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By Jay Ezrielev and Joseph J. Simons [1]

Abstract

The recently released draft Merger Guidelines have eliminated the Consumer Welfare Standard as a foundational principle of merger enforcement. In its place, the draft Merger Guidelines provide *ad hoc*, arbitrary, and incomplete theories of how mergers may violate antitrust law, including vague and disjointed policies that lack a cohesive analytical framework. The draft Merger Guidelines include multiple policy goals, focusing both on market structure and merger effects, but they fail to explain how the Agencies would balance the policy goals and merger effects in determining whether to challenge a merger. Overall, the draft Merger Guidelines provide very little clarity about the Agencies' merger enforcement policies.

I. Introduction

The U.S. Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) (the Agencies) have finally released draft Merger Guidelines (hereafter Draft Guidelines).[2] The Draft Guidelines come at a volatile time in antitrust. Deep divisions have formed during the last several years over the future direction of antitrust policy, with current leadership of the Agencies criticizing past enforcers under both Republican and Democratic Administrations for underenforcing antitrust laws.[3] The Agencies' release of the Draft Guidelines also comes on the heels of major losses for the FTC in the Meta/Within and Microsoft/Activision Blizzard merger challenges.[4]

The recent losses have not deterred the Agencies from seeking a fundamental transformation of merger policy. The Draft Guidelines include 13 distinct Guidelines that lay out horizontal, vertical, and conglomerate theories of how mergers can violate antitrust law. These theories differ from those in the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines in a number of respects.[5] The most significant difference is that the Draft Guidelines reject the "Consumer Welfare Standard" that has been a mainstay of antitrust enforcement over the past 40 years.[6] The Draft Guidelines' shift away from the Consumer Welfare Standard follows criticisms of this standard by Jonathan Kanter,

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[2] FTC AND DOJ SEEK COMMENT ON DRAFT MERGER GUIDELINES (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[3] See ASSISTANT ATTORNEY GENERAL JONATHAN KANTER OF THE ANTITRUST DIVISION DELIVERS REMARKS AT HOWARD LAW SCHOOL (January 12, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-howard-law; PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS "OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS" (September 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[4] *See* Jay Ezrielev, *Why Does the FTC Continue To Pursue Losing Cases?*, PROMARKET (Aug. 11, 2023), https://www.promarket.org/2023/08/11/the-ftc-takes-another-l-why-is-the-agency-continuing-to-pursue-bad-cases/.

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 HMG], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020), https://www.justice.gov/media/1090651/dl?inline. The FTC rescinded the 2020 Vertical Merger Guidelines in 2021. Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (September 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

[6] The adoption of the Consumer Welfare Standard in antitrust may be traced to the Supreme Court's 1979 opinion in *Reiter v. Sonotone Corp.*, where the Court quoted Robert Bork in stating that that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" (Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978)).

Assistant Attorney General for the Antitrust Division, and FTC Chair Lina Khan.[7]

The Draft Guidelines replace the Consumer Welfare Standard with *ad hoc*, arbitrary, and incomplete theories of how mergers may violate antitrust law, including vague and disjointed policies that lack a cohesive analytical framework. The Draft Guidelines include multiple policy goals focused on market structure and merger effects. However, the Draft Guidelines do not explain how the Agencies would balance the policy goals and merger effects in determining whether to challenge a merger. The Draft Guidelines' failure to offer an alternative standard is a significant shortcoming. The absence of an overarching standard will lead to more uncertainty about merger policy. The Draft Guidelines do not explain what it means for a merger to lessen competition or what constitutes substantial lessening of competition. Nor do the Draft Guidelines provide any limiting principle for antitrust enforcement.

Merger guidelines do not have the force of law. Their purpose is purely informational. The core task of merger guidelines is to explain the Agencies' enforcement policies. However, the current Draft Guidelines fail at this basic task, instead offering ambiguous and incomplete policy descriptions that rely on imprecise language and circular definitions. The absence of an overarching standard also makes it difficult to interpret vaguely worded policies as it is unclear what overall goal these policies are pursuing.

The 2010 Horizontal Merger Guidelines are far from perfect, and we have written about how merger guidelines can be improved.[8] However, new merger guidelines should not discard useful analytical frameworks of the 2010 Horizontal Merger Guidelines and replace them with unworkable policies. Below we detail how the Draft Guidelines fail to provide workable policies for merger enforcement.

II. Multiplicity of Policy Goals

The "unifying theme" of the 2010 Horizontal Merger Guidelines was that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[9] The 2010 guidelines further clarify that:[10]

> Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

In contrast to the 2010 Horizontal Merger Guidelines, the 13 Guidelines that make up the Draft Guidelines discuss multiple policy goals, including goals focused on both market structure and merger effects.

Guidelines 1, 7, and 8 discuss market structure goals. Guidelines 1 and 8 seek to prevent an increase in market concentration. Guideline 7 seeks to limit entrenchment or extension of a "dominant position," with the overall goal of preserving the "possibility of eventual deconcentration."[11] Guideline 7 states that the Agencies "examine whether the merger may entrench the dominant position through any mechanism consistent with market realities that lessens the competitive threats the merged firm faces."[12]

Guidelines 5 and 6 focus on how vertical mergers would affect the merged firm's rivals' ability to

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[7] *See* Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION LAW PRACT. 131 (2018), https://academic.oup.com/jeclap/article/9/3/131/4915966.

[8] See Jay Ezrielev & Joseph J. Simons, *Updating the Merger Guidelines: A Dynamic Reboot*, CPI ANTITRUST CHRON. (Apr. 2022), https://www.pymnts.com/cpi_posts/updating-the-merger-guidelines-a-dynamic-reboot/.

[9] 2010 HMG § 1.

[10] 2010 HMG § 1. We take the discussion in Section 1 of the 2010 Horizontal Merger Guidelines to be an articulation of the Consumer Welfare Standard, although this articulation differs from the one originally proposed by Robert Bork. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 56–66 (1978).

[11] Draft Guidelines § II.7 (citation omitted).

[12] *Id.* § II.7.

compete. Guideline 5 states that the Agencies' review of vertical mergers "focuses on the risk that the merged firm would have the ability and incentive to make it harder for rivals to compete [through control of products and services that the rivals may use to compete] and thereby harm competition."[13] Quoting the Supreme Court's 1962 *Brown Shoe Co. v. United States* (*Brown Shoe*) opinion, Guideline 6 explains that "[t]he primary vice of a vertical merger . . . is that, by foreclosing the competitors of either [merging] party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete."[14]

Guideline 4 seeks to prevent mergers that may eliminate potential entrants in a "concentrated market" when "[n]ew entry can yield a variety of procompetitive effects, including market deconcentration, increased output or investment, higher wages or improved working conditions, greater innovation, higher quality, and lower prices."[15] Thus, Guideline 4 incorporates policy goals focused on both market structure and merger effects.

Guideline 2 focuses on whether a merger under review would eliminate competition between the merging parties. Guideline 3 focuses on whether a merger under review would increase the risk of coordination in a relevant market. It is noteworthy that Guidelines 2 and 3 do not address the effects on consumers or suppliers. Thus, Guideline 2 focuses on the elimination of competition between the merging parties as a standalone offense, apart from any effects. Specifically, Guideline 2 states that, "[i]f evidence demonstrates substantial competition between the merging parties prior to the merger, the Agencies can determine that the merger may substantially lessen competition."[16]

The Draft Guidelines explain that the Agencies may consider "procompetitive efficiencies" in merger review.[17] Under the "Pass Through to Prevent a Reduction in Competition" heading, the Draft Guidelines state that:[18]

To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must show that, within a short period of time, the benefits will improve competition in the relevant market or prevent the threat that it may be lessened.

The Draft Guidelines further explain that: "[t]o overcome evidence that a merger may substantially lessen competition, cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market."[19] Although the Draft Guidelines recognize that merger efficiencies may have beneficial effects, they do not explain how the Agencies would weigh procompetitive efficiencies against other policy goals in determining whether to challenge a merger.

The absence of an overarching policy goal in the Draft Guidelines leaves major gaps in understanding how to balance different policy priorities. Suppose that a merger would increase output and lower prices but would also make it harder for rivals to compete against the merged firm (because of scale efficiencies achieved by the merged firm at the expense of its rivals). At the same time, the merger would result in a higher market concentration and would strengthen the merged firm's "dominant position." How would the Agencies weigh all these effects in determining whether to challenge a transaction? Would an antitrust enforcement agency challenge a merger that increases output? The Draft Guidelines do not provide answers.

III. Lack of Clarity

The Draft Guidelines fail to provide clear descriptions of the Agencies' merger enforcement policies. The descriptions are

[13] *Id.* § II.5 (citation omitted).

[14] *Id.* § II.6 (citing *Brown Shoe*, 380 U.S. at 323–24).

[15] *Id.* § II.4 (citation omitted).

[16] *Id.* § II.2 (citation omitted).

[17] *Id.* § IV.3.

[18] *Id*.

[19] *Id*.

replete with vague language, unnecessary complexity, incomplete frameworks, conflicting narratives, and circular definitions. Below are just some of the examples of ambiguity in the Draft Guidelines.

Market Definition

Market definition is even more important for merger review under the Draft Guidelines than under the 2010 Horizontal Merger Guidelines because of the former's focus on market structure as a standalone offense. However, the Draft Guidelines inject enormous ambiguity into the market definition process, creating significant uncertainty for all the enforcement theories that rely on market definition.

The Draft Guidelines state that the "Agencies may rely on any one or more of [four distinct methodologies] to demonstrate the validity of a candidate relevant antitrust market."[20] Each of these methodologies may lead to different relevant markets. The four methodologies are:[21]

1. Direct evidence of substantial competition between the merging parties;
2. Direct evidence of the exercise of market power;
3. Observed market characteristics (practical indicia) based on *Brown Shoe* factors; and
4. The hypothetical monopolist test.

Each of the four market definition methodologies contains significant ambiguity. For example, the Draft Guidelines describe the "[d]irect evidence of the exercise of market power" methodology for market definition as the following:[22]

Direct evidence of the exercise of market power can demonstrate a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and the rough contours of the relevant market.

The Draft Guidelines do not explain what it means for firms to exercise market power in the context of market definition analysis. What is the evidence that "identifies market power" and "rough contours of the relevant market" at the same time? Would the Agencies conclude that any firm that engages in the "exercise of market power" is also a firm with a "dominant position," regardless of the firm's size or its number of competitors? The Draft Guidelines do not explain.

The inclusion of four alternative market definition methodologies in the Draft Guidelines amplifies the uncertainty about market definition. For example, suppose that the evidence shows no substantial competition between the merging parties, but the merging parties share some market characteristics based on the *Brown Shoe* factors. Which market definition methodology takes precedence over the other? The Draft Guidelines do not provide an answer.

Market Concentration (Guideline 1)

Under the 2010 Horizontal Merger Guidelines, the "measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects."[23] In contrast, under the Draft Guidelines, "even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition."[24] Thus, under the Draft Guidelines, an increase in market concentration resulting from a merger appears to be a standalone offense, regardless of the merger's other effects.

The Draft Guidelines state that "[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 [Herfindahl-Hirschman Index ("HHI") greater than 1,800] and produce an increase in the HHI of more than 100 points,"[25] adding that "a merger that significantly increases concentration [an increase in the HHI of more

[20] *Id*. § III.
[21] *Id*.
[22] *Id*.
[23] 2010 HMG § 4.
[24] Draft Guidelines § II.1.
[25] *Id*. (citation omitted).

than 100 points] 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."[26]

It is unclear what the Draft Guidelines mean by a "structural presumption" trigger. When does the "presumption" lead to a merger challenge? How would the merging parties overcome the presumption? Guideline 1 has a structural policy goal: preventing the "threat of undue concentration." Would procompetitive effects evidence even count in overcoming the "structural presumption?" Or could the parties only overcome the "structural presumption" with evidence limited to market definition and market shares? Would the Agencies challenge a merger between firms with 28 and 2 percent shares of the relevant market when the merger is otherwise benign? Or would the Agencies challenge a merger between firms with 10 and 5 percent shares of the relevant market when merging firms compete against 5 other firms in the market (4 with 20 percent share and one with 5 percent share) and the merger is otherwise benign? Both mergers would trigger a "structural presumption" under Guideline 1. The Draft Guidelines do not provide answers.

<u>Eliminating Substantial Competition Between Firms (Guideline 2)</u>

The Draft Guidelines state:[27]

If evidence demonstrates substantial competition between the merging parties prior to the merger, the Agencies can determine that the merger may substantially lessen competition. 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.

The Draft Guidelines do not explain what it means for competition between the merging parties to be "substantial." Suppose, for example, that the merging firms are each other's fourth closest substitute. Would the Agencies consider this competition between the merging firms to be substantial? The Draft Guidelines do not explain when the loss of substantial competition between the merging firms would lead to a merger challenge or whether (and how) the Agencies would weigh any evidence of procompetitive effects against the evidence of loss of substantial competition.

It is also unclear whether the Draft Guidelines allow for any interaction between Guidelines 1 and 2. Would the Agencies challenge a merger that triggers a "structural presumption" under Guideline 1 but does not eliminate substantial competition under Guideline 2? What if the merger barely clears the threshold for "structural presumption" under Guideline 1 but does not eliminate substantial competition under Guideline 2? The Draft Guidelines do not provide answers.

<u>Entrenching or Extending a Dominant Position (Guideline 7)</u>

The Draft Guidelines state that "[t]he effect of entrenching or extending an already dominant position may be substantially to lessen competition or it may be…to tend to create a monopoly in violation of Section 7 of the Clayton Act."[28] The Draft Guidelines explain that: "[t]o identify whether one of the merging firms already has a dominant position, the agencies look to whether (i) there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share."[29]

Definition (i) of "dominant position" is circular. It is unclear how the Agencies would apply this definition in practice. It is also unclear how the Draft Guidelines define "entrenchment." Quoting *Emhart Corp. v. USM Corp.*, a First Circuit case from 1975, the Draft Guidelines explain that the "entrenchment doctrine properly blocks artificial competitive advantages … but not simple

[26] *Id*. (citation omitted).

[27] *Id*. § II.2 (citation omitted).

[28] *Id*. § II.7 (citation, internal quotations omitted).

[29] *Id*. (citation omitted).

improvements in efficiency."[30] However, it is not clear what is the difference between "artificial competitive advantages" and "simple improvements in efficiency." Moreover, in another section, the Draft Guidelines suggest that improvements in efficiency can lead to entrenchment. The Draft Guidelines explain that entrenchment can occur by "[d]epriving rivals of access to scale economies and network effects."[31] But that is exactly what happens when a firm achieves greater efficiency and takes business away from its rivals. Thus, the Draft Guidelines offer a mixed message on whether improvements in efficiency can constitute violations under entrenchment theory. Overall, the Draft Guidelines are unclear about how the Agencies would determine if a merger entrenches or extends a "dominant position."

<u>Arresting Trends Toward Concentration (Guideline 8)</u>

The Draft Guidelines state that the "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."[32] The Draft Guidelines explain that the "Agencies look for two factors that together indicate a merger would further a trend toward concentration sufficiently that it may substantially lessen competition."[33] The first factor "can be established by market structure, for example as a steadily increasing HHI exceeds 1,000 and rises toward 1,800" or "reflected in other market characteristics, such as the exit of significant players or other factors driving concentration."[34] The second factor "may be established by a significant increase in concentration, such as a change in HHI greater than 200, or it may be established by other facts showing the merger would increase the pace of concentration."[35]

The two factors for identifying trends toward concentration are vague. It is unclear what the Draft Guidelines mean by the condition where a "steadily increasing HHI exceeds 1,000 and rises toward 1,800." Increasing by how much and over what period? What is "steadily"? Suppose that a market starts out with 10 firms with a 10 percent market share each, and over the next year, one of the firms grows to 15 percent share and while another shrinks to 5 percent share with all the other firms maintaining their share. The change in the market concentration over the one-year period is an increase in HHI from 1,000 to 1,050. Does this change constitute a steady increase toward 1,800 HHI? If two of the 10 percent share firms were to merge (an HHI increase of 200 point), would the Agencies challenge the merger because it contributes to a "trend toward concentration?" The Draft Guidelines do not provide answers.

<u>Vertical Mergers (Guidelines 5 and 6)</u>

Guidelines 5 and 6 provide alternative frameworks for evaluating vertical mergers. Both Guidelines lack clarity.

Guideline 5 states that: "[a] merger involving products, services, or customers that rivals use to compete may substantially lessen competition when it results in a firm with both the ability and incentive to make it harder for its rivals to compete in the relevant market, or to eliminate them or deter the entry of new firms into the relevant market."[36] However, it is unclear what the Draft Guidelines mean by "harder for its rivals to compete." Harder relative to what? The vertical merger may achieve efficiencies that could make it harder for rivals to compete against the merged firm but could also benefit consumers. It is unclear whether vertical merger efficiencies may result in a violation under Guideline 5. It is also unclear whether Guideline 5 allows the Agencies to consider any benefits to consumers from a vertical merger in determining whether to challenge the merger.

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[30] *Id*. (quoting *Emhart Corp. v. USM Corp.*, 527 F.2d 177, 182 (1st Cir. 1975)) (internal quotations omitted).
[31] *Id*. § II.7.
[32] *Id*. § II.8.
[33] *Id*.
[34] *Id*. (citation omitted).
[35] *Id*.
[36] *Id*. § II.5.

Guideline 5 does not appear to put any limits on what it means to make it harder for rivals to compete. Guideline 5 explains that:[37]

The Agencies consider the potential impact on competition from limiting or degrading rivals' access to the related product or service. This inquiry focuses on whether doing so would make it harder for rivals to compete or raise barriers to entry by new firms and expansion by existing firms. For example, it would be harder for rivals to compete if raising rivals' costs as a result of the merger led rivals to charge higher prices, made their products less attractive to customers, or meant those products were less readily available to customers.

Guideline 5 excludes the "substantially" requirement for identifying vertical mergers that may substantially lessen competition. Note that, in rejecting the FTC's recent challenge of the Microsoft/Activision Blizzard vertical merger, the district court held that:[38]

It is not enough that a merger might lessen competition—the FTC must show the merger will probably substantially lessen competition. That the combined firm has more of an incentive than an independent Activision says nothing about whether the combination will "substantially" lessen competition.

Under Guideline 6, the Agencies may conclude that a vertical merger violates antitrust law based on "foreclosure share," which Guideline 6 defines as "the share of the related market that is controlled by the merged firm, such that it could foreclose rival's access to the related product on competitive terms."[39] This definition provides little clarity on how the Agencies would calculate foreclosure share. Moreover, Guideline 6 provides highly ambiguous guidance of how a vertical merger's foreclosure share would translate into a likelihood of an enforcement action.

The Draft Guidelines do not explain when the Agencies would use the Guideline 6 framework to evaluate a vertical merger rather than the Guideline 5 framework. The inclusion of two different frameworks for evaluating vertical mergers further increases uncertainty about vertical merger enforcement policy under the Draft Guidelines.

IV. Absence of an Overarching Standard

The Draft Guidelines do not incorporate an overarching metric or standard for determining when a merger may violate antitrust law. Instead, the Draft Guidelines provide *ad hoc* rules for identifying mergers that "may lessen competition substantially or tend to create a monopoly." The rules are arbitrary and incomplete. For example, Guideline 1 states that a merger with a post-merger HHI greater than 1,800 and an HHI increase of more than 100 "triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly."[40] However, under Guideline 1, there is no "structural presumption" for a merger with a post-merger HHI of 1,750 and an HHI increase of 400. The market concentration thresholds for identifying illegal mergers under Guideline 1 appear to be arbitrary.

Moreover, the rules for identifying illegal mergers under the Draft Guidelines lack limiting principles. What is the antitrust principle that determines when a market concentration increase (resulting from a merger) is impermissible under the Draft Guidelines? Why is an HHI increase of 50 points permissible, but an HHI increase of 150 points not permissible under Guideline 1 (assuming post-merger HHI of at least 1,800)? What makes one increase in market concentration significant and the other not significant? The Draft Guidelines do not articulate a significance principle.

An antitrust standard can provide an overarching metric for merger review as well as a limiting principle for merger enforcement. For example, the Consumer Welfare Standard limits the scope of antitrust law to actions that diminish competition and harm consumers. The overarching metric under the Consumer Welfare

[37] *Id*. § II.5.A(1).

[38] FTC v. Microsoft Corp., No. 3:23-cv-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023) at *13 (citing *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 133 (D.D.C. 2022)).

[39] Draft Guidelines § II.6.A.

[40] *Id*. § II.1.

Standard is the effect on consumers. However, this standard is not without its flaws. There are significant practical difficulties in reliably predicting merger effects and in using these predictions as evidence in merger enforcement.[41] There are also ambiguities about the definition of a "consumer" and the aggregation of effects on consumers. Nonetheless, the Consumer Welfare Standard may provide a useful conceptual framework for evaluating mergers. Under this conceptual framework, the focus of the analysis is on the effect of competition on consumers. Analysts and factfinders may evaluate the available evidence in the context of what the evidence demonstrates about the effects of competition on consumers. Such context is missing from the Draft Guidelines, leaving the Agencies with *ad hoc* and arbitrary rules for merger enforcement.

An overarching guiding principle can also help fill in the gaps in policy descriptions. Any ambiguity in the descriptions could be viewed in the context of the overarching guiding principle. Take, for example, Guideline 2 of the Draft Guidelines. This Guideline states that mergers that eliminate substantial competition between merging parties may substantially lessen competition. The substantiality of lost competition may be viewed in the context of the overarching guiding principle. In the case of the 2010 Horizontal Merger Guidelines, the substantiality may be interpreted in the context of the effect on direct customers or suppliers. This context is missing under the Draft Guidelines.

V. Conclusion

The Draft Guidelines have eliminated the Consumer Welfare Standard as the foundational principle for merger enforcement. However, the Draft Guidelines are a good reminder of why courts and the Agencies have embraced the Consumer Welfare Standard in the first place. It is one thing to criticize the Consumer Welfare Standard but quite another to come up with something better. The Draft Guidelines have come up with something that is substantially worse. The Agencies should go back to the drawing board and draft merger guidelines around a compelling foundational principle. If the Agencies believe that the Consumer Welfare Standard is problematic, they should come up with something better.

The overall effect of the Draft Guidelines may be significantly more uncertainty and less transparency about how the Agencies decide which mergers to challenge. Under the Draft Guidelines, the Agencies may challenge a merger under any of the theories in the 13 Guidelines. Because of the broad and vague language of each of the theories under which the Agencies may challenge a merger and the broad scope of the theories, the Agencies may apply the Draft Guidelines in a way that puts every merger at risk of a challenge. In the words of former DOJ Antitrust Division economist Greg Werden, "nothing is safe" when it comes to merger enforcement under the Draft Guidelines.[42] Because of resource constraints, the Agencies would only challenge a fraction of all mergers. But how would the Agencies choose which mergers to challenge? The Draft Guidelines do not explain. The lack of transparency about Agencies' merger policy may encourage the Agencies to pursue cases against political targets such as large technology companies and private equity firms. It is, therefore, important for antitrust enforcement policy to be as transparent as possible to discourage the Agencies from pursuing cases against political target.

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[41] *See* Kanter, *supra* note 7.

[42] Gregory J. Werden, *Two Bridges Too Far: First Take on the Draft Merger Guidelines*, CPI N. AM. COLUMN (September 5, 2023), https://www.pymnts.com/cpi_posts/two-bridges-too-far-first-take-on-the-draft-merger-guidelines/.