original 1,800 level set out in the 1982 Guidelines.[17] Practically speaking, if accepted by courts, this would deem presumptively illegal a much broader array of mergers at concentration levels well below recent merger challenges. In theory, under the 1,800 level presumption, a merger reducing the number of firms of equal market share from six to five would be presumptively illegal, yet no recent merger decision has deemed such a transaction illegal under Section 7.

The draft Guidelines also introduce a separate proposed structural presumption that would deem a combination unlawful if the merged firm's market share is 30 per cent or more, and the increase in HHI is 100 points or more. The alternative 30 per cent test appears to reflect the Supreme Court's analysis in *Philadelphia National Bank*, holding that a proposed bank merger violated Section 7 of the Clayton Act because '[t]he merger of appellees will result in a single bank's controlling *at least*

13 *United States v Phila Nat'l Bank*, 374 US 321, 362-63 (1963).

14 *United States v Baker Hughes Inc*, 908 F.2d 981, 983 n.3 (DC Cir 1990); *Federal Trade Commission v HJ Heinz Co*, 246 F.3d 708, 717 (DC Cir 2001).

15 Horizontal Merger Guidelines, Section 5.3 (DoJ, 19 August 2010), available at www.justice.gov/atr/horizontal-merger-guidelines-08192010#9 (2010 Guidelines).

16 *Ibid.*

17 Draft Guidelines, 7.

30 per cent of the commercial banking business in the four-county Philadelphia metropolitan area'.[18]

Competitive effects

Perhaps the most notable aspect of the draft Guidelines is the 'Thirteen Guidelines', enumerating 13 ways combinations can potentially cause competitive harm. By and large, the Thirteen Guidelines do not set out methodologies or thresholds for finding competitive effects in any particular situation. Instead, they describe ways in which mergers may warrant scrutiny.

Some Guidelines, such as Guideline 1, which states that mergers should not significantly increase concentration in highly concentrated markets, reiterate generally agreed-upon principles. Others, such as Guideline 12, which states that the DoJ and FTC should examine the competitive impact of acquisitions of partial or minority stakes, set out more novel and debatable ideas. The Thirteen Guidelines are best understood when grouped thematically:

- traditional horizontal merger analysis;
- vertical merger analysis;
- entrenchment;
- potential or future competition;
- transactions involving platforms;
- cumulative competitive effects; and
- coordinated effects.

This proposed grouping is discussed below.

Traditional horizontal merger analysis

Guideline 1: Mergers should not significantly increase concentration in highly concentrated markets.

Guideline 2: Mergers should not eliminate substantial competition between firms.

Guideline 11: When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.

With limited exception, Guidelines 1, 2 and 11 more or less reiterate traditional theories of harm concerning horizontal mergers of close competitors.

The exception is that Guideline 11 proposes a novel theory of harm concerning competition for labour. While monopsony was generally endorsed as a potential theory of competitive harm in the DoJ's challenge to the proposed

18 *United States v Phila Nat'l Bank*, 374 US at 364-65 (emphasis added).

Penguin Random House–Simon & Schuster merger,[19] no court decision has found a Section 7 violation based on a merger found to substantially reduce competition for workers. Judicial clarity on this issue is highly relevant to the efficiencies defence discussed below, as mergers frequently eliminate redundant staff as a means of achieving cost savings that can lead to pro-competitive price reductions.

Vertical transactions

Guideline 5: Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.

Unsurprisingly, the draft Guidelines attempt to clarify the ways in which a vertical transaction may harm competition. The DoJ and FTC have struggled to mount successful challenges to vertical mergers in recent years, having failed to block AT&T–TimeWarner, Microsoft–Activision, and United–ChangeHealth, among others.

The draft Guidelines state that a vertical transaction can give rise to competitive harm if it would give the merged firm both the ability and incentive to weaken or exclude rivals.[20] The ability prong considers (1) the extent to which the firm can limit or degrade access to a related product/service, and (2) the significance of the input to the rivals' competitive vigour.[21] The incentive prong evaluates the level of competition between the merged firm and its rivals, as well as any prior instances where foreclosure or access degradation occurred.[22]

In practice, satisfying the burden of proof on showing ability or incentive to harm can be intensely challenging. For example, in *United States v AT&T*, Judge Leon concluded that the AT&T–TimeWarner merger would not result in harm to rivals because the Turner network content that AT&T would acquire (and which DoJ contended AT&T would withhold from rivals) was not 'must have' content for rivals to be competitive.[23] As such, there was a failure of proof on whether the merged firm had a real ability to harm rivals.[24]

The draft Guidelines also warn against mergers that would give the combined firm access to rivals' competitively sensitive information. This appears to be a reaction to the decision in United–Change Health, a vertical merger where DoJ contended that the merged firm would gain improper access to other insurers'

19 *See United States v Bertelsmann SE & Co*, Civ No 21-2886 (DDC Nov 14, 2022).
20 Draft Guidelines, 14–15.
21 *Ibid.*
22 *Ibid.*
23 See *United States v AT&T Inc*, 310 F.Supp.3d 161, 203 (DDC 2018).
24 *Ibid.*

confidential information. In rejecting the DoJ's challenge, the Court concluded that while the merged firm 'would have some incentive (and ability) to exploit competitors' competitively sensitive data,' the possibility of such misuse was at best a possibility that fell short of the likelihood required to successfully make out a Section 7 violation.[25]

The draft Guidelines codify the DoJ's theory of harm, announcing that a 'merger that gives the merged firm access to competitively sensitive information could undermine rivals' ability or incentive to compete aggressively or could facilitate coordination'.[26] In light of United–ChangeHealth, a successful challenge under this theory would need to establish that this misuse is likely to happen, and not simply a theoretic or possible outcome.

Guideline 6: Vertical mergers should not create market structures that foreclose competition.

The draft Guidelines also propose an alternative and somewhat inchoate theory of harm concerning vertical mergers where the level of foreclosure is below 50 per cent but would nonetheless make entry or competition generally more difficult.

The draft Guidelines offer four 'plus factors' under which a vertical merger with foreclosure below 50 per cent might potentially harm competition. Those exist where: (1) there is a trend toward vertical integration in the relevant product or geographic market; (2) foreclosure of rivals is the purpose of the transaction; (3) there is a high concentration in the upstream market or alternatively, the merged firm would hold a dominant position in the upstream market, and (4) there will be increased barriers to entry following the merger.[27]

The plus factors appear to be FTC and DoJ's attempt to identify and provide clarity around market structures and situations where vertical mergers might pose real harm to competition even though the level of potential foreclosure is insufficient under commonly understood standards to give the merged firm the ability to foreclose rivals.

On this point, the 'trend toward vertical integration' prong is a particularly notable 'plus factor'. It suggests a growing suspicion within US antitrust agencies of vertical integration, which is traditionally considered a pro-competitive means of reducing costs through elimination of double marginalisation and reduction in bargaining costs.

25 *United States v UnitedHealth Group Inc*, 630 F.Supp.3d 118, 151 (DDC 2022).
26 Draft Guidelines, 16.
27 *Ibid*, 17–18.

Entrenchment

Guideline 7: Mergers should not entrench or extend a dominant position.

The draft Guidelines propose a new theory of harm concerning mergers 'involving an 'already dominant firm [that] may substantially reduce the competitive structure of the industry'.[28] The entrenchment theory of harm lists four potential ways in which a transaction (either horizontal or vertical) involving a dominant company could lead to competitive harm: the idea of an entrenchment theory of harm is novel and not found in Section 7 precedent, though the Guideline borrows concepts, such as potential or nascent competition, previously explored by courts applying Section 7.[29]

First, the transaction could increase entry barriers in two primary ways, either by increasing the time and expense required for successful entry or by limiting rivals' access to scale or network effects needed to be competitive.[30]

Second, the transaction could make switching more difficult either by bundling more products and services together or by taking control of a service that facilitates switching.

Third, a transaction could 'interfer[e] with use of competitive alternatives'[31] by giving the dominant firm control of a service that enables customers to use multiple providers. Under this theory of harm, post-merger, the combined firm would shut down or degrade this service in the hopes of driving customers from other providers to the combined firm.

Finally, the Guideline warns against mergers that would eliminate a nascent competitive threat. This echoes the same theory of harm set out in Guideline 4, which is discussed below.

Potential or future competition

Guideline 4: Mergers should not eliminate a potential entrant in a concentrated market.

The question of whether and how Section 7 applies to mergers involving potential market entrants dates back to the FTC's 2015 challenge to Steris's proposed acquisition of Synergy Health.[32] There, the FTC asserted that but for the merger, Synergy would have entered the United States with sterilisation technology

28 *Ibid*, 18–19.
29 *FTC v Steris Corp*, 133 F. Supp. 3d 962 (ND Oh 2015).
30 *Ibid*, 19–20.
31 *Ibid*, 20.
32 *Steris*, 133 F. Supp. 3d at 966.

competitive against Steris's existing product offering.[33] The court concluded that the FTC failed to carry its burden because there was insufficient evidence (such as customer commitments to purchase Synergy sterilisation products) showing that Synergy was likely to enter the US sterilisation market in the near-term.[34]

The draft Guidelines set out two theories of potential competition: (1) actual potential competition and (2) perceived potential competition. Under the actual potential competition theory, which is akin to the FTC's theory in *Steris*, a merger should not eliminate a company that is poised to enter a market in competition with the other party.[35] The entry should be both reasonably probable and also likely to deconcentrate the market or generate other pro-competitive effects.

Under perceived potential competition, a firm need not actually be poised to enter the market; instead, the firm must be viewed by other firms as waiting in the wings to enter such that it exerts competitive pressure on the market.[36] In other words, existing market participants are discouraged from raising prices or reducing product quality for fear of provoking entry from a particular firm that is the subject of the transaction. As such, the transaction works alleged competitive harm by taking the perceived potential entrant off the table, and thereby reduces or eliminates competitive restraints on the remaining market participants. Notably, the Guidelines attempt to cover off use of this theory to *defend* a proposed merger, contending that 'the existence of a perceived potential entrant does not override or counteract harm from mergers between companies that already participate in the relevant market'.[37]

Platforms

Guideline 10: When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.

Guideline 10 attempts to apply Section 7 precedent to transactions involving a platform or a company in some kind of relationship with a platform.[38] Under the Guidelines, '[p]latforms provide different products or services to two or more different groups or "sides" who may benefit from each other's participation'.[39]

33 *Ibid.*
34 *Ibid.*
35 Draft Guidelines, 11–12.
36 *Ibid*, 12–13.
37 *Ibid*, 13.
38 *Ibid*, 23.
39 *Ibid.*

The Guidelines suggest three ways in which platform transactions can reduce competition: (1) a merger of two competing platforms; (2) an acquisition by a platform operator of a platform participant; or (3) an acquisition by a platform operator of a firm that facilitates participation on multiple platforms.[40] Each of these borrows from theories of competitive harm set out in other Guidelines. For example, the Guidelines contend that an acquisition by a platform operator of a platform participant could deprive other platform operators of network effects (set out in Guideline 7) or access to the platform participant by rival platforms (discussed in Guideline 5). As such, Guideline 10 does not necessarily create new and distinct theories of harm so much as reiterate that other Guidelines apply to transactions involving platforms.

Cumulative competitive effects

Guideline 8: Mergers should not further a trend toward concentration.

Guideline 9: When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.

Guidelines 8 and 9 echo one another by introducing a cumulative effects theory of harm under which a series of transactions, taken together, substantially reduce competition,[41] even while no one transaction may substantially harm competition on its own. The Guidelines suggest that this could happen either by converting markets with non-vertically integrated participants into one of vertically integrated players, or by steadily driving a market to a higher concentration level.[42]

While no recent merger decision has found a violation of Section 7 based on this theory of harm, the Guidelines cite the Supreme Court's 1966 decision in *Pabst Brewing* for the contention that a series of transactions that increase concentration 'would have sufficed to support a finding of undue concentration'.[43]

Coordinated effects

Guidelines 3 and 12 are best understood as principles arising under coordinated effects theories of harm.

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40 *Ibid*, 24.
41 *Ibid*, 21–22.
42 *Ibid*.
43 *Ibid*, 21 n 68 (*citing United States v Pabst Brewing Co*, 384 US 546, 550–52 (1966)).

Guideline 3: Mergers should not increase the risk of coordination.

Guideline 3 essentially restates the coordinated effects theory of competitive harm found in the 2010 and prior merger guidelines.

Guideline 3 sets out three disjunctive prerequisites for potential coordinated effects: (1) a highly concentrated market; (2) prior actual or attempted coordination, or (3) a transaction that would eliminate a 'maverick' market participant. While Guideline 3 indicates that coordination is possible if 'any' of the preceding three factors are present, the 2010 Merger Guidelines explicitly linked market concentration with a higher risk of coordination,[44] suggesting that the draft Guidelines should be construed as softening the coordinated effects standard by allowing it to be found *either* if the market is concentrated *or* if participants have or have tried to coordinate before.

Guideline 12: When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

The draft Guidelines announce a policy against acquisition of non-controlling interests where the acquisition would have a negative impact on competition. The Guidelines set out examples of partial acquisitions, including 'rights to appoint board members, observe board meetings, veto the firm's ability to raise capital, or impact operational decisions, or access to competitively sensitive information'.[45]

In support of this policy, the Guidelines cite *United States v E.I. du Pont de Nemours & Co*[46] and *United States v Dairy Farmers of America*.[47] The possibility of competitive harm from partial acquisitions was announced in the *E.I. du Pont* case, which stated 'any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce'.[48] The more recent decision in *Dairy Farmers* observed 'even without control or influence, an acquisition may still lessen competition [...] The key inquiry is the effect on competition, regardless of the cause'.[49]

The draft Guidelines identify three ways in which partial control may affect competition. First, the draft Guidelines suggest that a partial owner could influence the conduct of a competitor. Second, a partial acquisition could blunt the incentive

44 2010 Merger Guidelines, 7.1.

45 Draft Guidelines, 27.

46 *United States v E.I. du Pont de Nemours & Co*, 353 US 586 (1957).

47 *United States v Dairy Farmers of America, Inc*, 426 F.3d 850 (6th Cir 2005).

48 *E.I. du Pont*, 353 US, 592.

49 *Dairy Farmers*, 426 F.3d, 860.

of the acquiror to compete. Third, the partial owner could gain access to 'non-public, competitively sensitive information from the target firm'.[50] While each of these appear to be potential harms from a partial acquisition, *duPont* and *Dairy Farmers* both would require an actual rather than potential effect on competition from a transaction. Therefore, it appears that a successful challenge to a partial acquisition under this theory of harm would need to establish *both* the incentive *and* ability by the partial owner to substantially harm competition.

Defences

The revised Guidelines set out three kinds of evidence that can be used to rebut a showing of substantial lessening of competition: efficiencies, failing firm defence, and entry/repositioning. Each is discussed below.

Notably, this section of the draft Guidelines does not take up the question of structural remedies like divestitures, which are often presented as a defence to a proposed transaction with possible competitive effects. The omission is significant given the frequency with which courts grapple with proposed divestiture remedies in Section 7 cases.[51]

Efficiencies

The availability of, and associated requirements for the efficiencies defence is a fraught area of merger law.

The draft Guidelines begin with the contention that 'possible economies [from a merger] cannot be used as a defence to illegality [under Section 7]'.[52] Notwithstanding this claimed prohibition, the draft Guidelines then go on to spell out the requirements to establish an efficiencies defence: (1) merger specificity; (2) verifiability; (3) pro-competitiveness; and (4) pass-through to customers of the merged firm.[53]

While merger specificity and verifiability are generally agreed-upon requirements to make out an efficiencies defence,[54] the draft Guidelines' additional factors of pro-competitiveness and pass-through are not found in merger precedent. The pro-competitiveness prong would require that the forces giving rise to the efficiencies do not stem from an 'anti-competitive worsening of terms for the merged firm's trading partners'.[55] Thus, it appears that under this proposed factor,

50 Draft Guidelines, 27–28.
51 See eg, *United States v Aetna Inc*, 240 F. Supp. 3d 1 (DDC 2017).
52 Draft Guidelines, 33 (*citing Phila Nat'l Bank*, 374 US at 371).
53 Draft Guidelines, 33–34.
54 See eg, *United States v Anthem, Inc,* 236 F. Supp. 3d 171, 236–42 (DDC 2017).
55 Draft Guidelines, 34.

any demonstrable efficiency arguably could *not* be credited if the combined firm could use its greater purchasing power to extract better pricing or terms from its suppliers, where the exercise of this power is somehow anti-competitive.

The pass-through requirement, also not found in merger precedent, mandates that the merged firm must pass on to its customers any savings flowing from the merger.[56] The draft Guidelines do not specify whether all or merely some of these savings must be passed through, and so there is some ambiguity in what is needed to satisfy this prong. In any event, it is debatable whether this requirement is supported in recent merger caselaw; while *Anthem* suggested that 'any claimed savings must inure to the benefit of the customer in order to *qualify* as an efficiency', it hesitated to characterise 'pass through as the defining touchstone of an efficiency'.[57]

Failing firm

US merger precedent has carved out a defence to a Section 7 violation for circumstances where the target firm is likely to go out of business, causing harm to competition absent the proposed transaction.[58]

The draft Guidelines set out three factors to determine whether the failing firm defence is available: (1) grave probability of business failure; (2) dim or nonexistent prospects for reorganisation; and (3) the proposed acquiror is the only available purchaser for the failing business.[59] While the draft Guidelines cite the Supreme Court's decision in *Citizen Publishing Co v United States*[60] in support of these three factors, the later Supreme Court case of *United States v Greater Buffalo Press* suggests there are only two factors for this defence:

> '(1) that the resources of [the failing firm] were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, and (2) that there was no other prospective purchaser for it'.[61]

Ultimately, given the significant overlap between the factors identified in *Citizen Publishing* and *Greater Buffalo Press*, this may be a distinction without a meaningful difference.

Entry and repositioning

The Guidelines' proposed requirements regarding entry and repositioning appear to be generally in line with prior guidance and recent caselaw. Generally speaking,

56 *Ibid.*
57 *Anthem*, 236 F.Supp. 3d, n 36.
58 See eg, *United States v Energy Solutions, Inc*, 265 F. Supp. 3d 415 (D Del 2017).
59 Draft Guidelines, 31–32 (citing *Citizen Publ'g Co v United States*, 394 US 131, 138 (1969)).
60 *Citizen Publ'g Co*, 394 US, 138.
61 *United States v Greater Buffalo Press, Inc*, 402 US 549, 555 (1971).

merging parties may assert that the transaction will not result in unilateral effects because any attempt to raise prices or reduce output, for example, will provoke either (1) entry by firms not in the market or (2) repositioning by firms in the market such that it will counteract any potential reduction in competition.[62]

To prove that entry or repositioning will remedy any potential harm to competition, the Guidelines require that merging parties must show that said entry or repositioning will be (1) timely; (2) likely; and (3) sufficient to address any reduction in competition.[63] These requirements are generally consistent both with prior versions of the Guidelines,[64] as well as recent merger precedent.[65]

That said, the Guidelines attempt to impose new requirements that may make it more difficult to successfully use this doctrine. With respect to timeliness, the Guidelines assert that '[e]ntry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger'.[66] It is unclear if this is empirically true, and the Guidelines do not provide support for this assertion. On sufficiency, the Guidelines assert that '[e]ntry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient'.[67] As with timeliness, there is no cited support for this assertion, and it seems at least conceptually possible that entry can be sufficient even while not precisely duplicating or surpassing the relevant qualities of one of the merging parties.

Looking forward

The draft Guidelines have been presented in a time of considerable upheaval for merger enforcement in the United States. Under the Biden administration, the DoJ and FTC have vowed to be more aggressive in challenging proposed transactions, albeit with mixed success.[68] The draft Guidelines can be viewed both as an attempt to revive and reinvigorate historic (and arguably more plaintiff-friendly) merger precedent such as *Brown Shoe* and *Philadelphia National Bank*, but also to distil learnings from more recent decisions.

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62 See eg, *FTC v Sanford Health*, 926 F.3d 959, 965 (8th Cir 2019).

63 Draft Guidelines, 32–33.

64 2010 Horizontal Merger Guidelines, Section 9.

65 *Sanford Health*, 926 F.3d, 965.

66 Draft Guidelines, 33.

67 *Ibid*.

68 Jonathan Kanter, 'Remarks to the New York State Bar Association Antitrust Section' (DoJ, 25 January 2022), available at www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york; Leah Nylen, Teresa Xie, 'FTC's Khan Defends Antitrust Record After Microsoft-Activision Loss' (Bloomberg, 24 July 2023), available at www.bloomberg.com/news/articles/2023-07-24/ftc-s-khan-defends-merger-record-after-microsoft-activision-loss#xj4y7vzkg.

For the draft Guidelines to have real and lasting effect (assuming they are formally adopted), they must avoid perception and treatment as a partisan exercise designed to cherry-pick favourable precedent. Ideally, they must also avoid a shift so far in one direction as to risk withdrawal and revision upon a change in administration.

The durability of the draft Guidelines will ultimately depend on their adoption by courts as a persuasive and objective examination of doctrines relevant to Section 7 enforcement. It is much too early to say whether the draft Guidelines will accomplish this goal, but at the very least, the draft Guidelines do serve as a comprehensive statement of merger enforcement policy and intent for FTC and DoJ under the Biden administration.