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The Use of Structural Presumptions in Antitrust – Note by the United States

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United States

1. Introduction

1. For decades, courts in the United States have relied on the so-called "structural presumption" that a merger that significantly increases concentration in a highly concentrated market can be presumed unlawful absent a rebuttal showing from the merging parties that other evidence establishes that there is no violation of law. In the experience of the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies" or the "government"), this rebuttable presumption offers a practical, efficient, and analytically sound method for the Agencies to identify harmful mergers and for courts to adjudicate illegality. Where concentration levels and market shares indicate a significant risk of harm, the structural presumption allows enforcers to focus resources on mergers that pose the greatest risk, while placing the burden on merging firms to show that their transaction would not substantially lessen competition in violation of U.S. law.

2. The Agencies recently had the opportunity to conduct a robust review of the legal and theoretical support for the structural presumption as part of the Agencies' 2023 update to the U.S. Merger Guidelines.[1] Starting in January 2022, the Agencies undertook a comprehensive review of the then-current guidelines to ensure that they accurately reflect the governing statutes and judicial precedent, current economic thinking, and modern market realities. This review included a fresh look at the structural presumption, which has been recognized in some form in U.S. merger guidelines since the guidelines were first created in 1968.[2]

3. As this paper explains, the Agencies' review affirmed that there is strong legal and economic support for continued reliance on a rebuttable structural presumption. In the following sections, we first provide an overview of the role that concentration and market shares play in judicial adjudication of mergers in the United States. We then describe the widespread recognition of the utility of the structural presumption among economists. We then explain the Agencies' approach to the structural presumption as an analytical framework in merger review, as reflected in the 2023 Merger Guidelines. Finally, we explore the interaction of structural presumptions with other tools and frameworks used for analyzing mergers.

[1] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines* (2023), *available at* https://www.justice.gov/atr/2023-merger-guidelines. The Agencies issue merger guidelines to enhance transparency and promote awareness of how the Agencies undertake merger analysis when deciding whether to challenge an acquisition. The first merger guidelines were issued in 1968, and periodically over the years, the Agencies have worked collaboratively to update them, including in 1982, 1992, 1997, 2010, and 2020.

[2] The 1968 Merger Guidelines explained that the goal of merger enforcement was to "preserve and promote market structures conducive to competition," setting forth market-share based presumptions prohibiting mergers that raised concentration. U.S. Dep't of Justice, *1968 Merger Guidelines*, 1 (1968), *available at*

https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

2. The Role of the Structural Presumption in Judicial Adjudication of Mergers

4. The structural presumption plays an important role in the legal analysis of whether a merger violates Section 7 of the Clayton Act, the primary law governing mergers in the United States. In making this assessment, U.S. federal courts follow a burden-shifting approach. If the government can show a reasonable probability that the challenged transaction would lead to "undue concentration" in a properly defined relevant market, this creates "a presumption that the merger would substantially lessen competition" and establishes a *prima facie* case of an anticompetitive effect in violation of Section 7.[3] This *prima facie* case is referred to as the "structural presumption," as it rests on measures of market structure—the level and increase in market concentration—resulting from the merger. Application of the structural presumption based on undue concentration is well-established and accepted in U.S. case law.[4]

5. The U.S. Supreme Court has urged "simplify[ing] the test of illegality" by "dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[5] Therefore, the government can establish its *prima facie* case based on market share statistics alone.[6] For example, in the 1963 *Philadelphia National Bank* case, the U.S. Supreme Court found a relevant market unduly

[3] *United States v. Baker Hughes Inc.*, 908 F.2d 981, at 982 (D.C. Cir. 1990) (internal quotation marks omitted).

[4] *See FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 173 (3d Cir. 2022) ("The District Court correctly concluded that these numbers [showing that the market was highly concentrated and the merger would result in a significant increase in concentration] demonstrate the merger is presumptively anticompetitive."); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 347 (3d Cir. 2016) ("The government can establish a *prima facie* case simply by showing a high market concentration based on HHI numbers."); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015) ("The extremely high HHI on its own establishes the *prima facie* case."); *ProMedica Health Sys. Inc v. FTC*, 749 F.3d 559, 570 (6th Cir. 2014) (applying the structural presumption based on "the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated"); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716

(D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anticompetitive"); *FTC v. Elders Grain*, 868 F.2d 901, 906 (7th Cir. 1989) ("[A]n acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances."); *FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (holding that the FTC met its *prima facie* burden by establishing the structural presumption by both HHI levels and a relevant market share above 30 percent and noting that defendants' arguments that the presumption had been "repudiated" were "directly contradict[ed]" by Second Circuit precedent).

[5] *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963).

[6] *See United States v. General Dynamics Corp.*, 415 U.S. 486, 497 (1974) ("The effect of adopting this approach to a determination of a 'substantial' lessening of competition is to allow the government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing. . . ."); *FTC v. Hackensack Meridian Health*, 30 F.4th 160, 173 (3d. Cir. 2022) (holding, after reviewing the FTC's evidence on market shares and concentration in the relevant market, that "the District Court needed no further evidence to find the FTC had established its *prima facie* case."); *FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024)("The high post-merger levels of market concentration alone would be sufficient for the FTC to state a *prima facie* case.")

concentrated—and therefore the merger unlawful—where the merging parties controlled 30% of the market and the merger increased market concentration by 33%.[7] The Court explained:

> *[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.*[8]

6. Importantly, even when the structural presumption is applied, defendants have the opportunity to rebut the presumption by producing evidence that shows that the market-share measures give an inaccurate account of the merger's probable effects on competition in the relevant market.[9] For example, defendants may produce evidence demonstrating "unique economic circumstances that undermine the predictive value of the government's statistics."[10] However, the "more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully."[11] If the defendant succeeds in its rebuttal, then the burden shifts back to the government to provide additional evidence of harm to competition. The ultimate burden of persuasion remains with the government at all times.

7. This approach recognizes that merger enforcement is a forward-looking exercise involving difficult predictions of future market behavior. Section 7 was designed to arrest anticompetitive tendencies in their incipiency and before harmful effects fully materialize.[12] Thus, to show that a merger is unlawful, a plaintiff need only "prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly.[13] As the U.S. Supreme Court has explained, this standard "creates a relatively expansive definition of antitrust liability."[14] The law does not require proof that a merger will certainly harm competition, but rather that there is an "appreciable danger" of such harm.[15] By shifting the burden to the merging firms to show that increased concentration will not harm competition, the presumption helps protect markets without demanding unreasonable levels of certainty.

8. Although not legally binding, courts often treat the Agencies' merger guidelines as persuasive authority and rely on them to assist in determining whether a merger is unlawful.

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[7] *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963).

[8] *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

[9] See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

[10] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 n.7 (internal quotation marks omitted); *see also United States v. Baker Hughes Inc.*, 908 F.2d at 985–86 (listing additional factors that can rebut the government's *prima facie* case).

[11] *Baker Hughes*, 908 F.2d 981, 991.

[12] *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962).

[13] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323).

[14] *Id.*

[15] *Hospital Corp. of America v. FTC.*, 807 F.2d 1381, 1389 (7th Cir. 1986).

For example, courts have looked to the guidelines when determining the appropriate measures of concentration that trigger whether the structural presumption is warranted.[16]

3. Economic Support for the Presumption

9. In reviewing the recent literature, the Agencies found strong economic support for the presumption.[17] There has long been recognition of the theoretical support for the presumption, and recent research has reinforced this foundation. In addition, a growing body of empirical studies, including a number of merger retrospectives, show that there is significant risk of harm from a merger combining two firms with substantial market shares in a concentrated market.

3.1. Theoretical Basis for the Structural Presumption

10. Economic theory provides a longstanding basis for the structural presumption, showing that mergers that are accretive to market concentration increase market power and, absent efficiencies, are harmful.[18] Recent economic research reinforced the structural presumption's consideration of change in concentration metrics as a tool to assess the potential impact of mergers.[19] As a result, there is a strong economic foundation to presume that market share indicators provide a reliable signal, or "red flag," suggesting the risk of elimination of substantial competition between merging firms (sometimes referred to as "unilateral effects") or increased risk of coordination among the remaining firms in the market ("coordinated effects"). As explained by one leading economist:

> *[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices. In general, the smaller the number of firms, the more likely the firms will be able to reach a mutually satisfactory outcome at a higher-than-competitive price. Unilateral price increases or output restraints also are more likely to be profitable when the merged*

[16] *See Federal Trade Commission v. Tapestry, Inc., & Capri Holdings Ltd.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523, at *37 (S.D.N.Y. Oct. 24, 2024) (finding the 2023 Merger Guidelines "persuasive" on the appropriate HHI levels notwithstanding that they had recently been updated); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 ("This creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market. *See* Horizontal Merger Guidelines, *supra*, § 1.51 (stating that HHI increase of more than 100 points, where post-merger HHI exceeds 1800, is "presumed ... likely to create or enhance market power or facilitate its exercise").

[17] For additional discussion, *see* Susan Athey & David Lawrence, *The 2023 Merger Guidelines: Lessons in the Importance of Incipiency, Modern Economics, and Monopsony*, Competition Policy International Antitrust Chronicle (2024), https://ssrn.com/abstract=4813045; Michael Kades, *Deputy Assistant Attorney General Michael Kades Delivers Remarks at GCR Live: Law Leaders Global 2024* (2024), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-remarks-gcr-live-law-leaders.

[18] *See, e.g.*, Keith Cowling & Michael Waterson, Price-Cost Margins and Market Structure, 43 Economica 267 (1976).

[19] *See, e.g.*,Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 American Economic Review 1915 (2022); Nathan H. Miller and Gloria Sheu, *Quantitative Methods for Evaluating the Unilateral Effects of Mergers*, Review of Industrial Organization 58, no. 1 (2021): 143–177.

> *firms have higher market shares, ceteris paribus. Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, ceteris paribus.*[20]

11. A number of prominent economists have written in support of maintaining the presumption.[21] For example, in a recent paper co-authored by 26 economists, including leaders of Agency economic teams from a range of administrations, the authors stated that "Economic theory provides support for the established legal presumption that a merger in a market is likely to have adverse competitive effects when it occurs in a concentrated market and makes it more concentrated . . . ."[22] Likewise, a forthcoming article in the Oxford Review of Economic Policy observes that "presumptions are grounded on solid economics and also acknowledge the real-world limitations in enforcement resources and information asymmetries between companies and regulators."[23]

3.2. Empirical Evidence from Merger Retrospectives

12. The structural presumption is strongly supported by evidence from recent merger retrospectives, which link increased concentration to post-merger anticompetitive effects such as increased prices and decreased product availability. Those studies cover a wide range of industries. For example, a study of 50 mergers in the consumer packaged goods industry found that these mergers raised prices by 1.5 percent and decreased quantities sold by 2.3 percent, on average.[24] Moreover, it found that mergers that resulted in higher changes in concentration led to larger price increases.[25] Likewise, a study of grocery store mergers found that the majority of grocery mergers in highly concentrated markets resulted in price increases of more than 2 percent.[26] Similarly, a study focused on mergers in the health insurance industry found the mean increase in local market HHI during the studied period raised premiums by roughly 7 percent.[27]

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[20] Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 Antitrust Law Journal, 269, 276-78 (2015).

[21] *See* Susan Athey & David Lawrence, *The 2023 Merger Guidelines: Lessons in the Importance of Incipiency, Modern Economics, and Monopsony*, Competition Policy International Antitrust Chronicle, 5-6, (2024), https://ssrn.com/abstract=4813045 (summarizing scholarship).

[22] *See* Nathan Miller et al., *On The Misuse of Regressions of Price on the HHI in Merger Review*, 10 Journal of Antitrust Enforcement, 248, 251 (2022).

[23] Filippo Lancieri & Tommaso Valletti, "A Defence of Rebuttable Structural Presumptions," Forthcoming: Oxford Review of Economic Policy, Vol. 40 No. 4: New Directions in Competition Policy (Winter 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4945868.

[24] Vivek Bhattacharya, Gaston Illanes, & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods* (National Bureau of Economic Research, Working Paper No. 31123, 2023), *available at* https://www.nber.org/papers/w31123.

[25] Id. at 30.

[26] Daniel Hosken, Luke Olson, & Loren Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, 27 Journal of Economics and Management Strategy, 3 (2018).

[27] Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 American Economic Association, 1161 (2012). The term "HHI" means the Herfindahl–Hirschman Index, a commonly

13. Studies that more broadly examine oligopoly markets yielded similar results. In one study, the author considered 40 mergers analyzed in prior retrospectives, examining price changes reported from the prior retrospective studies and comparing these to the changes in concentration and number of significant competitors after a merger.[28] The author found that HHI thresholds correctly predicted the anticompetitive effects stemming from the vast majority of the analyzed mergers.[29]

3.3. Structural Presumption as a Tool to Assess Risks of Increased Coordination

14. Theoretical and empirical literature in economics supports the proposition that merger enforcement in concentrated markets is particularly important as a prophylactic measure because "greater concentration inherently makes coordination more likely, stronger, or more effective."[30] In their recent paper on oligopoly coordination, Jonathan Baker and Joseph Farrell explain that coordinated conduct can come in the form of "purposive" and "non-purposive" behavior.[31] Purposive conduct includes intentional acts, like a price-fixing conspiracy, but also tacit collusion between firms built on mutual understanding. Non-purposive conduct refers to coordination without collusive intent but that still results in organically anticompetitive conduct—the typical example being truly non-collusive parallel conduct whereby firms choose prices independently, but in recognition of the likely reaction of rivals, organically coalesce around similarly elevated prices. Baker and Farrell posit that both types of coordination are relevant concerns for antitrust enforcement. They state, "Whether through purposive or nonpurposive conduct, greater concentration can be expected to make coordination more likely, stronger, or more effective. Accordingly, our analysis supports a structural merger policy, by which mergers between rivals that increase concentration significantly in a concentrated market are presumed to harm competition."[32]

15. This evidence supports the Agencies' recognition that merger enforcement is critically important given that some form of harmful coordinated effects is likely in many concentrated markets and some of this conduct may not be reachable because, for example,

accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.

[28] John E. Kwoka, Jr., *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837 (2017).

[29] "Anticompetitive" mergers were those that had an increase in price post-merger, "procompetitive" mergers were those that had no change or a decrease in price post-merger. *See also* Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 Journal of Law and Economics J.L. & Econ. 417 (2010) (examining a set of mergers that were unchallenged by the government finding that the majority resulted in a significant increase in consumer prices in the short run).

[30] This literature is summarized in Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 University of Pennsylvania Law Review, 1985, 1991 (2020).

[31] Jonathan B. Baker and Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 3 (2020).

[32] Id. at 7.

tacit coordination often cannot be addressed under Section 1 of the Sherman Act, which prohibits anticompetitive agreements.[33]

16. Mergers that may create or exacerbate coordinated interaction can be missed through over-reliance on unilateral-effects focused tools. For example, in 2008 SABMiller and Molson Coors created a joint venture to combine their U.S. operations. The DOJ in 2007 had focused on a theory of unilateral effects rather than potential coordinated effects. The unilateral effects analysis found that the joint venture would result in cost savings that would better enable the joint entity to compete against Anheuser-Busch, its largest competitor. Empirical work in recent years has found that the impacts from coordinated effects have been substantial, and they have outweighed any potential unilateral benefits. For example, an empirical study in the retail beer industry found that, following the joint venture between MillerCoors and Anheuser-Busch, prices increased by 6 percent to 8 percent, and markups increased by 17 percent -to 18 percent.[34] Importantly, those prices and markups increased for both MillerCoors and Anheuser-Busch, suggesting that the consolidation made coordination easier and thus allowed supra-competitive prices.

4. The Structural Presumption in the 2023 U.S. Merger Guidelines

17. The 2023 Merger Guidelines recognize the structural presumption as the first of six distinct frameworks the Agencies use to identify mergers that present competitive concerns. Guideline 1 states that "Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market." Reflecting the economic consensus cited above, it states that "in highly concentrated markets, a merger that eliminates a significant competitor creates significant risk that the merger may substantially lessen competition or tend to create a monopoly."[35] Thus, a "significant increase in concentration in a highly concentrated market can indicate that a merger may substantially lessen competition, depriving the public of the benefits of competition."[36]

18. Guideline 1 explains that an analysis of market concentration involves calculating pre-merger market shares within a relevant market.[37] The 2023 Merger Guidelines advise that the Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI"), defined as the sum of the squares of the market shares. Market HHI is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.

19. Merger guidelines have used HHI as a measure of concentration dating back to 1982. Under the 1982 Merger Guidelines, markets with an HHI greater than 1,800 were

[33] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 8 (2023) ("Because tacit coordination often cannot be addressed under Section 1 of the Sherman Act, the Agencies vigorously enforce Section 7 of the Clayton Act to prevent market structures conducive to such coordination.").

[34] Nathan H. Miller & Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 Econometrica 1763, 1763 (2017).

[35] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 5 (2023).

[36] Id.

[37] Market definition and market share calculation are explained in §§ 4.3 and 4.4 of the 2023 Merger Guidelines.

referred to as "highly concentrated." These thresholds were routinely applied by courts for the decades that followed. Despite no change in the prevailing precedent of the time, the 2010 Merger Guidelines increased the structural presumption thresholds. Informed by the Agencies' experience and market realities alongside the economic evidence, the Agencies chose to return to the prior thresholds as they both reflect prevailing law and are more likely to accurately assess potential harm to competition.[38] Thus, under Guideline 1, a merger is presumed to risk substantially lessening competition when it (1) results in a market HHI greater than 1,800 and (2) the merger increases the concentration by more than one hundred points.[39]

20. Guideline 1 also establishes an indicator based primarily on the market shares of the merging parties rather than overall market concentration. If a merger creates a firm with a share over thirty percent, it is presumed to be illegal if it also involves an increase in HHI of more than 100 points.[40] This directly follows the guidance of the U.S. Supreme Court in the *Philadelphia National Bank* case described above, which continues to be validated by modern courts.[41] It also reflects the long-standing recognition in the economics literature that a large *increase* in concentration can be a strong indicator that a merger creates a risk of substantial harm to competition, independent of the overall *level* of concentration.[42]

21. Consistent with the case law described above, the presumption can be rebutted or disproved. However, the higher the concentration metrics over these thresholds, the greater the risk to competition and the stronger the evidence needed to rebut or disprove it.[43]

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[38] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 6, n.15 (2023).

[39] Id. at 6.

[40] Id.

[41] *See* Remarks of David Lawrence, Policy Director, Antitrust Division, Georgetown Center for Business & Public Policy (July 2023), *available at* https://www.justice.gov/opa/speech/policy-director-david-lawrence-antitrust-division-delivers-remarks-georgetown-center; *FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (holding that the FTC met its *prima facie* burden by establishing the structural presumption by both HHI levels and a relevant market share above 30 percent and noting that defendants' arguments that the presumption had been "repudiated" were "directly contradict[ed]" by Second Circuit precedent); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, at 36 (D.D.C. Nov. 15, 2022) ("In *Philadelphia National Bank*, the U.S. Supreme Court held that a significant change in concentration that results in a combined market share of at least 30 percent is sufficient to establish the legal presumption that a merger violates Section 7.") (citing *Phila. Nat'l Bank*, 374 U.S. at 331, 364); *Fed. Trade Comm'n v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 907 (E.D. Mo. 2020) (noting that a proposed JV that would create a single entity with 68 percent market share "far exceeds what the U.S. Supreme Court has held to be a concerning level of concentration" and finding a presumption of anticompetitive effects created by FTC's showing of both market share and HHI levels) (citing *Phila. Nat'l Bank*, 374 U.S. at 364-65).

[42] In particular, an increase in HHI, based on the shares of the merging firms, is an important indicator of competitive harm under both unilateral and coordinated effects theories, while the level of HHI, based on the shares of all firms in the market, is most relevant to coordinated effects theories. *See*, e.g., Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 American Economic Review 1915 (2022) ("there is both a theoretical and an empirical basis for focusing solely on the change in the HHI, and ignoring its level, in screening mergers for whether their unilateral effects will harm consumers.").

[43] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 6 (2023).

22. Beyond Guideline 1, the 2023 Merger Guidelines reflect recent scholarship that discusses the ways that market concentration can be indicative of the potential for coordinated effects—whether explicit, through collusive agreements, or tacit, through observation and response to rivals.[44] Guideline 3 states that "Mergers Can Violate the Law When They Increase the Risk of Coordination," and explains that the fewer the number of competitively significant rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination.[45] Modern scholarship emphasizes the various ways in which market concentration influences competitive outcomes as firms consider the strategic reactions of their competitors.[46] For example, in a concentrated market, a firm may forego or soften an aggressive competitive action because it anticipates rivals responding in kind. This research is reflected in the 2023 Merger Guidelines, which explain that "[t]his harmful behavior is more common the more concentrated markets become, as it is easier to predict the reactions of rivals when there are fewer of them."[47]

23. In developing the 2023 Merger Guidelines, the Agencies sought input from members of the public. Thousands of stakeholders meaningfully contributed to the process by submitting public comments on a draft version of the 2023 Merger Guidelines or participating in listening forums and workshops.[48] The Agencies reviewed and considered every comment they received during this process.

24. The approach to the structural presumption described in the Draft Merger Guidelines was similar in many respects to the approach that was ultimately adopted. Like the final Guidelines, it proposed HHI thresholds in line with relevant case law and the 1982 Guidelines. It proposed two tests indicating an undue risk that the merger may substantially lessen competition: (1) if the market HHI is greater than 1,800 and the change in HHI is greater than 100; or (2) if a merger creates a firm with a share over thirty percent and it involves an increase in HHI of more than 100 points.[49] It also removed a "safe harbor" for

[44] *See* Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 University Pennsylvania Law Review, 3 (2020) ("[G]reater concentration can be expected to make coordination more likely, stronger, or more effective. Accordingly, our analysis supports a structural merger policy, by which mergers between rivals that increase concentration significantly in a concentrated market are presumed to harm competition.").

[45] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 8 (2023).

[46] Joseph Farrell & Jonathan B. Baker, *Natural Oligopoly Responses, Repeated Games, and Coordinated Effects in Merger Analysis: A Perspective and Research Agenda*, 58 Review of Industrial Organization103 (2021); Simon Loertscher & Leslie M. Marx, *Coordinated Effects in Merger Review*, 64 Journal of Law & Economics, 705 (2021).

[47] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 8 (2023).

[48] *See* Fed. Trade Comm'n & Dep't of Justice, Request for Information on Merger Enforcement, FTC-2022-0003 (Jan. 18, 2022); Fed. Trade Comm'n & Dep't of Justice, Four Listening Forums on Firsthand Effects of Mergers and Acquisitions (describing forums on food and agriculture, health care, media and entertainment, and technology); Fed. Trade Comm'n & Dep't of Justice, Draft Merger Guidelines for Public Comment, FTC-2023-0043-0001 (July 19, 2023) (release of 2023 Draft Merger Guidelines for public comment); Fed. Trade Comm'n & Dep't of Justice, Public Workshops on 2023 Draft Merger Guidelines (describing three public workshops on the 2023 Draft Merger Guidelines).

[49] Fed. Trade Comm'n & Dep't of Justice, Draft Merger Guidelines (July 2023).

transactions in unconcentrated markets that had been included in the 2010 Horizontal Merger Guidelines.[50]

25. Many commenters expressed support for a strong role for structural presumptions in the 2023 Draft Merger Guidelines. These commenters included academic experts, state attorneys general, and advocacy groups. For example, economist Joseph Farrell supported a "strong concentration-based presumption."[51] A joint comment from 23 State Attorneys General "urge[d] federal enforcers to adopt a modern and nuanced set of structural presumptions establishing that concentration exceeding certain thresholds reliably predicts that anticompetitive effects will flow from a transaction."[52] The attorneys general of Colorado and Nebraska similarly supported a strengthened presumption.[53] A number of advocacy groups weighed in in support of the presumption, including the American Antitrust Institute, which "encourage[d] the Agencies to consider making the existing concentration thresholds 'hard' guidance, signaling an intention to challenge all mergers that violate the structural presumption, thus forcing the abandonment or restructuring of more deals."[54]

[50] Fed. Trade Comm'n & Dep't of Justice, Horizontal Merger Guidelines (2010) (stating that "mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.").

[51] Comments of Joseph Farrell on Draft Merger Guidelines, FTC-2023-0043-1558 at 2 (Sept. 19, 2023) (Noting that concentration can be linked to other indicators of unilateral effects, such as diversion ratios and margins, and explaining that "Concentration also facilitates coordinated oligopoly conduct, such that high levels and increases in concentration substantially raise the risk of conscious and purposive coordination" and pointing to his research showing that horizontal mergers may tend to worsen non-purposive coordination as well).

[52] Request for Information on Merger Enforcement, Public Comments of 23 State Attorneys General, FTC-2022-0003-0807 at 23 (April 27, 2022) (offering suggestions for expanding the presumption, emphasizing that "If strengthened and implemented correctly, presumptions can be a tool to help enforcers identify problematic concentration in its incipiency. This is a better approach than having to address anticompetitive harms flowing from problematic concentration by attempting to unwind transactions after the fact. Further, presumptions can provide market participants with the clear guidance that they require.")

[53] Public Comments of the Colorado and Nebraska Attorneys General in Response to the Request for Information on Merger Enforcement, FTC-2022-0003-0767 (April 27, 2022).

[54] Comments of the American Antitrust Institute, FTC-2022-0003-1155 (April 28, 2022); *see also, e.g.*, Comment from Open Markets Institute, Athena Coalition, 14 other groups, and four individuals, FTC-2023-0043-1502 (Sept. 19, 2023); Comment from Consumer Federation of America, FTC-2023-0043-1486 (Sept. 19, 2023); Comment from American Economic Liberties Project, FTC-2023-0043-1521 (Sept. 19, 2023).

26. A number of commenters supported using even lower HHI thresholds compared to the thresholds used in the 2010 HMGs.[55] Had the thresholds been in place since 2010, they asserted that several industries would not be as concentrated as they are today.[56]

27. A number of commenters also supported adding the indicator based on the merging parties' market shares without a minimum market concentration level. Supporters of this metric point out that in highly concentrated industries, the emergence of a new competitor may pressure dominant firms when it comes to price, service, or selection, and that mergers that eliminate small competitors may affect competition more than the acquired firm's market share might suggest.[57]

28. The Agencies also heard from commenters with opposing views. There were some who questioned the lowering of the HHI level from 2500 to 1800, setting the change-in-HHI level at 100,[58] and including the 30 percent threshold.[59] Some critics also expressed concern that the Guidelines' approach is inconsistent with modern district court cases, particularly with respect to the addition of the 30% market share threshold.[60]

29. In fact, however, courts consistently endorse these thresholds.[61] Indeed, in October in *Federal Trade Commission v. Tapestry, Inc., & Capri Holdings Ltd.*, the court credited

[55] *See, e.g.*, Comment from Attorneys General of 19 States and Territories, FTC-2023-0043-1568 at 2, 4 (Sept. 19, 2023); Comment from Sen. Warren, Rep. Balint, 20 Members of Congress, FTC-2023-0043-1542 at 10, (Sept. 19, 2023); Comments of Professors of Law and Economics, Economists, and Health Policy Researchers on the Draft Merger Guidelines, FTC-2023-0043-1493 at 2 (Sept. 19, 2023); Comment from Salop, Steven, FTC-2023-0043-1364 at 17–18 (Sept. 13, 2023) (pointing to Nocke and Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 American Economic Review 1915 (June 2022)); Comment from Sen. Warren, Rep. Balint, 20 Members of Congress, FTC-2023-0043-1542 at 9, (Sept. 19, 2023) (stating the 30 percent threshold may be "too high"); Comment from Writers Guild of America West and American Federation of Musicians, FTC-2023-0043-1460 at 3 (Sept. 18, 2023) (a Netflix/Warner Bros. Discovery Merger would not trigger the presumptions).

[56] Comment from American Medical Association, FTC-2023-0043-1438 at 5 (Sept. 18, 2023) (referring to concentration in health insurance). The American College of Emergency Physicians express similar concerns about insurer concentration in local markets. Comment from American College of Emergency Physicians, FTC-2023-0043-1534 at 3-4 (Sept. 19, 2023); Comment from Natural Resources Defense Council, FTC-2023-0043-1540 at 5 (Sept. 19, 2023).

[57] See, e.g., Comment of Brewers Association, FTC-2023-0043-1491 at 3 (Sept. 18, 2023).

[58] *See, e.g.*, Comment from Werden, Gregory, FTC-2023-0043-0624 at 6–7 (Aug. 14, 2023) ("A mere 100-point increase in the HHI represents an insignificant increase in concentration in that it moves the market only 1 percent of the way to monopoly.").

[59] *See, e.g.*, Comment from Tennessee Attorney General, FTC-2023-0043-1566 at 16 (Sept. 19, 2023); Comment of International Center for Law & Econ, FTC-2023-0043-1555 at 8–26 (Sept. 19, 2023); Comment from Francis, Daniel FTC-2023-0043-1358 at 18–19 (Sept. 12, 2023) ("[A] mere share-based presumption applied to the post-merger firm is largely untethered to market concentration. … Nor does a merged-firm share threshold have much to do with the logic of unilateral effects". However, Francis recognizes "that the 30% threshold has been repeatedly endorsed by courts, … [so] my concern is muted.").

[60] Comment from Missouri Chamber of Commerce and Industry, FTC-2023-0043-1421 at 2 (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 497-98 (1974)).

[61] See, e.g., *Federal Trade Commission v. Tapestry, Inc., & Capri Holdings Ltd.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523, at *37 (S.D.N.Y. Oct. 24, 2024); *see also FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024).

the 2023 Merger Guidelines' approach to the structural presumption in ruling in favor of the FTC that a merger between competing affordable-luxury handbag brands was anticompetitive. With respect to HHI levels, the Court deemed the 2023 Guidelines "persuasive on this point."[62] It noted that although the 2010 Merger Guidelines had raised the thresholds, "Since the introduction of the HHI to the Merger Guidelines in 1982, nearly every iteration has used [the 2023] thresholds, . . . and courts have routinely cited them in assessing the effects of a merger on market concentration." [63] It went on to state that the 2010 Horizontal Merger Guidelines "were an outlier by adopting higher thresholds."[64] It also endorsed the 30% structural presumption from *Philadelphia National Bank*.[65] Here, the court found that the merger would result in a combined firm with a market share of approximately 59 percent and a market concentration of 3,646, an increase in HHI of 1,499.[66] The court found that these levels were "far greater" than the 2023 Guidelines' thresholds and "more than enough to create a presumption – *indeed, a strong presumption* – of anticompetitive effects."[67] The parties abandoned their proposed merger shortly after the court granted the FTC's request for a preliminary injunction.

30. Although the final 2023 Merger Guidelines retained the market structure indicators proposed in the Draft Merger Guidelines, feedback from commenters prompted the Agencies to clarify a key point pertaining to the role of the presumption. Some commenters expressed concern that the Draft Merger Guidelines implied that if the structural presumption is triggered, it is unrebuttable, making such mergers *per se* illegal.[68] In the final 2023 Merger Guidelines, the Agencies clarified that the structural presumption is a "useful indicator" of the risk of harm to competition and explicitly stated that the "presumption of illegality can be rebutted or disproved."[69] Moreover, "the higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it."[70]

5. The Structural Presumption and Modern Markets

31. The structural presumption can be a useful tool for assessing mergers in a wide range of contexts, including markets where new technologies and business models complicate the use of other enforcement tools. For example, in zero-price markets such as certain digital platforms, measures such as predicted post-merger price increases may not

[62] *Federal Trade Commission v. Tapestry, Inc., & Capri Holdings Ltd.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523, at *39 (S.D.N.Y. Oct. 24, 2024).

[63] Id.

[64] Id.

[65] Id., at *37 (S.D.N.Y. Oct. 24, 2024).

[66] Id. at *38-39.

[67] Id. at *39 (emphasis added).

[68] Comment from ACT | The App Association, FTC-2023-0043-1579 at 3 (Sept. 18, 2023); Comment from Technology Councils of North America (TECNA), FTC-2023-0043-1409 at 3 (Sept. 15, 2023); Comment from Consumer Technology Association, FTC-2023-0043-1504 at 4-5 (Sept. 19, 2023); Comment from American Bar Assoc., FTC-2023-0043-1494, at 2 (Sept. 18, 2023).

[69] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 6 (2023).

[70] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 6 (2023).

capture the competitive dynamics at play. Mergers in these markets might instead raise competition issues such as reduced competitive pressure to innovate or to improve consumer services, for example.[71] The structural presumption may provide a useful signal as to these non-price competitive risks.

32. Likewise, mergers in markets where algorithmic pricing tools may be used present another modern challenge where the structural presumption provides a versatile framework. In markets where firms use algorithms to set prices, the risk of tacit coordination is a growing concern because algorithms can quickly react to competitors' price changes and optimize strategies. Since algorithmic pricing can make anticompetitive behavior more opaque and harder to detect, the structural presumption may be particularly useful for identifying mergers that may exacerbate these conditions by increasing concentration.

6. Relationship with Other Tools and Evidence

33. While the structural presumption serves as a valuable tool, it is just one of many tools that the Agencies may flexibly employ to assess the risk of harm to competition from a merger. It can be used both independently and in conjunction with other tools and evidence to evaluate the risks to competition from a transaction. As explained above, mergers that result in "undue concentration" are presumed to be anticompetitive without needing further detailed evidence.[72] In many cases, however, the structural presumption is used alongside other indicators and tools.

34. Illustrative of how the Agencies have used the structural presumption alongside other tools is *United States v. Bertelsmann SE & Co. KGaA*, in which the DOJ successfully blocked the proposed merger of Penguin Random House (owned by Bertelsmann) and Simon & Schuster, two of the largest book publishers in the United States. The proposed acquisition would have put the combined firm in control of nearly half of the market for acquiring publishing rights to anticipated top-selling books, leaving hundreds of individual authors with fewer options and less leverage. In enjoining the merger, the U.S. District Court for the District of Columbia stated that "the substantial market share of the proposed combined entity justifies a strong presumption of anticompetitive effects."[73] The court also pointed to direct evidence, such as internal documents and economic analysis, showing how the merged entity would have the power to unilaterally lower advances paid to authors, harming the competitive process. The court was also persuaded by concerns about

[71] *FTC v. Meta Platforms, Inc.*, No. 20-3590, 2024 WL 4772423, at *14, *17 (D.D.C. Nov. 13, 2024).

[72] For example, the FTC's investigation of the proposed acquisition of Martin Marietta Materials, Inc. by CalPortland Company showed that the merger would have been presumptively unlawful, because it would have reduced the number of cement suppliers in Southern California from five to four and increased concentration in an already concentrated market. Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of CalPortland Company's Attempted Acquisition of Assets Owned by Rival Cement Producer Martin Marietta Materials, Inc. (Apr. 28, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/statement-regarding-termination-calportland-companys-attempted-acquisition-assets-owned-rival-cement (quoting Bureau of Competition Director Holly Vedova's statement that "The transaction would have reduced the number of cement suppliers in Southern California from five to four, further concentrating an already concentrated market, and was presumptively illegal"). The merging parties abandoned the transaction before the FTC initiated an enforcement action.

[73] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 37 (D.D.C. 2022).

coordinated effects, where the reduced number of major publishers would make tacit coordination on lower bids for author advances more likely. A history of collusion provided a "backdrop" for continued tacit coordination on terms such as audiobook rights, installment payments to authors, and royalties. This combination of structural and qualitative evidence led the court to conclude that the merger would result in both unilateral and coordinated effects.

35. Similarly, in *FTC v. IQVIA Holdings Inc.*, the FTC successfully blocked the proposed acquisition of Propel Media by IQVIA, two of the top three providers of programmatic advertising platforms that specifically target healthcare professionals with advertising for pharmaceutical drugs and other healthcare products.[74] In evaluating evidence of market shares and concentration, the court found that, even under conservative estimates, the combined firm's market share would exceed 30 percent and the merger would increase concentration by 893 points and result in a highly concentrated market with an HHI of 3,320.[75] The court concluded that these levels were "well above the thresholds set forth in the [2010] Merger Guidelines" and therefore established a presumption that the merger would have anticompetitive effects.[76] Notwithstanding this presumption of harm, the court also found that the FTC was likely to succeed on its claim that the merger would eliminate substantial head-to-head competition based on a variety of evidence. First, the court found that "time and again" IQVIA's and Propel Media's ordinary course business documents showed that the two firms engaged in fierce competition with each other.[77] Additionally, testimony from the merging parties' customers and other third parties supported the conclusion that the merger would eliminate substantial direct competition between the parties.[78] Finally, the court found that economic modeling provided further support for the conclusion that the merger would eliminate head-to-head competition.[79] Altogether, the court found that the FTC's structural, qualitative, and economic evidence demonstrated that it would be likely to succeed on the merits and that the merging parties' rebuttals could not overcome the FTC's strong showing.[80] IQVIA and Propel abandoned their proposed acquisition shortly after the court granted a preliminary injunction.

36. Notwithstanding its value in many cases, use of concentration metrics may not always be necessary. For example, evidence that the merging parties have tried to win business from each other by offering lower prices, new or better products or services, more attractive features, higher wages, improved benefits, or otherwise shaped one another's behavior can provide a stand-alone basis to conclude that the merger may substantially lessen competition.[81] As the 2023 Merger Guidelines explain, "[a]lthough a change in market structure can indicate risk of competitive harm, . . . an analysis of the existing

[74] 710 F. Supp. 3d 329 (S.D.N.Y. 2024).

[75] Id. at 382.

[76] Id.

[77] Id. at 383.

[78] Id. at 384-85.

[79] Id. at 386-89.

[80] Id. at 399.

[81] *See* Remarks of Henry Liu, Director of the FTC's Bureau of Competition, *Guideline 2: The Importance of Direct Indicators of Competition in Merger Review*, Crowell and Bates White 13th Annual Luncheon, (April 11, 2024).

competition between the merging firms can demonstrate that a merger threatens competitive harm *independent from an analysis of market shares*."[82]

7. Conclusion

37. In the Agencies' experience, the structural presumption provides a highly administrable and useful tool for identifying mergers that may harm competition. Modern economics and empirical research strongly support the predictive value of market structure measures as an indicator of harm from a merger. These insights are reflected in the approach to the structural presumption outlined by the Agencies in the 2023 Merger Guidelines.

[82] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines*, 7 (2023) (emphasis added).