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US DRAFT MERGER GUIDELINES: MANIFESTO OF IMPROVEMENTS OR STEP BACK?*

This paper critically evaluates the draft version of the US Merger Guidelines from 2023 (D23), which departs from the consumer welfare standard, sparking intense debates within the academic, professional, and business communities. D23, released by the US Department of Justice and the Federal Trade Commission, introduces a shift toward a more structuralist approach in horizontal merger assessment. The paper examines the diverse perspectives of D23, with some perceiving it as a populist move sidelining economic rationale and others viewing it as an attempt to base decisions on factual grounds and enhance antitrust activism. The discussion emphasises the importance of precision in defining relevant markets within D23, a crucial element in merger assessment. This analysis sheds light on the evolving landscape of merger policy, prompting critical inquiries into the future trajectory of competition law.

Key words: *Merger guidelines. – Structuralism. – Concentration. – Relevant market. – Hypothetical monopolist.*

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*To abandon economic theory is to abandon the possibility
of a rational antitrust law.*

Robert H. Bork (1978, 117)

1. INTRODUCTION

This paper focuses on US Merger Guidelines – a sophisticated intersection of the law and the economics of competition. It is worth noting that Robert H. Bork was a lawyer by profession and is considered one of the contributors of intellectual DNA to the Chicago School of Antitrust, despite spending most of his academic career at Yale University. The foundations of this school of antitrust policy have been shaken seriously in the age of rising populism. The words of Robert Bork at the beginning warn about what can happen to antitrust if the vision of it becomes one-sided.

On 19 July 2023, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) released a draft version of the Merger Guidelines (D23, for simplicity)¹ for public review and comment. It is worth noting that the draft version of the guidelines covers horizontal mergers (concentrations), as was previously the case, but can also apply to non-horizontal mergers (vertical and potentially conglomerate ones). While control of vertical concentrations is regulated by separate guidelines (at least until D23 is adopted), conglomerate concentrations traditionally have not attracted the attention of American antitrust authorities. This negligent attitude could be subject to radical change when D23 becomes an official document.

Notably, the draft version of the upcoming guidelines represents a significantly different approach to merger control from the 2010 guidelines. This is most likely the reason why, at the time of writing this text, there is an extremely intense, almost epic, discussion among policy stakeholders about whether the proposed Merger Guidelines is a step forward or a step backwards, to the 1968 roots, in various aspects and as a whole.²

1 The draft version of 2023 Guidelines is available at www.justice.gov/atr/d9/2023-draft-merger-guidelines (last visited 20 October 2023). Additionally, all previous versions of the guidelines are available on the same webpage.

2 For critical reviews of the draft version of the Guidelines, see the Stigler Center's website ProMarket (<https://www.promarket.org>, last visited 25 October 2023), with contributions by notable figures such as Herbert Hovenkamp, Steven Salop, Fiona Scott Morton, Dennis Carlton, Eleanor Fox, and Carl Shapiro. Eric A. Posner and John Kwoka notably defend the approach outlined in D23, which is unsurprising considering their involvement in its creation.

The first published guidelines in the field were the US Merger Guidelines from 1968. They underwent significant revisions in 1982, 1992 and 2010, and minor amendments in 1984 and 1997. If the 2023 document is adopted, it will mark the seventh iteration in this multi-decade series. It is a fact that each new version of the guidelines has always been a manifestation of accumulated knowledge and experience in the enforcement of antitrust law by the US agencies responsible for merger policy (DOJ and FTC). According to Farrell and Shapiro (2021) '[e]ach iteration of the merger guidelines has reflected the economic thinking of the day ... also has made a substantial impact on merger enforcement and the development of antitrust law.' In other words, every new iteration of the guidelines signifies a more profound understanding of merger policy issues, pinpointing gaps between enforcement practices and the economic logic of the guidelines and antitrust's willingness to adopt innovations that address these gaps.

Consequently, Carlton (2010) observes that 'it is desirable to update and improve the Guidelines to reflect developments in merger analysis over recent years as well as changes in the types of issues that the agencies face in reviewing mergers.' Indeed, the new versions of the guidelines are more the result of evolutionary rather than revolutionary changes. Even after the changes, they must remain a helpful tool for agencies to explain their intentions and actions to the business community, their consultants, relevant courts, and the general public, i.e., all stakeholders of this policy.

The attempt of D23 to unify the approach to all forms of concentrations in one-sided and multi-sided markets is subject to debate, but it is beyond the scope of this work. Therefore, this paper's discussion will focus only on the changes that directly concern horizontal mergers of sellers in traditional (one-sided) markets.

The attention of the general public (not just the American one) is fixed on the process of drafting these guidelines, their content, and the potential consequences of their implementation. Once adopted, these guidelines will represent the official stance of US antitrust agencies towards corporate mergers, whether horizontal or non-horizontal. This has been covered through 13 guidelines that cover the distinctive market environments in which mergers can occur.

Whether D23 justifies the expectations rightly placed on it is a matter of significant contention, as evident from the reviews and comments provided by the most prominent thinkers in this field after the draft was made available for public review and commentary. On the one hand, some words go so far as to characterise D23 as a manifestation of the Biden administration's populist approach to almost everything, including antitrust. They see it as

an expulsion of economic rationale from this area of law, portraying it as a tool for combating Big Tech companies that use acquisitions to consolidate their market and consequently political power.³ On the other hand, there are comments positioning D23 as an attempt to push the guidelines into the framework of law where conclusions are based on facts, as is the case in other areas of law. Proponents of this view argue that it will enable greater activism in merger policy. Even small mergers will be blocked if planned in significantly concentrated markets, since it is believed they carry the ‘risk’ to substantially lessen competition. One of the key arguments in this second group of opinions is that the United States has been affected by increasing concentration levels in some crucial markets. This is a trend that antitrust policy evidently cannot prevent based on the consumer welfare standard.⁴ Apparently, consumers are not the only ones this policy should protect from the market power consolidation resulting from mergers and acquisitions.

One of the significant changes revolves around what appears to be a shift in the goal of merger policy and how agencies aim to achieve it. This fundamental shift has, in fact, served as the basis for all adjustments to D23 compared to the 2010 guidelines. These adjustments are subject to criticism, thus providing the reason for the discussion in this paper.

In brief, the substantial lessening of competition is assessed through the lens of economic efficiencies (allocative, productive, and dynamic) caused by mergers and how they impact consumer welfare. For example, an increase in prices, accompanied by a rise in willingness to pay due to innovations, may be reason to approve a merger that can unlock such innovations.

In D23, it is evident that the consumer welfare standard is being abandoned, while the risk of substantial lessening of competition can arise due to the predicted impact of mergers on the metrics of market concentration. Such metrics used to be just a preliminary indication in assessing the merger effects, i.e., one of the reasons to challenge the proposed merger. Conversely,

3 Ilić (2022) provides a profound discussion on the rise of populism in antitrust policy, directed by the New Brandeis movement in antitrust and the departure from the Chicago School, based on the consumer welfare standard. A critical review of the “Klobuchar Bill” is central to this discussion. It is worth noting that this legislation immediately preceded the draft version of the Merger Guidelines.

4 Shapiro (2018) refutes the relevance of such claims for competition law. First, most of these empirical pieces of evidence are not based on the relevant metric of market concentration. Second, in most cases, the concentration level remains below the threshold that triggers antitrust policy concerns. Finally, the first and the second points become irrelevant if the increase in concentration over time is not observed in relevant markets but at the level of entire sectors of the US economy, as it is irrelevant from an antitrust perspective.

in D23, the ‘risk’ indicated by concentration metrics seems equivalent to the ‘certainty’ that a merger will substantially lessen competition and should be blocked. Reasoning based on market shares might be more likely to block a merger than expected economic efficiencies would be able to enable it.

Criticism of D23 does not only come from the academic community and antitrust practitioners. The wave of reactions in the business community can be described as timely and significant. For example, the draft guidelines prompted five global pharmaceutical giants (AbbVie, Amgen, Gilead, Merck, and Novartis) to join forces with 26 other leading companies from the pharmaceutical sector to form a ‘coalition’ to oppose the proposed changes in the guidelines. In short, the pharmaceutical sector’s resistance primarily revolves around the rise of the structuralist approach and neglect of the importance of the driving force of this industry – innovations (CPI, 2023).

Moreover, since structuralism has likely made a comeback, it is worth considering the role of the relevant market in D23. If the metric based on market shares is back in focus, it is undeniable that these shares must be relevant, which means they come from a precisely defined antitrust market.

The rest of the paper is organised based on the premises mentioned above. In addition to the introductory section, the three main sections shape the primary discussion. The first section explores the range of structuralist reasoning in D23. The second section examines D23’s approach to the definition of the relevant market, while the third brings concluding remarks caused by the discussion presented in the paper. The Appendix at the end of the paper serves to lock the elements of the microeconomic analysis underlying the structuralist paradigm.

2. A TURN TOWARDS STRUCTURALISM

The draft version of the 2023 Guidelines seemingly abounds with structuralist reasoning. This is notably evident in essential guidelines concerning horizontal concentrations, particularly guidelines G1–G3 and G8, representing the firmest positions within the draft version. These guidelines undeniably echo traditional structuralist perspectives.

- (G1) Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.
- (G2) Mergers Should Not Eliminate Substantial Competition between Firms.

- (G3) Mergers Should Not Increase the Risk of Coordination.
- (G8) Mergers Should Not Further a Trend Toward Concentration.

It should be noted that the crucial guidelines affecting horizontal mergers begin ominously with ‘Merger Should Not...’. It also states, ‘[t]hese guidelines are not mutually exclusive... the Agencies may limit their analysis to any one Guideline or subset of Guidelines’. In other words, mergers incompatible with any guideline could be blocked, as this ‘may’ result in a substantial lessening of competition or cause the ‘risk’ of substantial lessening of competition. The frequency of the word ‘risk’ appearing in D23 in the context of a substantial lessening of competition is notable, which is not the case in the 2010 guidelines. This may indicate a more stringent stance by agencies towards mergers and acquisitions. ‘Risk’ is less than ‘certainty’, but enough to block a merger. How much risk is needed to block horizontal mergers? The answer seems to be based on structuralist reasoning, where it is not necessary to challenge the merger based on its perceived effects.

D23 does not address the assessment of unilateral effects, although it was central in the 2010 guidelines. The shift towards a structuralist approach seems evident. In G1, this position is overly apparent. Significant mergers in highly concentrated markets are not permitted, even though such significant mergers could be relatively small. Clearly, we have to conduct a detailed examination of G1 and other listed guidelines. Before that, let us illuminate the logic behind this seemingly abandoned approach in antitrust.

2.1. The Logic Behind Structuralism

The roots of structuralism or the SCP (Structure-Conduct-Performance) approach are associated with the work of Edward S. Mason (Mason 1939; Mason 1949) and his colleagues at Harvard University. This research significantly changed industrial organisation, incorporating premises from microeconomic analysis. One of the standard definitions of the SCP approach is ‘[i]n the SCP paradigm, an industry’s *performance* [P]—its success in producing benefits for consumers—depends on the *conduct* [C] or behavior of sellers and buyers, which depends on the *structure* [S] of the market’ (Carlton, Perloff 2015, 270).

A limited number of cross-sectional studies confirmed this causality, especially those related to the work of Joe Bain (Mason's student) in the 1940s and 1950s.⁵ It is notable that Bain conducted his research not within the boundaries of antitrust markets but within entire industries. However, competition law is only applicable within the relevant antitrust market.

Therefore, S affects C , and C causes P . Assuming that the relations are transitive, C can be omitted from the chain, allowing causality to be directly established between S and P . This is often done, especially to enforce competition law. The structure is defined by basic market conditions – available technology and product demand. The number and size of market participants can further simplify this structural representation. This simplification, based on market shares and concentration metrics, operationalises the SCP approach in competition law.

It appears that the behaviour of market participants, as materialised in the Nash equilibrium in quantity games, perfectly represents the application of the structuralist approach. Cowling and Waterson (1976) give the example of a general oligopoly model with homogeneous products and quantity competition among N oligopolists that establish a connection between market structure metrics and the average market power in the oligopoly market (L) [L represent a weighted sum of Lerner's indexes of all N oligopolists],

$$L = \frac{H}{|\varepsilon|} (1 + \mu). \quad (1)$$

Based on the previous expression, for a given μ representing conjectural variations that define the type of quantity game,⁶ it can be noted that L is positively correlated with the value of the Herfindahl–Hirschman index (H). In contrast, it is negatively correlated with the price elasticity of market demand. Additionally, if constant marginal costs are assumed for all oligopolists, expression (1) would be equivalent to

$$\frac{\Pi + F}{R} = \frac{H}{|\varepsilon|} (1 + \mu), \quad (2)$$

where Π , F , and R are aggregate measures representing profit, fixed costs, and revenue, respectively. From a static perspective, for a given μ , average market power and aggregate producer surplus are positively correlated

⁵ See Bain (1959), which presents the most significant findings from cross-sectional analyses of various sectors of the US economy.

⁶ The exact meaning of the parameter μ is explained in the Appendix at the end of the paper.

with H and negatively correlated with $|\varepsilon|$, aligning with the logic behind the structuralist paradigm and the messages conveyed by D23. This gives the chain of Structuralist reasoning in antitrust

Increasing market concentration → enhanced average market power → increasing likelihood of its utilisation → substantial lessening of competition.

In other words, a higher concentration is undesirable from an antitrust perspective, which is the position unequivocally advocated by D23, establishing a direct link between market concentration and the substantial lessening of competition (particularly highlighted in guideline G1). Starting from the premise that the American antitrust policy traditionally follows a consumer welfare standard, which glorifies both static and dynamic economic efficiencies, it becomes apparent that an increase in market concentration is detrimental to welfare, particularly consumer welfare.⁷

The relationship between market welfare (W), i.e., the difference between gross consumer surplus and production costs, and market concentration (H) can be inverse, assuming Cournot competition among N symmetric oligopolists with constant average costs. In this case, increasing the number of oligopolists enhances welfare, and vice versa. However, this is highly rigid scenario.

Therefore, let us take it a step further, as in the seminal works of Farrell and Shapiro (1990a, 1990b). Suppose $\mu = 0$, in line with Cournot competition (see Appendix), the workhorse of antitrust policy. Under the reasonable assumption that horizontal mergers lead to changes in the output vector of all individual firms' production, a merger results in a positive shift in total welfare ($dW > 0$) if

$$\frac{dX}{X} + \frac{1}{2} \frac{dH}{H} > 0. \quad (3)$$

In the described context, the condition is met if the relative changes in aggregate output (dX/X) and market concentration (dH/H) have the same sign.⁸ In other words, for any relative change of aggregate production (X), there is a higher likelihood that welfare will increase if concentration increases due to a merger. This might sound counterintuitive from the standpoint of the structuralist philosophy supported by expressions

⁷ The emphasis on dynamic efficiencies, rooted in producer surplus and innovation, moves the consumer welfare standard closer to a static conception of welfare. See Bishop, Walker (2002, 25–27).

⁸ The Appendix contains derivation of equations 1, 2, and 3.

(1) and (2). In Cournot equilibrium, larger firms are more efficient than smaller ones, meaning larger firms have relatively lower marginal costs. Based on this fact, if part of the production of a fixed aggregate output X shifts from smaller to larger firms, welfare will increase simultaneously with market concentration. In other words, a merger of two differently efficient firms (smaller and larger) will increase market concentration as well as welfare in the oligopolistic market. Farrell and Shapiro (1990a) stated, '[g]iven the complex relationship between concentration, output, and welfare, a careful analysis of the welfare effects of mergers is badly needed'. This perspective does not align with the *per se* approach in considering the relation between market concentration and market performance.

Nevertheless, Mason (1939, 63), as the pioneer of structuralism, warns, '[i]n a society in which size is popularly considered a menace, the large firm must consider carefully the probable reception of its price and production policies by public opinion and political agencies'. Does D23 consider firm size to be a menace?

2.2. Structuralist Words in the Draft Guidelines

The link between structure (market concentration) and performance can be observed in expressions (1) and (2). The lesson is that big is necessarily bad; therefore, high concentration will lead to a substantial lessening of competition. Thus, 'many researchers, after finding a link between high profits ... and high concentration ratios, infer improperly that high concentration rates are bad because they "cause" high profits' (Perloff, Karp and Golan 2007, 33). It is considered that high profits can indicate the exercise of market power or even the presence of collusive behaviour. In contrast, expression (3), based on the same non-cooperative conduct as (1) and (2), contradicts this structuralist reasoning.

It is also essential to consider at least two key factors affecting previous conclusions. First, equations (1) and (2) represent equilibrium relationships that hold simultaneously in the described oligopolistic market. It turns out that simultaneously, S influences P , but P also affects S . This mutual interdependence is not a causal relationship based on structuralist reasoning; instead, it is a theoretical construct necessary to derive the closed-form solution to the oligopolistic game. At the same time, structuralism implies 'causality', a concept empirically examined by Joe Bain. Indeed, the idea strongly suggested by equations (1) and (2) can form the basis for empirical testing of the causality between market concentration

and the average profitability of the oligopoly market.⁹ This approach offers a way for empirically establishing the link between structure and performance, making the knowledge of *C* unnecessary. However, if structural variables are not exogenous in an empirical model, it might be, for instance, that high concentration causes high profits, but conversely, long-term entry barriers cause both high concentration and high profits. In such circumstances, concluding that market performance can be based on any market concentration metric would be erroneous. Finally, the findings of such empirical research are not relevant for the antitrust standpoint if they do not use data specific to a precisely defined relevant market.

Moreover, by excluding *C* from the SCP framework, some argue directly that high profits in highly concentrated markets indicate collusive behaviour. Building on the insights from Stigler (1964), some go even a step further, contending that *H* can be derived from general arguments on the probability of successful collusion. Accordingly, the Herfindahl–Hirschman index, standing on its own, can function as an indicator predicting the likelihood of collusive behaviour. As we have seen, this may not be a general case if we delve into the nature of oligopoly conduct. Dominant players (those with colossal market shares) could be more efficient than smaller ones, who might exit the market primarily due to pro-competitive, Darwinian arguments. However, ‘difficulty rests on one fundamental fact: we do not have a generally acceptable theory of oligopoly’ (Stigler, 1966). Even nowadays, Stigler’s words seem relevant since *H* pretends to be overused in antitrust.

Secondly, most behaviours in oligopolistic markets, even those selling homogeneous (undifferentiated) products, are not quantity-based. For instance, in the case of price competition models or differentiated products, the relationship indicated by equations (1) and (2) would not hold. Moreover, it should be noted that equation (3) contradicts the standard structuralist viewpoint, even though it is derived from the special case of quantity games.

D23 does not establish a connection between structure and performance but rather directly between structure and substantial lessening of competition. Ultimately, the focus of D23 is not on market power and its potential exercise leading to substantial lessening of competition. For instance, the term market power appears 35 times in various contexts in the 2010 guidelines, while it only appears five times in the draft version. The statute term “substantial lessening of competition” appears 118 times in the

9 We refer to Perloff, Karp and Golan (2007, 27–28) and Davis and Garcés (2010, 292–295) for the issues regarding the empirical testing of the causation between structure and performance.

draft guidelines, while only 6 times in the 2010 guidelines. Structure directly influences the agencies' decisions, thus bypassing conduct and performance. To some extent, this aligns with the statute tone embodied in Section 7 of the Clayton Act.

Suppose the structure can directly indicate a substantial lessening of competition without considering the market power. In that case, a crucial question arises: how does D23 perceive competition in the first place? If the standard shifts away from consumer welfare and the associated considerations of market power and economic efficiencies, competition seems to most resemble rivalry (refer to guideline G2). The task of antitrust policy then becomes to preserve this rivalry, i.e., to maintain the established market structure, even when significant dynamic efficiencies are expected due to its change.

Until D23, US antitrust was widely believed to follow the consumer welfare standard primarily associated with the Chicago School of Antitrust, a philosophy that undoubtedly extended beyond US borders.¹⁰ Bork (1978, 7) argues '[a] consideration of the virtues appropriate to law *as law* demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare.'

Over time, it became clear that the Substantial Lessening of Competition (SLC) test, derived from Section 7 of the Clayton Act (1914), aims to predict whether a merger will diminish or enhance consumer welfare. Generally, any merger that leads to a positive shift in consumer welfare (which may involve cheaper, higher quality, and more innovative products) is not considered harmful from this point of view.

Therefore, even a merger that creates or strengthens a dominant position (and consequently increases market concentration) can be approved if it is determined to bring about precious dynamic efficiencies. If a post-merger price increase results from innovation, i.e., increased willingness to pay for an innovative product, the consumer welfare standard will be satisfied, as will the SLC test (as seen in the 2010 guidelines). The phrase 'from hedgehog to fox' was used by Shapiro (2010) to describe the orientation of the 2010 guidelines towards assessing the effects of concentrations (unilateral and coordinative effects) rather than relying on market shares. Reflecting on this phrase, Valletti and Zenger (2021) observe, '[w]hereas the hedgehog knows one big idea (market shares), the fox knows many different ideas: the variety of economic tools that are tailored to different market environments

¹⁰ Regarding the goal of competition law in the European context, refer to Bishop and Walker (2002, 25–27).

as described in the Guidelines'. Is D23 a hedgehog or a fox? The answer critically depends on to what extent the final decision in merger cases can be based on market shares.

In the explanation of Guideline G1 (Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets), it states

'A merger causes undue concentration and triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly when it would result in a highly concentrated market and produce an increase in the HHI of more than 100 points. The Agencies also may examine the market share of the merged firm: a merger that significantly increases concentration and creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration.'

The term 'highly concentrated market' refers to a market where H , the Herfindahl–Hirschman Index (HHI), exceeds 1,800 after the merger. A significant increase in concentration implies an increase in H (Δ) greater than 100. This means that a merger can be prohibited solely on structural considerations, without effects-based analysis, nor considering economic efficiencies or other factors that might positively impact competition, when we have

– post-merger H greater than 1,800 AND Δ greater than 100

OR

– merged Firm's Market Share greater than 30% AND Δ greater than 100.

Compared to the 2010 guidelines, the threshold for a highly concentrated market has been lowered from 2,500 to 1,800. Despite considering other factors, this change indicates a more restrictive stance of the draft guidelines towards horizontal mergers. Several hypothetical examples in Table 1 demonstrate the restrictiveness of the thresholds set in G1.

Table 1. Alternative distributions of market shares.

Distribution	A	B	C	D	E
Market share (%)	70	40	30	51	10 firms with 10% market share
	14	40	25		
	10	10	15	49 firms with 1% market share	
	6	10	10	5 firms with 4% market share	
Pre-merger <i>H</i>	5,232	3,400	1,930	2,650	1,000
Delta*	(120; 1,960)	(200; 3,200)	(32; 1,500)	(2; 102)	200
Post-merger <i>H</i> *	(5,352; 7,192)	(3,600; 6,600)	(1,962; 3,430)	(2,652; 2,752)	1,200
Merged Firm's Market Share (%)*	(16; 84)	(20; 80)	(8; 55)	(2; 52)	20

* The values provided represent minimum or maximum possible thresholds (min, max) based on hypothetical two-firm mergers.

It turns out that a ‘delta’ greater than 100 is a necessary but not sufficient condition for triggering the structuralist mechanism to block mergers. Moreover, it would be ‘sufficient’ if such a merger results in a high concentration zone or the participants’ share exceeds 30% of the relevant market.¹¹ Based on this straightforward rule, all mergers involving two firms are allowed within distribution E. Conversely, no combinations would be permitted in distributions A and B. It is worth noting that oligopoly structures C and D contain so-called competitive fringe (firms with insignificant market shares of 4% and 1%, respectively). However, their mergers with leading market players would not be allowed. The top three market players in distribution C cannot merge, not even with the fringe firms. Also, in distribution D, the dominant company is blocked from acquiring participants with a 1% market share. According to G1, the risk of substantial lessening of competition is caused unequivocally by increased

¹¹ The standard Guidelines logic still holds: the newly merged entity’s market share is determined by adding the merging parties’ market shares.

market concentration. As stated in D23 ‘[i]n highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition.’

Guideline G2 (Mergers Should Not Eliminate Substantial Competition between Firms) should not be based on market shares but on the significance of the competition among the merging parties. Nevertheless, let us carefully read the following passage from D23.

‘Focusing on the competition between the merging parties can reveal that a merger between competitors may substantially lessen competition even where market shares are difficult to measure or where market shares understate the competitive significance of the merging parties to one another.’

Unlike G1, which can be considered a standalone guideline, G2 is subordinate to G1. If a merger does not pass G1, there is no need to consider G2. However, if it passes the structuralist filter set in G1, it does not necessarily mean it will pass G2. When is G2 applied? As it turns out, ‘where market shares are difficult to measure or where market shares understate the competitive significance’. Two points in the previous sentence deserve close attention. First, if the relevant market is well-defined, calculating market shares is a matter of routine. Therefore, it would probably be more accurate to say ‘where it is impossible to precisely define the relevant market’ instead of ‘where market shares are difficult to measure’. In any case, in situations where obtained market shares are not a precise metric of how the market pie is distributed, G1 cannot be applied either. However, a question arises: how can we have a reliable merger assessment in cases where the market shares of relevant players cannot be calculated? Unlike the first observation, the second, as we will see, is not so trivial. Secondly, the part that states ‘where market shares understate the competitive significance’ is the crucial idea of the G2 guideline. It turns out that G2 serves as a corrective factor for G1, at least for those cases that pass through the structuralist filter set by G1, such as, hypothetical mergers within distribution E (Table 1) that satisfy G1.

Guideline G3 (Mergers Should Not Increase the Risk of Coordination) pertains to the assessment of the risk of coordinated merger effects. At its core, the consideration of coordinated effects is based on the simple economic logic that it is easier for fewer market players than more to form cartel agreements. Or, as stated by Stigler (1964), it is a fact that collusion is impossible in the case of many firms. Also, similar-sized firms can more easily reach agreements than when significant asymmetry exists. Logic coincides with the metric of market concentration. For this reason, one of the critical factors in evaluating the satisfaction of G3 is stated as ‘[m]arkets

that are highly concentrated after a merger that significantly increases concentration ... are presumptively susceptible to coordination'. Therefore, all mergers within distributions A and B, besides being per se blocked under G1, could also be subject to the prohibition under G3. However, G3 goes a step further by stating

'Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market with an HHI above 1,000, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.'

Even mergers within distribution E (Table 1) could be suspect regarding coordinated behaviour. It overwhelmingly appears that G3 represents an additional structuralist sieve placed beneath G1.

Finally, Guideline G8 (Mergers Should Not Further a Trend Toward Concentration) points out the harmful nature of mergers occurring in markets with a pronounced trend of increasing concentration. For instance, if concentration measured by the Herfindahl–Hirschman Index shows a rise over time, approaching the threshold of 1,800, any merger that contributes to an increase in concentration by more than 200 can be considered to substantially lessen competition, even if it aligns with Guideline G1. Therefore, D23 states, '[t]he effect of a merger may be substantially to lessen competition or to tend to create a monopoly if it contributes to a trend toward concentration'. This notably resembles a stricter version of the guidelines, relative to those from 1968, which stated, '[t]he Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration'. The need for closer scrutiny of a merger and the label suggesting that a merger substantially lessens competition carry significantly different implications. The first implies the rule of reason approach, while the following means per se prohibition. Indeed, G8 seeks to establish circumstances under which horizontal mergers would lead to a substantial lessening of competition, even in situations where post-merger H is below 1,800.

While G1 is explicitly a structuralist guideline, G2, G3, and G8, in addition to structuralist instructions, contain other criteria for merger prohibitions. Generally, if a horizontal merger is prohibited based on G1, the other three guidelines do not need to be considered. However, the reverse does not hold: if a merger passes the structuralist scrutiny posed by G1, it does not mean it automatically satisfies G2, G3, or G8.

If agencies become consistent in applying the structuralist filter, pressure on the definition of the relevant market will be significant. In an arbitrarily defined market, the structuralist filter becomes a potent tool in the hands of antitrust agencies. Therefore, the draft guidelines approach to defining the relevant market is also worth considering.

3. THE ROLE OF RELEVANT MARKET DEFINITION

Before the 2010 guidelines, the definition of the relevant market was established as an indispensable part of the merger assessment procedure, actually its first step. The 2010 guidelines make a significant deviation in that regard. Notably, they allowed for cases where the relevant market did not need to be specified, if the assessment of the merger effects could be conducted directly. Numerous criticisms were directed at such a radical shift. Gregory Werden's (2013) commentary on Louis Kaplow's paper, 'Why (Ever) Define Markets?' (Kaplow, 2010), illustrates the controversy surrounding the role of market definition in horizontal merger assessment. In brief, defining the relevant market gives structure and content to this policy. At least for the time being, this is the only way the business community, courts, lawyers, and other stakeholders can understand the logic and consequences of this policy. Posner (2001, 147) emphasises the importance of defining the relevant market by saying

'The importance that antitrust law attaches to defining a market is another consequence of the law's failure to have developed an approach at once genuinely economic and operational to the problem of monopoly. If we knew what would happen if a group of sellers raised their prices—if we knew how rapidly the price increase would be undone by the response of other sellers—it would be redundant to ask whether the group constituted an economically meaningful market.'

Indeed, at least where the definition of the relevant market is necessary, the 2010 guidelines remained faithful to the 'philosophy' established by the hypothetical monopolist test. This test measures how much demand substitution is needed for product B to be included with product A in the exact market definition, or territory X to the adjacent territory Y, since demand substitution, in itself, lacks the wisdom to specify the boundaries of the relevant market.

On the other hand, according to D23, defining the relevant market should at least implicitly be imperative in cases of horizontal mergers, considering the described structuralist foundation behind the guidelines. In other words, it would be expected that this structuralist nature places considerable importance on defining the relevant market in a way that minimises arbitrariness. It turns out that following the criteria imposed by the hypothetical monopolist test is crucial. Typically, this leads to the narrowest market worth monopolising. Therefore, if conclusions are drawn based on the structuralist filter, precision in defining the relevant market is implied. As Devlin (2021, 76) state

‘Concentration in a well-defined antitrust market is relevant. But it is relevant only because it serves as an imperfect proxy for causal factors like diversion ratios and consumer preferences.’

How does D23 envisage the definition of the relevant market? It turns out, quite expectedly, that a step towards defining the relevant market is necessary (contrary to the 2010 guidelines). Still, there is no uniformity in the criteria to carry out that task. Therefore, Werden (2023) sees the attempt to define the relevant market in D23 as akin to the gerrymandering phenomenon. In other words, the market can be determined using different tools from case to case, since the abundance of criteria embedded in D23 allows for this. So far, the hypothetical monopolist test has been crucial for the definition. In contrast, D23 implies

‘The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to demonstrate the validity of a candidate relevant antitrust market.’

Any ‘tool’ can be used to define the relevant market, which significantly simplifies the job for agencies when handling cases. However, it creates an insurmountable problem: without a single criterion, it seems reasonable to ask what will happen if unsatisfied merging parties complain about market definition. Whose standard of reasoning will the competent court consider? Note that the traditional orientation of US courts is toward the hypothetical monopolist test. What ‘alternative’ tools does D23 envisage?

The first ‘tool’ in D23 is defined as follows:

- ‘Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to

identify the line of commerce and section of the country affected by a merger, even if the precise metes and bounds of the market are not specified.’

This ‘tool’ coincides with Guideline G2, defining the market based on the substantial intensity of competition among the merging parties. Players feeling competitive pressure should indeed be part of the same relevant market. However, it is not only the merging parties that define the market. Applying such a tool would not pose a problem in determining the relevant product market in a homogeneous product market. However, if companies A and B – which produce goods of the same names that are not perfect substitutes – merge, product C, which is a closer substitute for product A than product B is for A, could be left out of the definition. This neglects the so-called *circle principle* from the 2010 guidelines, when defining the relevant market. Ignoring product C leads to an unreasonably narrower market.

Indeed, it seems redundant to define the relevant market when merging parties face substantial competition. Such a merger ‘should not’ happen under G2 if competition between merging parties is substantial, even without precisely defining the relevant market. Finally, to be considered an accurate tool, it has to provide an answer to how intense the competition must be for products or territories to be part of the same definition. D23 does not provide an answer to this question.

The second ‘tool’ in D23 is as follows

- ‘Direct evidence of the exercise of market power can demonstrate a relevant market in which that power exists.’

Although market power is not a central focus in D23, it does appear within the context of tools for market definition. Unlike the first tool, this one appears vague, seemingly taken from the context of a hypothetical monopolist test, which it is not explicitly based on. The question arises: whose market power is being considered? Is it solely the merging parties’ market power, or does this assessment encompass a broader set of participants constituting the relevant market? If applied within the context of a hypothetical monopolist, the use of this tool would be apparent. In contrast, without the framework of the hypothetical monopolist, this tool cannot address how much market power is sufficient to consider the market boundaries well-defined in terms of product and geographic scope. D23 does not provide a clear answer to this question.

The third ‘tool’ derived from the *Brown Shoe* case¹² states

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

In this setup, this tool represents only a ‘practical indicia’ checklist that may suggest that certain products could be part of the same relevant market. These indicators are often referred to as the Brown Shoe factors. In practice, although not mentioned in the 2010 guidelines, agencies use them as complements to the hypothetical monopolist test, to support the definition of the relevant market. Since any of these indicators can serve as conclusive in D23, this tool becomes overly arbitrary, mainly if applied as a substitute for the hypothetical monopolist test. This checklist is not capable of addressing critical questions in defining market boundaries. How many indicators must justify the set boundaries, and what minimum intensity must they have to reasonably ensure that the market is not broadly or narrowly defined? Once again, D23 does not answer these questions; it simply states ‘[v]arious practical indicia may identify a relevant market in different settings’.

In general, the common characteristic of all three mentioned tools is that they do not indicate a criterion based on which the boundaries of the relevant market are set. Consequently, D23 does not comply with principles such as the *circle principle* and the *smallest market principle*. The latter suggests choosing the narrowest available definition that satisfies the criterion. The absence of the smallest market principle seems to push policy enforcement towards broad market definitions, which contradicts the earlier mentioned tendency of the first tool to establish the narrowest possible market around the merging entities. Only the correct application of the hypothetical monopolist test incorporates both criteria. By applying the first three tools, market boundaries can be defined in any way – ‘gerrymandering redux’ or ‘magic market delineation’, as Werden (2023) points out in his policy brief.

The fourth tool is well-known and the only one that can be labelled without quotation marks. Let us pay attention to how D23 defines it.

12 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

- ‘This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price.’

As stated in Werden (2023), it turns out that the hypothetical monopolist test achieved its generalisation. Specifically, it is not limited to the price version of the test, as has always been the case, considering that the test is derived from monopoly theory. Instead, the hypothetical monopolist is allowed, as a possibility, to worsen parameters other than price, such as quality, service, capacity investment, choice of product variety or features, and innovative effort. Thus, the famous SSNIP (Small but Significant and Non-transitory Increase in Price) test becomes just a special case of the more general SSNIPT test (SSNIP + T = worsening Terms along any dimension of competition, including price). What does this generalisation achieve? It turns out, it spoils the concise logic of the hypothetical monopolist test. According to Werden (2023) ‘[t]his generalization achieves nothing and is impractical’. D23 does not address how the hypothetical monopolist test runs in the case of the T shift; instead, it craftily inputs the price version of the test wherever there is a lack of practical explanation of how hypothetical monopolists behave. In D23 section Magnitude of the SSNIPT, it appears that T can be approached in various ways, depending on the specificities of the case under analysis. In fact, only SSNIP offers a sufficiently operational solution for conducting the test.

Regardless of which strategic variable is dominant, the source of market power is exclusively linked to the ability to set prices above marginal costs. Suppose two-sided markets; even in such extreme cases as the zero price on one side of the market, there must be another product on the other with a positive price, thus financing that zero price and creating significant market power. Also, suppose the exercise of market power involves a change in quality at an unchanged price; in that case, such a shift can have an equivalent change in price for the given quality. The hypothetical monopolist test does not require generalisation, as done in D23, but rather an adaptation of the price version of the test to the specificities of particular markets. Generalisation only drops the criterion that the test establishes.

4. CONCLUDING REMARKS

The United States is the cradle of antitrust policy. Important innovations in competition protection that the US adopts usually spill over to all other respectable jurisdictions, with some delay. The impact of US Merger

Guidelines is expected to be discussed worldwide, giving this topic an almost universal character. At least until the 2010 guidelines, changes in merger policy occurred evolutionarily rather than revolutionarily. In July 2023, the FTC and DOJ released a draft version of the Merger Guidelines (D23) for public review and commentary.

On various grounds, this paper expresses concerns that D23 represents a step backwards concerning horizontal merger control, compared to the previous official guidelines. The argumentation focuses on the fundamental pillars supporting such doubt – the return to structuralism and arbitrary definition of the relevant market. Additionally, this paper did not delve into the justification of linking horizontal and non-horizontal merger guidelines under one roof, nor did it address the content of the sections of D23 covering non-horizontal concentrations. This does not mean that the suggested policies governing non-horizontal concentrations perform flawlessly; they just fall outside the scope of this work.

D23 places particular emphasis on a well-established category within European competition law: the concept of a dominant market position, as outlined in Guideline 7 (Mergers Should Not Entrench or Extend a Dominant Position). Notably, the term ‘dominant position’ is mentioned as many as 32 times in D23, while it did not exist in the 2010 guidelines. Additionally, it can be observed that the concern of US agencies over conglomerate mergers is revived. Conglomerate mergers can transfer significant market power from one relevant market, where it exists, to another relevant market, where it did not exist before the merger. This is especially notable in circumstances involving complementary products. Substantial market power and a dominant market position go hand in hand. Its appearance in D23 seems logical if the guidelines aim to prevent harmful conglomerate mergers. Hence, the concept of dominant position opens the possibility to target those acquisitions that are ‘neither strictly horizontal nor vertical’, especially those conducted by Big Tech companies.

It turns out that the main shift in D23 is towards the structuralist approach, which the guidelines skilfully avoided in recent decades. The size of a company, measured by its market share, is one of the factors of the company’s market power, and as such, it becomes a decisive factor in determining whether a merger can be deemed harmful. For instance, mergers in highly concentrated markets, exceeding a modest delta of 100, are considered to substantially lessen competition. In the 2010 guidelines, market structure indicators could be regarded, at best, as a preliminary indication of the potential effects of horizontal mergers but by no means a fundamental criterion for decision-making. Additionally, D23 does not discuss market power and its role in creating unilateral effects. That is why

economic efficiencies seem unimportant in the decision-making process, as does the consumer welfare standard. Thus, the SLC test can be solely based on the market concentration metrics.

Structuralism itself does not offer flexibility. Structuralist filters, especially the ones that Guideline 1 promotes, are rather rigid from the business community's perspective, which is rightfully concerned about the potential implementation of D23 in the US economy.

Turning back to structuralism, or to the 'hedgehog' that knows one big thing (market share), may pose significant problems. In addition to being simple to apply, it is also very inflexible. A delta of 101 is not the same as a delta of 99. The problem is further compounded by the flexibility surprisingly offered in defining the relevant market – exactly where it should not be found. If we base our decisions on market shares, these shares should be relevant.

If the draft Guidelines come into effect, it is expected that the main interest of the policy stakeholders will revolve around market definition. While the mere application of per se structural rules, although often wrong, is at least simple to understand, the definition of the relevant market is left to a wide range of alternative criteria, adding to legal uncertainty. The hypothetical monopolist is just an alternative tool. In its generalised form, it becomes arbitrary in setting the boundaries of the relevant market, like all other 'tools' provided by D23.

Applying the structuralist approach to horizontal mergers with a flexible definition of the relevant market significantly facilitates agencies' work in expanding the set of mergers that create 'undue risk that the merger may substantially lessen competition' (D23), potentially increasing the restrictiveness of this policy. Trade-offs are unavoidable. The cost is a significant increase in the likelihood of Type I errors, which this policy has traditionally been most concerned about.

APPENDIX

The purpose of this Appendix is show the derivation of expressions (1), (2), and (3) related to the discussion in section 2.1. The model of quantity competition in the market for homogeneous products is shared by these three expressions.

Cowling and Waterson (1976) start from a general oligopoly model with homogeneous products and quantity competition. Section 2.1 shows that the oligopoly consists of N firms, each producing output X_i where $i = 1, 2, \dots, N$, so the total output in the industry is $X = X_1 + X_2 + \dots + X_N$. The inverse market demand function can be written as $p = p(X)$ and is twice differentiable, continuous, and positive in the domain where it is defined, ensuring that $p'(X) < 0$ always holds. Firms can have different efficiencies, so the variable costs of the firm i are denoted as $c_i(X_i)$, while F_i represents the fixed costs. Marginal costs are derived from this cost structure and are non-decreasing in X_i up to the firm's capacity. Therefore, the profit function for firm i can be written as

$$\Pi_i = p(X)X_i - c_i(X_i) - F_i. \quad (\text{A.1})$$

The first-order condition for profit maximisation is

$$p + X_i p'(X) \frac{dX}{dX_i} - c'_i(X_i) = 0, \quad (\text{A.2})$$

where

$$\frac{dX}{dX_i} = 1 + \frac{d\sum_{j \neq i} X_j}{dX_i} = 1 + \lambda_i, \text{ and } -1 \leq \lambda_i \leq \frac{X - X_i}{X_i}, \quad (\text{A.3})$$

so the first-order condition can be rewritten as

$$p + X_i p'(X)(1 + \lambda_i) - c'_i(X_i) = 0. \quad (\text{A.4})$$

The nature of quantity competition changes depending on the value of the parameter λ_i (conjectural variations) for each individual firm. The number of modalities in quantity interactions becomes infinite. Following Varian (1984, 102–103), we will focus on specific values within the mentioned range, indicating well-known models of quantity competition. If $\lambda_i = -1$ it implies competitive behaviour for firm i , which assumes that its output cannot affect the market price. It equates the market price it observes with its marginal cost when making its equilibrium decision. At the other end of the spectrum, for $\lambda_i = (X - X_i)/X_i$, collusive behaviour is at play, as expression (A.4) reduces to the condition for a perfect cartel equilibrium. Finally, for $\lambda_i = 0$, we have classic Cournot behaviour. In this case, each firm myopically believes that other firms will not change their output decisions, and a change of 1 unit in its output will lead to a 1-unit change in the total industry output.

Nevertheless, keeping the previous discussion in mind, by multiplying equation (A.4) with X_i , summing up such expressions for all N firms, and with further rearranging, (A.4) becomes

$$\sum pX_i + \sum \frac{X_i^2}{X^2} p'(X)(1 + \lambda_i)X^2 - \sum c'_i(X_i)X_i = 0. \quad (\text{A.5})$$

By dividing (A.5) with pX , where

$$\mu = \frac{\sum_{i=1}^N \lambda_i X_i^2}{\sum_{i=1}^N X_i^2} \quad (\text{A.6})$$

we obtain

$$\frac{pX - \sum c'_i(X_i)X_i}{pX} = - \sum \left(\frac{X_i}{X} \right)^2 \frac{p'(X)X^2}{pX} (1 + \mu). \quad (\text{A.7})$$

The left-hand side of equation (A.7) represents the weighted sum of the price-cost margins of all N firms or the weighted average of their Lerner indexes. The firms' market shares are used as weights. In a sense, this measures the average market power in the given oligopoly structure. The right-hand side of equation (A.7) can be reformulated based on the expression for the Herfindahl–Hirschman Index (H) and the price elasticity coefficient of market demand (ε). Thus, we get

$$\sum s_i L_i = L = \frac{H}{|\varepsilon|} (1 + \mu), \quad (\text{A.8})$$

or, by assuming constant marginal costs across all firms and equating them to the average variable costs, (A.7) can be written as

$$\frac{\Pi + F}{R} = \frac{H}{|\varepsilon|} (1 + \mu). \quad (\text{A.9})$$

On the other hand, the path to expression (3) can be constructed as in Farrell and Shapiro (1990a, 1990b), considering the change in total welfare in the relevant market resulting from the merger. Unlike the previous general discussion, the focus will be on the Cournot behaviour of market participants, implying that $\lambda_i = 0$ for all $i = 1, 2, \dots, N$, which means that $\mu = 0$. Under the reasonable assumption that the merger leads to changes in the vector of individual firms' outputs, and these changes for firm i can be represented as dX_i , the change in total welfare in the relevant market can be expressed as

$$dW = \sum_{i=1}^N [p - c'_i(X_i)] dX_i. \quad (\text{A.10})$$

Based on expression (A.4) and assuming that $\lambda_i = 0$, it turns out that in equilibrium we have $p - c'_i(X_i) = X_i p'(X)$. Therefore, (A.10) can be written as

$$dW = -p'(X) \sum_{i=1}^N X_i dX_i. \quad (\text{A.11})$$

For sufficiently small changes in output, dX_i , and with the definition of H , it is possible to approximate the sum on the right-hand side of the previous equation as

$$\begin{aligned} \sum_{i=1}^N X_i dX_i &= \int X_i dX_i = \frac{1}{2} d\left(\sum_{i=1}^N X_i^2\right) \\ &= \frac{1}{2} d(X^2 H) = XH dX + \frac{1}{2} X^2 dH. \end{aligned} \quad (\text{A.12})$$

Thus, it turns out that

$$dW = -p'(X) X^2 H \left(\frac{dX}{X} + \frac{1}{2} \frac{dH}{H} \right). \quad (\text{A.13})$$

Given that $p'(X) < 0$, while X and H are positive numbers by definition, it follows that $dW > 0$ if and only if

$$\frac{dX}{X} + \frac{1}{2} \frac{dH}{H} > 0. \quad (\text{A.14})$$

This completes the derivation of equations (1), (2), and (3), which are equivalent to expressions (A.8), (A.9), and (A.14), respectively.

REFERENCES

- [1] Bain, Joe S. 1959. *Industrial Organization*. New York: John Wiley & Sons.
- [2] Bishop, Simon, Mike Walker. 2002. *The Economics of EC Competition Law: Concepts, Application and Measurement*. London: Sweet & Maxwell.
- [3] Bork, Robert H. 1978. *The Antitrust Paradox: A Policy at War with Itself*. New York: Basic Books.
- [4] Carlton, Dennis W. 2010. Revising the Horizontal Merger Guidelines. *Journal of Competition Law & Economics* 6(3): 619–652.
- [5] Carlton, Dennis, Jeffrey Perloff. 2015. *Modern Industrial Organization*. 4th ed. Harlow: Pearson Education.
- [6] Cowling, Keith, Michael Waterson. 1976. Price-Cost Margins and Market Structure. *Economica*, New Series 43(171): 267–274.
- [7] CPI. 2023. Pharma Giants Unite Against Antitrust Overhaul, 5 October, https://www.pymnts.com/cpi_posts/pharma-giants-unite-in-defense-against-antitrust-overhaul/ (last visited 21 October 2023).
- [8] Davis, Peter J., Eliana Garcés. 2010. *Quantitative Techniques for Competition and Antitrust Analysis*. Princeton: Princeton University Press.
- [9] Devlin, Alan J. 2021. *Reforming Antitrust*. Cambridge & New York: Cambridge University Press.
- [10] Farrell, Joseph, Carl Shapiro. 1990a. Horizontal Mergers: An Equilibrium Analysis. *The American Economic Review* 80(1): 107–126.
- [11] Farrell, Joseph, Carl Shapiro. 1990b. Asset Ownership and Market Structure in Oligopoly. *The RAND Journal of Economics* 21(2): 275–292.
- [12] Farrell, Joseph, Carl Shapiro. 2021. The 2010 Horizontal Merger Guidelines After 10 Years. *Review of Industrial Organization*, 58: 1–11.
- [13] Ilić, Nikola. 2022. The Klobuchar Bill: Is Something Rotten in the US Antitrust Legislative Reform? *Annals of the Faculty of Law in Belgrade* 70(1): 101–120.
- [14] Kaplow, Louis. 2010. Why (Ever) Define Markets? *Harvard Law Review* 124(2): 437–517.
- [15] Mason, Edward S. 1939. Price and Production Policies of Large-Scale Enterprise. *The American Economic Review* 29(1): 61–74.

- [16] Mason, Edward S. 1949. The Current Status of the Monopoly Problem in the United States. *Harvard Law Review* 62(8): 1265–1285.
- [17] Perloff, Jeffrey M., Larry S. Karp, Amos Golan. 2007. *Estimating Market Power and Strategies*. New York: Cambridge University Press.
- [18] Posner, Richard A. 2001. *Antitrust Law*. 2nd ed. Chicago: University of Chicago Press.
- [19] Shapiro, Carl. 2010. The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years. *Antitrust Law Journal* 77(1): 49–107.
- [20] Shapiro, Carl. 2018. Antitrust in a time of populism. *International Journal of Industrial Organization* 61: 714–748.
- [21] Stigler, George J. 1964. A Theory of Oligopoly. *Journal of Political Economy* 72(1): 44–61.
- [22] Stigler, George J. 1966. The Economic Effects of the Antitrust Laws. *The Journal of Law & Economics* 9(1): 225–258.
- [23] Valletti, Tommaso, Hans Zenger. 2021. Mergers with Differentiated Products: Where Do We Stand? *Review of Industrial Organization* 58: 179–212.
- [24] Varian, Hal R. 1984. *Microeconomic Analysis*. 2nd ed. New York: W.W. Norton & Company.
- [25] Werden, Gregory J. 2013. Why (Ever) Define Markets? An Answer to Professor Kaplow. *Antitrust Law Journal* 78(3): 729–746.
- [26] Werden, Gregory J. 2023. Gerrymandering Redux: The Relevant Market under the Draft Merger Guidelines. *Policy briefs*, Mercatus Center. <https://www.mercatus.org/media/167276> (last visited 21 November 2023).

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