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Efficiencies in Merger Control – Note by the United States

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1. Introduction

1. The Antitrust Division of the U.S. Department of Justice ("DOJ") and the U.S. Federal Trade Commission ("FTC" or "Commission") (together, "the Agencies") submit this paper to describe how U.S. courts and the Agencies evaluate efficiencies claims when analyzing mergers.

2. The American economy depends in large part on an entrepreneurial spirit that embraces risk taking. American entrepreneurs and businesses fight to bring their ideas, goods, and services to the market. This entrepreneurial spirit has helped to create the largest and most innovative economy in the world. The competitive process typically drives firms to innovate and seek efficiencies on their own, but sometimes they engage in mergers or acquisitions to accomplish those goals. While the Agencies recognize that mergers are an important vehicle for the free flow of capital, they are committed to enforcing the antitrust laws. As the Agencies have recently explained, they will seek to block a merger when they believe it may substantially lessen competition, but if they do not, they will quickly "get out of the way" of the merger, allowing firms to develop new products and pursue whatever efficiencies can be generated by the merger.[1] Under this approach, Americans can expect greater prosperity and growth throughout the economy.

3. Although no court has ever found that efficiencies justified an otherwise anticompetitive merger, merging parties sometimes assert that efficiencies will prevent a lessening of competition. Thus, defendants may point to efficiencies to rebut a plaintiff's evidence that a merger is *prima facie* unlawful. When defendants have raised efficiencies arguments, the Agencies—when they review transactions—and U.S. courts after the Agencies file suit to block the merger subject these efficiencies claims to rigorous scrutiny, requiring them to be merger-specific, verifiable, passed through to prevent a reduction in competition in the relevant market, and of sufficient magnitude and likelihood such that no substantial lessening of competition or tendency to create a monopoly would be threatened in any relevant market.[2]

[1] Interview by Eamon Javers, CNBC, with Andrew Ferguson, Chairman, Fed. Trade Comm'n (Mar. 13, 2025), https://www.youtube.com/watch?v=GWYo_w_A_uU (see video at 4:20, explaining that the FTC will "get out of the way" of a proposed merger unless it believes it violates the antitrust laws"); Statement of Chairman Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak and Comm'r Mark R. Meador, *In the Matter of Synopsys, Inc./Ansys, Inc.*, Matter No. 2410059, at 2 (May 28, 2025), https://www.ftc.gov/system/ files/ftc_gov/pdf/synopsys-ansys-ferguson-statement-joined-by-holyoak-meador.pdf ("When a merger would not violate the antitrust laws, the Commission must get out of the way quickly to avoid bogging down innovation and interfering with the forces of a free and competitive market."); "DAAG Bill Rinner Delivers Remarks to the George Washington University Competition and Innovation Lab Conference Regarding Merger Review and Enforcement," June 4, 2025, Washington, DC, https://www.justice.gov/opa/speech/daag-bill-rinner-delivers-remarks-george-washington-university-competition-and ("Our primary mission is civil merger enforcement against the handful of mergers that are problematic, not civil merger deterrence generally.").

[2] *See, e.g., FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022); *U.S. v. Anthem, Inc.*, 855 F.3d 345, 353–54 (D.C. Cir. 2017) (courts have rejected efficiencies claims where "the merging parties had not clearly shown the merger would enhance rather than hinder competition"); *id.* at 369 (Millett, J., concurring) ("The proffered efficiencies, even if they are

4. The Agencies' Merger Guidelines ("Guidelines"), most recently revised in 2023, describe the analytical framework and specific standards that the Agencies normally use in analyzing mergers. For decades, courts have relied on the Agencies' merger guidelines when reviewing mergers, although the Guidelines are not binding on the courts.[3] Like previous versions of the Agencies' guidelines, the 2023 Merger Guidelines detail the criteria that must be met before the Agencies will recognize efficiency arguments. The approach described in the 2023 Merger Guidelines both reflect and incorporate longstanding case law as well as the Agencies' focus on transactions that pose the greatest risk to competition while avoiding interfering with transactions that are competitively neutral or may benefit competition.

2. Legal Framework

5. U.S. courts apply a three-phase burden-shifting framework when analyzing mergers under Section 7. First, the plaintiff bears the burden of establishing a *prima facie* case that the merger may substantially lessen competition or tend to create a monopoly.4 After plaintiffs have established a prima facie case that the proposed acquisition is illegal, defendants then bear the burden to rebut that prima facie case by producing "significant evidence,"5 which "mandate[s] a conclusion that no substantial lessening of competition" is "threatened" by the acquisition.6 The magnitude of the evidence that Defendants must produce to rebut plaintiffs' prima facie case depends on the strength of the likely adverse competitive effects of a merger. The stronger plaintiffs' prima facie case is, the heavier defendants' rebuttal burden becomes.7 Finally, if the defendants do rebut the government's prima facie case, the burden of producing additional evidence shifts back to the plaintiff, and merges with the ultimate burden of persuasion, which remains with the plaintiff at all

verifiable and merger specific, "must at least neutralize if not outweigh the harm caused by the loss of competition and innovation."); *Saint Alphonsus*, 778 F.3d 775, 791 (9th Cir. 2015) ("It is not enough to show that the merger would allow St. Luke's [hospital] to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the *prima facia* case is inaccurate."); *see also* U.S. Dep't of Justice and Fed. Trade Comm'n, Merger Guidelines § 3.3 (2023) (Merger Guidelines).

[3] *See, e.g., U.S. v. Aetna Inc.*, 240 F. Supp. 3d 1, 24 n. 7 (D.C. Cir. 2017) ("Although the [2010] Guidelines are not binding, the D.C. Circuit and other courts have looked to them for guidance in previous merger cases."); *FTC v. Kroger Co.*, No. 24-cv-347, 2024 WL 5053016, at *15 (D. Ore. Dec. 10, 2024) (citing 2023 Guidelines); *FTC v. Whole Foods*, 548 F.3d 1028, 1037 & n.1 (D.C. Cir. 2008) (citing 1992 guidelines); *see also* Memorandum from Andrew Ferguson, Chairman, Fed. Trade Comm'n, to FTC Staff, at 2 (Feb. 18, 2025) ("No business can plan for the future on the basis of guidelines they know are one election away from rescission, and no courts will rely on guidance that is so obviously partisan.").

[4] *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337–38 (2016).

[5] *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631–32 (1974).

[6] *U.S. v. General Dynamics*, 415 U.S. 486, 498 (1974).

[7] *ProMedica Health Sys., Inc. v. FTC,* 749 F.3d 559, 571 (6th Cir. 2014) (where plaintiff "did not merely rest upon the presumption, but instead discussed a wide range of evidence that buttresses it," that additional evidence "makes [defendants'] task more difficult still"); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 426 (5th Cir. 2008) (when plaintiff presents "very compelling" *prima facie* case that "anticipates and addresses [defendants'] rebuttal evidence," defendants' "burden of production on rebuttal is also heightened").

times.[8] If the result of the presentation of evidence is an "appreciable danger" of anticompetitive effects,[9] then Section 7 requires the court "to arrest [those] anticompetitive tendencies in their incipiency."[10]

6. U.S. courts, including the Supreme Court have not recognized efficiencies as a defense to an otherwise illegal merger.[11] The Supreme Court explained that "[p]ossible economies cannot be used as a defense to illegality" because "Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition."[12] Competition incentivizes firms to reduce costs, improve quality, develop innovative products and services, and optimize operations internally. Despite the Supreme Court's skepticism of the efficiencies defense, lower courts have considered evidence of efficiencies as part of a defendant's rebuttal of a plaintiff's *prima facie* case. Here, lower courts look for "proof that a merger is not, despite the existence of a *prima facie* case, anticompetitive" because "the *prima facie* case portrays inaccurately the merger's probable effects on competition."[13]

7. Courts and Agencies require merging parties to show that efficiencies meet four criteria to be legally recognized, or "cognizable." They must: (1) be merger-specific; (2) be verifiable, not speculative; (3) prevent the threatened harm to competition in the relevant markets; and (4) not arise from anticompetitive reductions in output or service.[14] These criteria are explained below.

2.1. Merger Specificity

8. For an efficiency claim to be considered, it must be "merger-specific, meaning that it cannot be achieved by either company alone."[15] U.S. courts require merger-specificity because otherwise, anticompetitive mergers might be allowed even when the benefits "can be achieved without the concomitant loss of a competitor."[16] Defendants bear the burden

[8] *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 983 (1990).

[9] *U.S.* v. *H&R Block*, 833 F. Supp. 2d 36, 49 (2011).

[10] *Phila. Nat'l Bank*, 374 U.S. at 362.

[11] *See Anthem, Inc.* 855 F.3d at 353–54; *see also St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783, 790 (9th Cir. 2015) ("We remain skeptical about the efficiencies defense in general and about its scope in particular.").

[12] *Procter & Gamble Co.*, 386 U.S. at 580; *see also Brown Shoe*, 370 U.S. 294, 344 (1962) ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.").

[13] *Id.* (quoting *St. Alphonsus*, 778 F.3d at 790).

[14] *See, e.g.*, *Hackensack Merdian Health, Inc.*, 30 F.4th at 176 (citing *Penn State Hershey*, 838 F.3d at 348–49).

[15] *Anthem*, 855 F.3d at 356 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001)); *FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 50530162023, at *21 (D. Or. Dec. 10, 2024); Merger Guidelines, § 3.3 at 32.

[16] *Heinz*, 246 F.3d at 722. Efficiencies are merger-specific if "they represent a type of cost saving that could not be achieved without the merger." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82 (D.D.C. 2015) (internal quotations omitted) (quoting *H&R Block*, 833 F. Supp. 2d at 89).

of demonstrating that the efficiencies are merger-specific.[17] This requirement stems, in part, from the fact that most of the information relating to efficiencies is in the possession of the merging firms.[18] Merging parties cannot claim credit for benefits that they could have achieved through alternative arrangements. The Guidelines explain that the Agencies will consider alternative ways of achieving the claimed benefits, for example, "organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies."[19]

9. For example, in *FTC v. H.J. Heinz Co.*, Heinz (a baby food manufacturer) defended its acquisition of a competitor by arguing that the acquisition would allow it to use the competitor's superior recipes.[20] The appellate court reversed the district court's finding that the efficiency was merger specific, because neither the district court nor the defendants had considered whether Heinz could have developed a comparable product without acquiring its competitor.[21] Similarly in *FTC v. Sysco*, the district court rejected efficiency claims because many of the purported cost savings could have been achieved through internal improvements or alternative arrangements that did not require the merger of the two largest U.S. food distributors.[22]

2.2. Verifiability

10. A defendant asserting efficiencies claims must "specifically explain . . . how [the claimed] efficiencies would be created and maintained."[23] For an efficiency to be verifiable, it must be "reasonably verifiable by an independent party."[24] To the extent that estimates of efficiencies are based on the subjective judgments of the parties, the Agencies and courts will not credit them.[25] "The difficulty in substantiating efficiency claims in a verifiable way is one reason why courts 'generally have found inadequate proof of efficiencies to sustain a rebuttal of the Government's case.'"[26] For example, general arguments about reducing "unnecessary duplication" and even quantitative estimates of

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[17] *Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *21 (citing *Sysco Corp.*, 113 F. Supp. 3d at 82).

[18] 4A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 970f; *see also Illumina v. FTC,* 88 F.4th at 1061.

[19] 2023 Merger Guidelines at 32.

[20] 246 F.3d at 722.

[21] *Id.*

[22] *Sysco Corp.,* 113 F. Supp. at 1.

[23] *FTC v. Univ. Health*, 938 F.2d 1206, 1223 (11th Cir. 1991); *see also Penn State Hershey*, 838 F.3d at 350 ("We . . . require that the [defendants] provide clear evidence showing that the merger will result in [the claimed] efficiencies . . . ."); *Heinz*, 246 F.3d at 721 ("[T]he court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior.").

[24] *H&R Block,* 833 F. Supp. 2d at 89.

[25] *See, e.g., id.* at 91 (finding that reliance on "managers experiential judgment" in calculating cost savings efficiencies rendered the claimed efficiencies not verifiable and therefore not cognizable); 2023 Merger Guidelines at 33.

[26] *Id.* (quoting *Heinz,* 246 F.3d at 720).

those duplications cannot verify claimed efficiencies.[27] The Agencies consider evidence generated prior to the merger challenge more probative than evidence developed during the Agencies' investigation or litigation. The longer it takes for an efficiency to be realized, the more speculative (and correspondingly, less verifiable) it is.[28]

2.3. Prevents a Reduction in Competition

11. Claimed efficiencies must be sufficiently large that they overcome the threatened harm to competition in the relevant markets.[29] Where the levels of market concentration are high, "proof of extraordinary efficiencies" is required to meet this bar.[30] In addition, defendants must show that the claimed efficiencies "would ultimately be passed on to consumers" in the relevant markets.[31] Moreover, any claimed efficiencies must be based on more than "speculative assurances that a benefit enjoyed by the [defendants] will also be enjoyed by the public."[32] Indeed, defendants must proffer "clear evidence showing that the merger will result in efficiencies that will . . . ultimately benefit consumers."[33] For example, in *United States v. Aetna*, involving the proposed merger of two of the largest health insurance companies in the United States, the district court rejected the merging parties' efficiencies defense in part because they had not demonstrated that savings resulting from the merger would be passed on to consumers as opposed to being retained by the merged entity.[34]

12. Merger efficiencies must provide benefits to competition in the relevant markets in which the harm is threatened.[35] U.S. law does not permit consideration of out-of-market

[27] *Univ. Health*, 938 F.2d at 1223; *see also Anthem*, 236 F. Supp. 3d at 243–49 (finding claimed efficiencies unverifiable despite expert testimony in support of the efficiencies).

[28] *See Anthem*, 855 F.3d at 360 ("The longer it takes for an efficiency to materialize, the more speculative it can be; *see also* Horizontal Merger Guidelines § 10 & n.15, so the district court was on solid ground to give less weight to the claimed renegotiation savings.").

[29] *Hackensack*, 30 F.4th at 176 (explaining that the "magnitude of the efficiencies needed to overcome a *prima facie* case depends on the strength of the likely adverse competitive effects of a merger"); *St. Alphonsus*, 778 F.3d at 791 (The "claimed efficiencies . . . must show that the prediction of anticompetitive effects from the *prima facie* case is inaccurate" and must offset harm to competition, as opposed to providing some other benefit); *Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *21 ("Finally, defendants must demonstrate that merger-specific and verifiable efficiencies will have a positive effect on competition.")

[30] *Heinz*, 246 F.3d at 720.

[31] *Penn State Hershey*, 838 F.3d at 351; *accord Anthem*, 855 F.3d at 362 (claimed efficiencies "only improve consumer welfare to the extent that they are actually passed through to consumers, rather than simply bolstering [defendants'] profit margin"); *ProMedica*, 749 F.3d at 571 (efficiencies arguments only cognizable when "merger would benefit consumers (as opposed to only the merging parties themselves)"); *Univ. Health*, 938 F.2d at 1223 (efficiencies must "ultimately . . . benefit competition and, hence, consumers" and therefore must be "passed on to consumers").

[32] *Penn State Hershey*, 838 F.3d at 351.

[33] *Id.* at 350.

[34] *Aetna* 240 F. Supp. 3d at 1.

[35] *See, e.g., Anthem*, 855 F.3d at 363–64 (rejecting cost savings efficiencies because they were based on a different market than the relevant market that was defined, so they were "unmoored from the actual market at issue"); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020) (crediting efficiencies that would "cause [the merged firm] to compete more vigorously with

merger efficiencies. The leading decision on this issue is *United States v. Philadelphia National Bank*,[36] in which the Supreme Court rejected the argument that two large Philadelphia-based banks should be allowed to merge notwithstanding a substantial lessening of competition in the market for commercial banking in the Philadelphia area, because on a combined basis the two banks purportedly would be able to compete better with New York banks in making loans to large corporations. According to the Supreme Court, "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another."[37] Lower courts have adhered to this principle.[38]

2.4. Not Anticompetitive

13. Efficiencies that themselves reduce competition or facilitate anticompetitive conduct cannot be used to rebut a *prima facie* case, even if they reduce costs or improve operations of the merging parties.[39] The Agencies do not recognize claimed benefits if they "result from the anticompetitive worsening of terms for the merged firm's trading partners."[40] For example, in *FTC v. Penn State Hershey Medical Center*, the appellate court found that abandoning premerger plans to build 100 additional hospital beds was a reduction in output and, therefore, not a cognizable efficiency.[41] Nor do the Agencies credit efficiencies if they reflect or require a decrease in competition in a separate market. For

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its rivals in the [relevant] Markets"). For a more detailed discussion, see the U.S. Submission for the OECD Competition Committee Roundtable on Out-of-Market Efficiencies (Dec. 2023).

[36] 374 U.S. 321 (1963).

[37] *Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963); *see also NCAA v. Alston*, 141 S. Ct. 2141 (2021) (applying Sherman Act to protect workers from an employer-side agreement to limit competition).

[38] *See Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1982) ("[T]he anticompetitive effects of an acquisition in one market cannot be justified by procompetitive effects in another market. Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law."); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) (projected public benefits from increased employment due to possible construction of new linerboard plant not a cognizable defense where merger would harm competition in separate market for corrugating medium); *U.S. v. Ivaco, Inc*., 704 F. Supp. 1409, 1427 (W.D. Mich. 1989) ("Procompetitive effects outside the relevant geographic market cannot be used to offset anticompetitive effects in the relevant market."); *United Nuclear Corp. v. Combustion Engineering, Inc.* 302 F. Supp. 539, 554–55 (E.D. Pa. 1969) ("It is simply not legally possible to permit a clear violation of the Clayton Act in one line of commerce in order to strengthen competition in another line of commerce."); *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958) ("A merger may have a different impact in different markets—but if the proscribed effect is visited on one or more relevant markets then it matters not what the claimed benefits may be elsewhere."); *see also Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023) ("One problem with [the district court's] approach is that it treats benefits to consumers (increased output) as justifying detriments to workers.").

[39] *Penn State Hershey*, 838 F.3d at 349 (efficiencies "must not arise from any anticompetitive reduction in output or service."); *Hackensack*, 30 F.4th at 176; *Aetna*, 240 F. Supp. 3d at 94; *H&R Block*, 833 F. Supp. 2d at 89; *see also Anthem*, 855 F.3d at 369 (Millet, J. concurring) ("[T]here is no dispute that, to have any legal relevance, a proffered efficiency cannot arise from anticompetitive effects.").

[40] 2023 Merger Guidelines at 33.

[41] *Penn State Hershey*, 838 F.3d at 350.

example, cost savings that reflect an increase in monopsony power will not be credited as reduced input costs.[42]

3. Illustrative Cases

14. Below, the Agencies provide some examples of how efficiencies claims have been analyzed by U.S. courts in specific cases.

3.1. United States v. Anthem, Inc.

15. In 2016, the United States, 11 states and the District of Columbia sued to block the $54 billion merger of Anthem and Cigna, which would have combined the second and third largest national health insurers. Following a six-week trial, the district court found in favor of the government and enjoined the proposed acquisition. The district court found that the merger threatened to substantially lessen competition in two markets: the market for the sale of health insurance to national accounts in 14 states where Anthem operates, and the large group employer in Richmond, Virginia. The court conducted a detailed analysis of Anthem's claimed medical cost savings, which included rebranding Cigna customers as Anthem customers to allow them to pay Anthem's lower rates, exercising affiliate clauses in its provider agreements, and renegotiating provider contracts. The district court rejected the efficiencies arguments, holding that "the claimed medical cost savings are not cognizable efficiencies since they are not merger-specific, they are not verifiable, and it is questionable whether they are 'efficiencies' at all."[43]

16. Anthem appealed on the grounds that the court improperly rejected its efficiencies defense. The appellate court affirmed in a two-to-one decision that the district court "reasonably determined that Anthem failed to show the kind of 'extraordinary efficiencies' that would be needed to constrain likely price increases in this highly concentrated market, and to mitigate the threatened loss of innovation."[44] The appellate court held that the efficiencies had not been sufficiently verified and were not merger-specific. With respect to rebranding, for example, the appellate court held that this was not a merger-specific efficiency because it "would simply involve Anthem offering Cigna customers Anthem products, in a manner that is no different than Anthem selling new business in the market."[45] "[T]hat is not a merger-specific outcome; that is just more successful marketing of the existing Anthem product."[46]

17. The majority also questioned whether efficiency gains on the input side would be passed on to consumers rather than simply captured by Anthem. The appellate court opined:

> *[I]n highly concentrated markets like this one, lower prices, if they occur at all, may be transitory. Owing* to the lower level of competition in highly concentrated markets, when presented with lower supply input prices, companies have a greater ability to retain for themselves the input savings rather than pass them on to

[42] 2023 Merger Guidelines at 33, fn. 71.

[43] *Anthem*, 236 F. Supp. 3d 171, 181 (D.D.C. 2017).

[44] *Anthem*, 855 F.3d at 364.

[45] *Id.* at 357 (internal quotation omitted).

[46] *Id.*

> consumers. . . . The ability of a firm to obtain lower prices for inputs for its product (here, *provider services) should, especially in light of the prophylactic nature of the Clayton Act, be viewed skeptically when high market concentrations may have the future effect of permitting capture of those savings.*[47]

3.2. United States v. Bertelsmann SE & Co. KGaA, et al.

18. In November 2021, DOJ filed suit to block the proposed acquisition by Bertelsmann, parent company of Penguin Random House (PRH), of Simon & Schuster, Inc. for $2.175 billion. DOJ alleged that the acquisition would put PRH in control of close to half the market for acquiring publishing rights to anticipated top-selling books, leaving hundreds of individual authors with fewer options and less leverage.

19. During the trial, the defendants sought to present expert testimony regarding predicted cost savings based on a deal model that was created by a PRH executive in 2020 in anticipation of the merger. DOJ filed a pre-trial motion to preclude PRH from presenting this evidence, arguing that PRH did not sufficiently substantiate or verify its claimed efficiencies. The purported expert had not independently verified the claims or tested the model's assumptions, but had made only a "cursory effort to rubber stamp an outdated financial model and claim it as transformed into an efficiencies defense."[48] As such, he "ha[d] served more as an advocate than an expert reliably applying generally accepted economic principles to fact."[49]

20. In August 2022, the district court excluded the testimony because the efficiencies had not been substantiated and verified. The district court noted that "[a]lthough many of the projections may be verifiable, some are not verifiable. Moreover, the efficiencies have not, in fact, been independently verified by anyone," and therefore were not cognizable under the Merger Guidelines.[50] The district court agreed with DOJ that the model used to predict the savings was "unreliable" because it used outdated 2020 inputs that were "proveably inconsistent with actual numbers for 2021."[51] Defendants asserted that many of these savings were verifiable and could likely be verified by the court. The district court "strongly disagree[d] that this is what is contemplated by horizontal merger guidelines and the case law." [52] The district court was not in a position to do the type of "rigorous verification that is necessary to rely on efficiencies in an antitrust case."[53] The district court ruled that "legal standards and precedents place the burden on defendants to establish that the projected efficiency relied upon . . . are substantiated, that they are reasonably verifiable by an independent party, and that they are, in fact, verified."[54]

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[47] *Id.* at 366.

[48] *U.S.' Motion in Limine to Exclude Testimony of Dr. Edward Snyder Regarding Efficiencies* at 3, *available at* https://www.justice.gov/jmd/media/1235756/dl?inline. https://www.justice.gov/jmd/media/1235756/dl?inline

[49] *Id.* at 2.

[50] *U.S. v. Bertelsmann SE & Co. KGaA, et al,* Trial Transcript at 2751:22-2751:1, *available at* https://www.justice.gov/atr/media/1257816/dl?inline.

[51] *Id.* at 2766:17-22.

[52] *Id.* at 2763:18-23.

[53] *Id.* at 2764:19-22.

[54] *Id.* at 2755:6-10.

21. In October 2022, the district court blocked the merger, finding that it was "likely to substantially lessen competition to acquire the publishing rights to anticipated top-selling books," the relevant market in the case.[55]

3.3. Illumina, Inc. v. FTC

22. In 2021, the FTC challenged Illumina's proposed acquisition of Grail, a maker of a non-invasive, early detection liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients at very early stages using DNA sequencing.[56] At the time of the lawsuit, Illumina was the only provider of DNA sequencing that was a viable option for multi-cancer early detection ("MCED") tests in the United States. The FTC alleged that Grail was one of several competitors seeking to develop liquid biopsy tests and that, if consummated, Illumina could raise the prices charged to Grail's competitors for the critical input of DNA sequencing needed for MCED tests, as well as reduce innovation for MCED tests. The Commission sitting as an adjudicative body issued a decision finding that the transaction violated Section 7 of the Clayton Act, which Illumina appealed to the U.S. Court of Appeals for the Fifth Circuit.[57]

23. The Fifth Circuit affirmed that the FTC had proven its *prima facie* case that the transaction would likely substantially lessen competition,[58] and that Illumina failed to show that any of its six asserted efficiencies were cognizable:

1. Illumina claimed that the merger would reduce or eliminate Grail's obligation to pay Illumina a royalty, leading to significant consumer surplus. While the court disagreed with the FTC that a reduced royalty payment was not a merger-specific benefit, the court did agree that Illumina failed to show that Grail *would* pass on its lower royalty to its customers.[59] In the court's view, because the evidence showed that Illumina would be incentivized to foreclose Grail competitors, Grail would have no reason to pass a royalty reduction through to its customers.[60]
2. Illumina asserted that the merger would eliminate double marginalization. The court rejected this claim because Illumina did not offer a model to calculate the purported benefit.[61] The court also rejected the notion that it was the FTC's burden to provide such a model because "much of the information relating to efficiencies is uniquely in the possession of the merging firms."[62]
3. Illumina claimed that the merger would generate approximately $140 million in supply chain and operational efficiencies over a 10-year period. Again, the court

[55] *U.S. v. Bertelsmann SE & Co. KGaA, et al,* 646 F. Supp. 3d 1, 12 (D.D.C. 2022).

[56] Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

[57] *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1045–46 (5th Cir. 2023).

[58] *Illumina,* 88 F.4th at 1055.

[59] *Id.* at 1059–60.

[60] *Id.* at 1060.

[61] *Id.*

[62] *Id.* (cleaned up).

rejected this claim because Illumina did not present a model explaining how it calculated this figure, making it unverifiable.[63]

4. Illumina claimed that the merger would result in significant research and development efficiencies. Here, the court found that these benefits could not be verified because Illumina did not quantify them, merely relying on subjective testimony from its executives that they would be achieved.[64]

5. Illumina asserted that its regulatory and market-access expertise would accelerate regulatory approval for the MCED test that Grail was developing. The court agreed with the FTC that Illumina had not established how it would help Grail accelerate regulatory approval or that such acceleration would, in fact, happen.[65] Further, the court doubted Illumina's claimed regulatory expertise because Grail had "already obtained breakthrough device designation" for its MCED test independently.[66]

6. Illumina claimed that the merger would accelerate international expansion of Grail's MCED test. The court rejected this claim because Illumina provided no concrete plans showing the countries where expansion would take place, how much faster expansion would occur, how much such expansion would cost, or why such expansion could be achieved only through a merger.[67]

24. Following the Fifth Circuit's decision, Illumina announced that it would divest Grail.[68]

3.4. FTC v. Tapestry, Inc.

25. In *FTC v. Tapestry, Inc.*, the FTC successfully blocked a merger that would have combined Tapestry's Coach and Kate Spade brands with Capri's Michael Kors brand and eliminated direct head-to-head competition between them in the market for accessible luxury handbags.[69] In response to the FTC's *prima facie* case—which showed that the merger would result in Tapestry controlling 59% of the market for accessible luxury handbags and result in a high post-merger HHI of 3,646 with a change in HHI of 1,449—Tapestry and Capri claimed, among other unsuccessful rebuttal arguments, that the merger would generate over $200 million in costs savings over the first three years, as well as "revitalize" sales of Michael Kors by providing it with access to Tapestry's supply chain, consumer insights, digital architecture, and culture and talent.[70]

[63] *Id.*

[64] *Id.* at 1060–61.

[65] *Id.* at 1061.

[66] *Id.*

[67] *Id.*

[68] Press Release, Fed. Trade Comm'n, Statement Regarding Illumina's Decision to Divest Grail (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail; Press Release, Illumina, Illumina Announces Decision to Divest GRAIL (Dec. 17, 2023), https://investor.illumina.com/news/press-release-details/2023/Illumina-Announces-Decision-to-Divest-GRAIL/default.aspx.

[69] 755 F. Supp. 3d 386 (S.D.N.Y. 2024).

[70] *Id.* at 463–64, 479–80

26. As an initial matter, the parties claimed that these cost savings and revitalization efforts were not an efficiencies defense and, thus, need not satisfy the elements of a cognizable efficiency under established precedent and the 2023 Merger Guidelines.[71] Instead, the parties claimed that the court could simply weigh the procompetitive effects of these plans against any anticompetitive effects. Persuaded by the Court of Appeals for the Third Circuit's rejection of a similar argument, the court proceeded to apply the efficiencies framework to Tapestry and Capri's claimed benefits, noting that the merging parties "cannot reap the benefits of an efficiencies defense while evading its requirements."[72] After applying the efficiencies framework under case law and in line with the 2023 Merger Guidelines, the court found that the parties' efficiencies claims did not rebut the presumption of anticompetitive effects. First, the court found that the $200 million in asserted cost savings over the first three years were not sufficiently large enough to outweigh the $365 million in *annual* harm that the FTC projected would result from the transaction.[73] Second, the court found that Tapestry's plan to revitalize the Michael Kors brand was not a merger-specific benefit. In the court's view, the parties provided no evidence to conclude that Capri could not "improv[e] its own consumer insights work, supply chain, and talent base."[74] Significantly, the court found that the parties' revitalization claim was not merger-specific because Michael Kors was "*already* [] undergoing a brand transformation unrelated to the potential merger between Tapestry and Capri."[75] Tapestry and Capri abandoned the proposed merger after the court granted the FTC's request for a preliminary injunction.[76]

[71] *Id.* at 480–81.

[72] *Id.* at 481.

[73] *Id.*

[74] *Id.* at 482.

[75] *Id.* (emphasis in original).

[76] Press Release, Capri Holdings Ltd., Capri Holdings Announces Termination of Merger with Tapestry (Nov. 14, 2024), https://www.capriholdings.com/news-releases/news-releases-details/2024/Capri-Holdings-Announces-Termination-of-Merger-With-Tapestry/default.aspx.