

Before the

**United States Federal Trade Commission and
Department of Justice**
Washington, D.C.

In re
FTC-DOJ Draft Merger Guidelines

Docket No. FTC-2023-0043

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

In response to the Federal Trade Commission (“FTC”) and the Department of Justice’s (“DoJ”) (jointly “Agencies”) draft Merger Guidelines (“Guidelines”), released on July 19, 2023,¹ the Computer and Communications Industry Association (“CCIA”)² submits the following comments.

1. Introduction and General Comments

CCIA acknowledges the important work done by the Agencies by reviewing and reexamining their merger guidelines to ensure they reflect current practices, market realities, and

¹ Merger Guidelines Draft for Public Comment (Jul. 19, 2023), U.S. Federal Trade Commission and Department of Justice (hereinafter “Guidelines”), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf; “FTC and DOJ Seek Comment on Draft Merger Guidelines” (Jul. 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines>.

² CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

economic learning. These comments provide CCIA’s general observations on the proposed Guidelines, as well as more specific comments on particular sections of the document.

1.1. Merger Guidelines Should Serve as a Roadmap to Merger Analysis

The Agencies’ previous iterations of merger guidelines have been a vital instrument and resource for companies, antitrust practitioners, and judges alike. Their practical application in day-to-day merger practice has been of paramount importance. Companies rely heavily on this agency guidance when considering the consequences of potential integrations. Merger guidelines have also provided businesses with useful legal and economic basis as to what kind of transactions the Agencies may consider a risk to competition. As such, practitioners use the guidelines to counsel clients on how the Agencies are likely to proceed in their merger review, while judges rely on them as they evaluate merger challenges in court.³ As a guiding document, merger guidelines should provide all parties involved with clear notice and concepts, allowing them “to focus on observable facts that tend to predict anticompetitive effects rather than on complex and speculative claims.”⁴

Merger guidelines should be based on sound economic principles and actual merger review practice, instead of attempting to create new concepts.⁵ CCIA is concerned that this iteration of the Guidelines falls well short of this promise. Prospective merging parties need a clear roadmap as to what to expect from the Agencies when they are preparing for a deal. These

³ See Daniel A. Crane, Rethinking Merger Efficiencies, 110 MICH L. REV. 347, 352 (2011).

⁴ Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission, at 6–7, File No. P810034 (Sep. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

⁵ See “ICN RECOMMENDED PRACTICES FOR MERGER ANALYSIS” (Apr. 2008), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf. See also U.S. Department of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010), <https://www.justice.gov/atr/file/810276/download> (“These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the “Agencies”) with respect to mergers and acquisitions involving actual or potential competitors (“horizontal mergers”) under the federal antitrust laws.”).

Guidelines do not accomplish this crucial objective, and instead introduce substantially greater uncertainty. Understanding the requirements of the Agencies and the scope of merger review is fundamental for businesses. However, the Guidelines give special attention to outdated legal precedent that goes against more recent merger case law. Moreover, the Guidelines attempt to dictate law rather than serve as a tool to reflect implementation. This is particularly concerning as the document should serve as a guidance for courts to better employ well developed legal and economic analysis when deciding on merger challenges brought by the Agencies. The Guidelines should also enable courts to better understand mergers' potential procompetitive and anticompetitive effects on the market.⁶ As numerous commentators have pointed out, the proposed Guidelines bring a sense of antipathy towards mergers and acquisitions,⁷ leaving organic growth as the only apparent way for a company to grow and rejecting the notion of procompetitive effects of the vast majority of mergers and acquisitions.⁸

The Guidelines, as presently proposed, depart from key principles of U.S. antitrust policy that have been based on sound economic analysis and several decades of case law, which undercuts the fundamental purpose of guidance.⁹ Previous merger guidelines gave the antitrust

⁶ “How Biden Can Get Antitrust Right,” Jason Furman and Carl Shapiro (Jul. 27, 2023),

<https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639>.

⁷ “In with the Old, Out with the New: DOJ and FTC Issue Much-Anticipated Draft Merger Guidelines,” Bruce D. Sokler, et al. (Jul. 26, 2023), <https://www.mintz.com/insights-center/viewpoints/2191/2023-07-26-old-out-new-doj-and-ftc-issue-much-anticipated-draft>; Springboard, “The FTC And DOJ’s Draft Merger Guidelines Lack Legal and Economic Support And Threaten to Chill Merger Activity,” <https://springboardccia.com/2023/07/21/the-ftc-and-dojs-draft-merger-guidelines-lack-legal-and-economic-support-and-threaten-to-chill-merger-activity/>; Jeffrey Welstein, “Biden FTC’s Mistaken Views on Multi-sided Platforms,” (Aug. 1, 2023),

<https://www.americanactionforum.org/insight/biden-ftcs-mistaken-views-on-multi-sided-platforms/>.

⁸ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION at ch. 10A-2 (2021), at 757a; U.S. Department of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines 1 (2010), <https://www.justice.gov/atr/file/810276/download>; U.S.

Department of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (Revised Apr. 8, 1997), <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf> (“Mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.”).

⁹ See, e.g., Froeb, Luke M. and Sokol, D. Daniel and Wagman, Liad, Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines (Aug. 10, 2023), Southern California Law Review, Forthcoming,

community a clear roadmap to follow when analyzing potential mergers and a sense of legal predictability. The clarity of knowing the rulebook is more likely to prevent anticompetitive deals from leaving the boardroom; ambiguity, however, raises concerns for companies and markets.

1.2. The Guidelines Depart from Established Antitrust Principles and Economic Learning

As with antitrust generally, merger enforcement should develop and be constantly reevaluated to take into account market developments and evolving economic theories.¹⁰ However, it must build on, not discard, the important economic advancements and developments of recent decades.¹¹ Instead, the draft Guidelines disregard established precedent, wipe the slate clean, and shift the paradigm back to standards that courts have rejected in recent decades. Notably, the Guidelines depart from the consumer welfare standard that has been a lodestar of antitrust policy and case law for the last several decades. CCIA is concerned about the Guidelines' departure from established antitrust principles and economic learning when determining the procompetitive or anticompetitive effects of a merger.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425; William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSP. 43 (2000).

¹⁰ *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 461-62 (2015) (“We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them “on their own terms.”).

¹¹ John Asker, Kostis Hatzitaskos, Bob Majure, Ana McDowall, Nathan Miller, and Aviv Nevo, “Comments on the January 2022 DOJ and FTC RFI on Merger Enforcement (2022), at 4, https://downloads.regulations.gov/FTC-2022-0003-1847/attachment_1.pdf (“We therefore conclude that mainstream economic literature does not support large deviations from the 2010 HMG's existing prescriptions. Changes to the Guidelines that are not supported by proper research risk hurting the long-term credibility of the Guidelines. Furthermore, we expect that proposals to strengthen enforcement through changes to presumption thresholds are likely to be met with skepticism by courts.”).

As a key principle of U.S. and international merger control, merger guidelines should have general applicability to mergers and acquisitions throughout the economy.¹² A broad revision or the addition of industry-specific rules¹³ should be substantiated by economic evidence. The Guidelines should represent an evolution rather than a revolution of merger enforcement.¹⁴

The longstanding approach taken in previous iterations of the Guidelines has been based on economic learning, to give merger review a more consumer-centered view and focus on the potential harm to competition. However, the current iteration of the Guidelines goes back to dated and previously rejected cases and economics, giving market concentration and structural presumptions a leading role in merger review, while procompetitive effects, consumer welfare, and market efficiencies are left behind. Further, the restrictive disposition of the Guidelines will deter healthy, procompetitive deals and limit the ability of companies to advance their transactions by demonstrating that the proposed integration does not harm competition and, in fact, benefits consumers.

If the Guidelines were to be adopted in their current version, the lack of clarity and predictability about what type of mergers bring forth harm to competition could lead to

¹² ICN RECOMMENDED PRACTICES FOR MERGER ANALYSIS (2008), at 2, <https://www.ftc.gov/system/files/attachments/merger-workshop-competition-authorities-caribbean/rec-practices-merger-analysis.pdf>.

¹³ “There is no pressing need to create a new, untested framework for merger analysis,” CCIA Comments to Antitrust Modernization Commission Working Group on the New Economy (2005), at 5, <https://www.ccianet.org/wp-content/uploads/2015/03/AMC-New-Economy-Working-Group-Comments.pdf>; Comments of The Computer & Communications Industry Association (CCIA) Before the United States Federal Trade Commission and Department of Justice, In re Request for Information on Merger Enforcement (Apr. 19, 2022), at 2, https://ccianet.org/wp-content/uploads/2022/08/04192022_CCIA-comments-on-FTCDOJ-RFI-on-merger-enforcement.pdf.

¹⁴ Christine A. Varney, The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution, 77 Antitrust L. J. 651, 652 (2010), <https://www.jstor.org/stable/23075623>; U.S. Chamber of Commerce, Response to Request for Information on Merger Enforcement (Apr. 19, 2022), https://www.uschamber.com/assets/documents/FINAL-220404_Comments_MergerGuidelines_FTCDOJ.pdf; The Financial Times, Lina Khan’s FTC should aim for evolution, not revolution (Jul. 16, 2023), <https://www.ft.com/content/9f311f1d-d781-41a2-a389-760d9e7cd04d>; “Field of Dreams: FTC and DoJ Seek to Build a New Playing Field for Challenging Mergers,” Sherman & Sterling (Jul. 21, 2023), <https://www.shearman.com/en/perspectives/2023/07/ftc-and-doj-seek-to-build-a-new-playing-field-for-challenging-mergers>.

procompetitive mergers being challenged in court, increasing the risk of losing the procompetitive advantages and efficiencies of such transactions, although it is a very open question whether courts – which have widely followed prior versions of the Guidelines, largely due to the consensus nature of prior versions – will accept this significant departure. Further, given the limited capacity of the Agencies, a high degree of focus on many mergers that do not raise competition concerns can lead to more harmful mergers going unnoticed or unchallenged by the Agencies.¹⁵ CCIA is concerned about the Agencies’ giving an increased consideration to factors such as concentration thresholds while disregarding key and established concepts, such as the consumer welfare standard and procompetitive effects. Mergers’ procompetitive effects for the economy, the efficiencies brought by merging parties to the economy, and the benefits for consumers that mergers bring forth should remain at the center of merger analysis within the Agencies.

1.3. The Guidelines’ Harmful Effects on Small and Medium Businesses

Startups and small and medium businesses (SMBs) rely on mergers and acquisitions to enter a market, grow within it, and better compete with the bigger participants of the market. As studies have shown, for technology startups, “exits via acquisitions are five times more likely than IPOs,” which brings an innate incentive to innovate.¹⁶ However, a key concern is how precisely these startups and SMBs would be hurt the most by the Guidelines. Importantly, the Guidelines would deny SMBs access to capital and expertise they need. They would also limit SMB’s and startup’s options for strategic acquisitions as they would not be able to afford the cost of extending the transaction’s time in a Second Request or a lengthy challenge in court. As a

¹⁵ See “The New Merger Guideline Commandments: Thirteen is an Unlucky Number,” Alden Abbott, <https://truthonthemarket.com/2023/07/19/the-new-merger-guideline-commandments-thirteen-is-an-unlucky-number/amp/>.

¹⁶ Froeb, Luke M. and Sokol, D. Daniel and Wagman, Liad, Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines (Aug. 10, 2023), Southern California Law Review, Forthcoming, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425; Dan Wang, Emily Cox Pahnke, & Rory M. McDonald, The Past Is Prologue? Venture-Capital Syndicates’ Collaborative Experience and Start-Up Exits, 65 ACAD. MGMT. J. [], <https://foster.uw.edu/wp-content/uploads/2021/04/Wang-Pahnke-McDonald-2021.pdf>.

result, numerous potentially procompetitive deals involving SMBs might not leave the drawing board at all, thereby harming innovation and the broader economy.¹⁷

2. Increased Focus on the Structural Presumptions and Market Concentration

Under the Guidelines' proposed structural presumptions market concentration thresholds,¹⁸ the transaction under review is considered sufficiently likely to lessen competition when it would significantly increase the market concentration of an already highly concentrated market.¹⁹ Once triggered, the burden shifts to the merging parties to show how the merger would not diminish competition in the market.²⁰

CCIA concurs that a significant increase in the concentration of an already highly concentrated market is more likely to harm competition. However, CCIA is concerned with the lack of any meaningful economic evidence supporting the introduction of a 30 percent market share structural presumption to determine market power.²¹ The Agencies do not provide a substantial legal or economic basis to suggest that a transaction with a post-merger HHI of 1,800 and an HHI increase of 100 points would bring forth a substantial lessening of competition.²² This concern becomes even more clear when analyzing previous U.S. court rulings that have

¹⁷“Why Merger Guidelines Must Do More to Support Productivity, Innovation, and Global Competitiveness,” Aurelien Portuese (May 3, 2023), at 10, <https://www2.itif.org/2023-merger-guidelines.pdf>; “Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications,” Robert Kulick, Ph.D., Andrew Card (Feb. 2023), at 10, <https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf>.

¹⁸ Supra n. 1, Guideline 1.

¹⁹ See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

²⁰ Supra n. 1, Guideline 1, at 6-7. There are three prongs that must be fulfilled, according to the Guidelines, for the structural presumption to be triggered: (i) the transaction must occur in a highly concentrated market; (ii) as a result of the transaction, the HHI index increases by more than 100 points; and (iii) the market share of the resultant integrated party is greater than 30 percent.

²¹ Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, B.E. J. THEORETICAL ECON, Jan. 2010, art. 9, 1 (2010); Luke M. Froeb & Gregory J. Werden, A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of a Homogeneous Product, 58 ECON. LETTERS 367 (1998).

²² “Two Bridges Too Far: First Take on the Draft Merger Guidelines,” Gregory Werden (2023), https://www.pymnts.com/cpi_posts/two-bridges-too-far-first-take-on-the-draft-merger-guidelines/; Christine A. Varney, An Update on the Review of the Horizontal Merger Guidelines, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, Washington, D.C., Jan. 26, 2010, <https://www.justice.gov/atr/file/518236/download>.

established a threshold of 70 percent, or at the very least 55 percent, to make a case for market power.²³ This focus on the merging firms' market share is particularly worrisome when the case law has shown reservations affirming that a market share threshold on its own is sufficient proof to conclude that a firm possesses market power.²⁴ Moreover, a commanding market share by itself, without additional supporting evidence, should not be a defining argument to decide if a transaction should be challenged or not. This consideration was also reflected in the Agencies' 2010 Horizontal Merger Guidelines and modern antitrust jurisprudence.²⁵

Therefore, it would be necessary for the Agencies to balance this newly introduced focus on the structural aspects of mergers by also increasing their focus and analysis of other efficiency and procompetitive factors. As such, courts and commentators alike have repeatedly underscored that market concentration is an imperfect measure of market power because it represents an outcome of competition that in turn depends on various features of the market environment.²⁶

Market concentration is an important factor to establish the potential risks to competition following a merger. However, it comes with some inherent risks when it is given a predominant role over other factors such as procompetitive efficiencies or benefits for consumers.²⁷ In its

²³ *Exxon Corp v. Berwick Bay Real Estate Partners*, 748 F.2d 937 (5th Cir. 1984); “a share significantly larger than 55% has been required to establish prima facie market power;” *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). See also *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), when referring to market power “it is doubtful whether sixty or sixty-four percent would be enough; and certainly, thirty-three percent is not.”

²⁴ See, e.g., *U.S. v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990) § 990.

²⁵ U.S. Department of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010), at 17, <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

²⁶ Leena Rudanko: Is Rising Product Market Concentration a Concerning Sign of Growing Monopoly Power? (2021), at 5, <https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2021/q2/eiq221-rising-product-market-concentration.pdf>; OECD “Market Concentration Issues Paper by the Secretariat,” at 5, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf); Criscuolo, Chiara, “What’s Driving Changes in Concentration Across the OECD?,” Organization for Economic Co-operation and Development working paper (2018); Joseph Farrell & Carl Shapiro, Horizontal Mergers: An Equilibrium Analysis, 80 AM. ECON. REV. 107, 118 (1990) <https://www.jstor.org/stable/2006737>.

²⁷ “Replacing the Structural Presumption,” Louis Kaplow (Jul. 6, 2022), <https://www.americanbar.org/content/dam/aba/publications/antitrust/journal/84/2/replacing-the-structural-presumption.pdf>; “Structuring a Structural Presumption for Merger Review,” Filippo Lancieri & Tommaso Valletti (Apr. 14, 2023), <https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review/>.

current version, the Guidelines suggest that an increase of concentration in a highly concentrated market is in itself anticompetitive without providing sufficient consideration to other elements in the merger analysis. CCIA recommends that, if the Agencies are to place greater emphasis on market structure by lowering the concentration thresholds, an equally weighted and detailed review should be given to efficiencies, consumer welfare, innovation, and related concepts. This would provide the Agencies with a more detailed picture of a proposed merger’s potential harm to competition as well as its procompetitive effects. As noted by CCIA,²⁸ the Agencies’ previous guidance, including the 2010 Horizontal Merger Guidelines, properly weighted all these important aspects of merger review and the current iteration should continue to do so.

3. Efficiencies of Mergers and Acquisitions

Numerous studies have found that the vast majority of mergers are beneficial to competition, because they allow companies to better serve consumers and increase efficiencies.²⁹ It is the exception, and not the norm, that a merger results in a harm to competition. In fact, as the Agencies have often noted, most transactions do not raise competitive concerns.³⁰ Hence, it is fundamental to acknowledge procompetitive efficiencies in merger analysis since, without efficiency considerations, all mergers would be anticompetitive as they involve some sort of loss

²⁸ Comments of The Computer & Communications Industry Association (CCIA) Before the United States Federal Trade Commission and Department of Justice, In re Request for Information on Merger Enforcement (Apr. 19, 2022), at 2, https://ccianet.org/wp-content/uploads/2022/08/04192022_CCIA-comments-on-FTCDOJ-RFI-on-merger-enforcement.pdf.

²⁹ See David L. Meyer, Merger Enforcement is Alive and Well at the Department of Justice, U.S. DEP’T OF JUST. (Nov. 15, 2007), <https://www.justice.gov/atr/file/519351/download>; “The Case for M&A: Evidence of Efficiencies in Consummated Mergers,” (Aug. 29, 2023), at 1, <https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf>; Mark J. Niefer, Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s, 29 Antitrust 53 (Summer 2015) at 57, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622795.

³⁰ “An Update on FTC Merger Enforcement,” Christine S. Wilson, Commissioner, U.S. Federal Trade Commission, Remarks at International Bar Association’s 19th Annual International Mergers and Acquisitions Conference (Jun. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CWilsonUpdateMergerEnforcement.pdf; see also “How Mergers are Reviewed,” Federal Trade Commission, <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review> (“The vast majority of deals reviewed by the FTC and the Department of Justice are allowed to proceed after the first, preliminary review.”).

of direct competition.³¹ As recognized in previous iterations of the Guidelines, a primary benefit of mergers is their potential to enhance a merged entities' potential and incentives to compete through significant efficiencies that may result in lower prices, improved quality, enhanced services, or new products.³²

The benefits of a proposed merger are a necessary and crucial component of merger analysis. Economies of scale, an increase in efficient management, as well as the R&D benefits that come from the integration of complementary functions are all factors that benefit competition and the economy as a whole and are often achieved through a merger.³³ Despite substantive economic and practical evidence available on merger efficiencies,³⁴ the Agencies suggest that efficiencies can rarely be proven by merging parties.³⁵ Over time the Agencies have been able to successfully design a framework to measure efficiencies.³⁶ Just as the Agencies rely

³¹ Farrell, Joseph and Shapiro, Carl, Scale Economies and Synergies in Horizontal Merger Analysis (October 2000). UC Berkeley, Center for Competition Policy Working Paper No. CPC00-15, at 2, <http://dx.doi.org/10.2139/ssrn.502846>.

³² U.S. Department of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 1 (2010), <https://www.justice.gov/atr/file/810276/download>; see also U.S. Department of Justice & Fed. Trade Comm'n, 1997 Merger Guidelines (1997), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf> ("Mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies."); U.S. Department of Justice & Fed. Trade Comm'n, 1992 Merger Guidelines (1992), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf> ("The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Agency.").

³³ "The Case for M&A: Evidence of Efficiencies in Consummated Mergers," at 3 (Aug. 29, 2023), <https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf>.

³⁴ Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission 1997-2007(2009), <https://www.ftc.gov/reports/merger-efficiencies-federal-trade-commission-1997-2007>.

³⁵ Fed. Trade Comm'n & U.S. Dep't of Justice, Letter re Ministry's Public Consultation Paper on the Future of Competition Policy in Canada (Mar. 31, 2023), at 2, <https://www.ftc.gov/news-events/news/speeches/letter-chair-lina-khan-assistant-attorney-general-jonathan-kanter-canadian-ministry-innovation>.

³⁶ Revised Section 4 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (Apr. 8, 1997), <https://www.justice.gov/atr/horizontal-merger-guidelines-0#4>; Section 10 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (Aug. 19, 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10>; Competition Enforcement and Regulatory

on economic models to assess the probable anticompetitive effects of a merger, they should continue to employ models and other predictive sources and give sufficient weight to the probable procompetitive effects brought by post-merger efficiencies. Even if market concentration might increase, an efficient company can acquire an underperforming competitor and bring their services and products to the increased level of performance and quality of the acquiring firm.³⁷ This, in the end, would benefit the economy as a weaker unproductive competitor would leave its place to a more efficient competitor that can compete better and bring a higher quality of products and services to consumers.

Procompetitive efficiencies are not a defining characteristic only of horizontal mergers. They are also present, and perhaps even more so, in non-horizontal transactions. Vertical mergers often yield clear economic benefits,³⁸ most prominently through the elimination of double marginalization (“EDM”).³⁹ Vertical integration typically helps to lower costs, and increase the stability of supply of an important input. Furthermore, the combination of talent from the different workforces can promote innovation for the benefit of consumers. In fact, size may be a benefit in vertical mergers; the efficiencies of vertical control, especially EDM, often rise with the level of pre-existing market power.⁴⁰ Merger review should continue to give

Alternatives – Note by the United States (Jun. 7, 2021), submitted to the Organization for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, at 3, https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/competition_enforcement_and_regulatory_alternatives_us_submission.pdf.

³⁷ Boyan Jovanovic & Peter L. Rousseau, The Q Theory of Mergers, 92 Am. Econ. Rev. 198 (2002), <https://www.aeaweb.org/articles?id=10.1257/000282802320189249>.

³⁸ Steven C. Salop, Revising the Vertical Merger Guidelines, as part of FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law 5-57 (Nov. 1, 2018), https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf.

³⁹ “EDM reflects the merged entity’s recognition that it can maximize its total profits when it sells the vertically integrated input to itself at cost.” Christine S. Wilson, There’s Nothing New Under the Sun: Why Professor Roger Blair of the University of Florida Is Still Right About Vertical Integration, Remarks at the University of Florida Competition Policy Enforcement Conference, at 14-15 (Nov. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552631/wilson_remarks_-_florida_competition_policy_enforcement_conference_11-1-19.pdf.

⁴⁰ James C. Cooper, Luke M. Froeb, Dan O’Brien, & Michael G. Vita, Vertical Merger Policy as a Problem of Inference, 23 Int’l J. Indus. Org. 639, 658 (2005), at 20-22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=702961.

sufficient weight to efficiencies. A review of economic evidence demonstrates that mergers lead to efficiencies in a wide range of industries, and there is no empirical support to alter the case-by-case approach to analyzing efficiencies and instead adopt a higher standard of proof than the Clayton Act⁴¹ standard (whether a merger may substantially lessen competition) to require parties to prove a likelihood of no substantial lessening of competition.⁴² Leaving efficiencies behind, or giving them less consideration than market concentration as proposed in the Guidelines, would constitute an ineffective and incomplete approach to merger enforcement. As stated above, companies, practitioners, and judges need a complete and clear roadmap as to how to analyze the competitive effects of a merger. Not including procompetitive efficiencies would omit a key piece of required analysis from that roadmap.

4. Digital Markets and Platform Effects Do Not Require a Tailored Set of Rules

The proposed Guideline no. 10 reflects the Agencies' concern regarding competition in digital markets and platforms.⁴³ It further reflects the Agencies' consideration of a "conflict of interest"⁴⁴ standard, a newly created concept that reinforces the appearance of a tailored set of rules specifically targeting digital markets and platforms. In this regard, it is important to underscore the ongoing digitalization across the economy.⁴⁵ Most industries have digital

⁴¹ 15 U.S.C. §§ 12-27, <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section12&edition=prelim>.

⁴² Maureen K. Ohlhausen and Taylor M. Owings, "Evidence of Efficiencies on Consummated Markets"; Francine LaFontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LIT. 629 (Sept. 2007), at 8, <https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf>; See John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). But see Michael Vita & F. David Osinski, John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review, 82 ANTITRUST L.J. 361, 377-81 (2018).

⁴³ "Mergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical." Guidelines, at 23.

⁴⁴ "A conflict of interest may arise when a platform operator is also a platform participant. The conflict of interest stems from the operator's interest in operating the platform as a forum for competition and its interest in winning competition on it." *Id.*, at 24.

⁴⁵ See "The four pillars of a trusted industrial information infrastructure," Sarah Robson, Tim Cowell (2023); see also "Digital Transformation: Examples from 5 Industries," Yifat Perry (Jun., 2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

components and digital offerings that also compete with physical ones, as it happens in retail and telemedicine.⁴⁶ Thus, as the entire economy is moving towards digitalization,⁴⁷ creating a different set of rules for digital markets would create ambiguity and inconsistency.⁴⁸ As such, the Guidelines should acknowledge that transactions in the digital space may positively affect firms' incentive to innovate, and have indeed brought innovative products and services to consumers.

Low barriers to entry, as well as the benefits brought to consumers by innovation and efficiencies, are a key component of mergers in general, but are even more notable in transactions in the digital space. Even when the central concern of U.S. antitrust law has traditionally been durable market power,⁴⁹ case law shows that a significant market share by itself does not establish market power, recognizing that with low or non-existing barriers of entry to the market, monopolistic prices could not be maintained for a prolonged time.⁵⁰ Digital markets, particularly in the software and applications space, are typically characterized by very low barriers to entry, a dynamic participation of new competitors, and constantly shifting market shares. Writing code is possibly the least facilities-dependent industry in the U.S. economy. Hence, a structural approach with an increased focus on market concentration is particularly flawed in digital markets.

⁴⁶ "Competitive Dynamics of Online and Brick-and-Mortar Retail Prices," Rosa Abrantes-Metz & Mame Maloney, (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Harvard Business Review, "It's Time to Cement Telehealth's Place in U.S. Health Care," John Glaser and Kyle Zebley, (Jan. 20, 2023); <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Harvard Business Review "Which Industries Are the Most Digital (and Why)?," Prashant Gandhi, Somesh Khanna, and Sree Ramaswamy, (Apr. 01, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

⁴⁷ Comments of The Computer & Communications Industry Association (CCIA) Before the United States Federal Trade Commission and Department of Justice, In re Request for Information on Merger Enforcement (Apr. 19, 2022), at 7, https://ccianet.org/wp-content/uploads/2022/08/04192022_CCIA-comments-on-FTCDOJ-RFI-on-merger-enforcement.pdf.

⁴⁸ *Id.*

⁴⁹ Barriers to Entry (Sep. 30, 2005), Note by the United States, DAF/COMP (2005) 42, at 229, <https://www.oecd.org/daf/competition/36344429.pdf>; *NCAA v. Board of Regents of the University of Oklahoma*, 468 US 85, 109 n.38 (1984).

⁵⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985). See also *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 366 (9th Cir. 1988); *Ball Mem'l Hospital, Inc. v. Mutual Hosp. In.*, 784 F.2d 1325, 1336 (7th Cir. 1986).

CCIA recognizes the importance of the Agencies' including multi-sided market analysis in the Guidelines, thus incorporating recent discussions and developments in economic analysis. Further, the review of mergers that eliminate potential competitors is fundamental in antitrust analysis and enforcement. However, as previously noted, the Agencies' concerns that large firms are harming competition by acquiring technology startups are not borne out by the results of the tech acquisitions over the last two decades.⁵¹ In addition, there has been sufficient evidence to show that the prospect of being acquired has inspired innovators to create, invent, patent, and commercialize new technology to the increasing benefit of consumers.⁵² Studies have shown how nascent technology firms look to prospective acquisitions as their most reliable source of market growth and income generation, which underscores the importance of not hindering acquisitions and thereby chilling innovation.⁵³

5. Vertical Integration

Vertical integration typically helps to lower costs and increase the stability of the supply of an important input.⁵⁴ For example, a combination of talent from different workforces can promote innovation for the benefit of consumers. As mentioned above, size may be a benefit in

⁵¹ Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, (Aug. 19, 2010), at 9, <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>; Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study, (Sep., 2021), at 36, <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>.

⁵² See Jan Bena & Kai Li, Corporate Innovations and Mergers and Acquisitions, 69 J. FIN. 1923 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917215; see also Marianna Makri, Michael A. Hitt & Peter J. Lane, Complementary Technologies, Knowledge Relatedness, and Invention Outcomes in High Technology Mergers and Acquisitions, 31 STRATEGIC MGMT. J. 602 (2010), <https://www.jstor.org/stable/40587498>.

⁵³ See Susan Woodward, Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital (Nov. 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf; Jeffrey Bartel, “Exploring Trends In Venture Capital Acquisitions For 2023” (Dec. 1, 2022), <https://www.forbes.com/sites/forbesfinancecouncil/2022/12/01/exploring-trends-in-venture-capital-acquisitions-for-2023/?sh=3bb28c54443c>.

⁵⁴ The Case for M&A: Evidence of Efficiencies in Consummated Mergers, Maureen K. Ohlhausen & Taylor M. Owings (Aug. 29, 2023), at 3, <https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf>.

vertical mergers: the efficiencies of vertical control, especially the EDM, often rise with the level of pre-existing market power.⁵⁵ Moreover, economic literature suggests that benefits from vertical mergers can offer significant and direct increases to consumer welfare, which may potentially outweigh the harmful foreclosure effects of vertical mergers.⁵⁶

It has been traditionally accepted that vertical mergers are less likely to harm competition than horizontal mergers.⁵⁷ This is because vertical mergers combine firms that operate at different levels of the production chain. Thus, a vertical merger does not alter concentration in any relevant market or eliminate current competition between firms.⁵⁸

Although vertical mergers tend to be more procompetitive, these transactions are not exempt from potentially harming competition. Hence, the Agencies should balance the potential harm to competition from vertical mergers against the benefits these transactions can bring by

⁵⁵ Daniel O'Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems*, in *THE PROS AND CONS OF VERTICAL RESTRAINTS* 40, 76 (2008), at 67,

https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyror/pros-and-cons/rapport_pros-and-cons_2008_vertical-restraints.pdf; Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, *ProMarket* (Sep. 23, 2021), <https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>, (“we find it very helpful to think of EDM as just one example of a far more general concept: some supply chains are handled more efficiently within a single firm than through contract.”)

⁵⁶ Comments of The Computer & Communications Industry Association (CCIA) Before the United States Federal Trade Commission and Department of Justice, *In re Request for Information on Merger Enforcement* (Apr. 19, 2022), at 8, https://ccianet.org/wp-content/uploads/2022/08/04192022_CCIA-comments-on-FTCDOJ-RFI-on-merger-enforcement.pdf.

⁵⁷ See Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the European Commission’s Draft Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings 7 (May 2007); *Vertical Merger Guidelines*, U.S. Department of Justice & The Federal Trade Commission (Jun. 30, 2020), “Vertical mergers, however, also raise distinct considerations, which these Guidelines address. For example, vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm.” https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf. Wong-Ervin, Koren, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings* (Oct. 30, 2018), *ABA Antitrust Source*, Feb. 2019, <https://ssrn.com/abstract=3273344> or <http://dx.doi.org/10.2139/ssrn.3273344>; Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 *Antitrust L.J.* 943, 944 (1995), <https://www.jstor.org/stable/40843308>.

⁵⁸ Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Keynote Address at GCR Live (Feb. 1, 2019), at 4, https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_vertical_merger_speech_at_gcr_2-1-19.pdf.

analyzing their net effect on consumers.⁵⁹ However, the Guidelines evidence an excessive concern by the Agencies' regarding vertical foreclosure. They state that "if the foreclosure share⁶⁰ is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence."⁶¹ This language is overly vague, capable of encompassing most vertical mergers in the market, and a clear indicator of the Agencies' focus on structural market share analysis, while avoiding other relevant indicators as part of vertical merger analysis.

The Agencies consider market concentration to be the predominant element in this analysis, leaving behind other fundamental factors such as market efficiencies, consumer welfare, and procompetitive results of the mergers. Without providing sufficient economic and empirical evidence buttressing these presumptions, the Guidelines appear to prefer to protect specific competitors rather than promote competition and benefit consumers, while disregarding case law on the issue.

In addition, under Guidelines no. 5 and 6, many proposed vertical mergers that allow the acquiring firm to increase efficiencies and the merging firms' ability to compete more effectively in adjacent markets, would be considered anticompetitive without sufficient consideration given to their benefit to consumers.⁶² Guideline no. 6 makes it clear that the Agencies will not ponder efficiencies, which could potentially create the appearance of a *per se* illegality on certain vertical mergers.⁶³

⁵⁹ *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 153 (D.D.C. 2022).

⁶⁰ "The "foreclosure share" is 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." See Guidelines, at 23, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

⁶¹ *Id.*, at 17.

⁶² "How Biden Can Get Antitrust Right," Jason Furman and Carl Shapiro (Jul. 27, 2023), <https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639>.

⁶³ "MERGER GUIDELINES - 1960'S MANIFESTO STYLE," The Deal (Aug. 21, 2023), https://www.jonesday.com/en/insights/2023/08/merger-guidelines1960s-manifesto-style-the-deal?utm_source=amplify&user_name=craig%20waldman

The Guidelines also propose that “mergers should not entrench or extend a dominant position,” where a “dominant position” means a market share of at least 30 percent.⁶⁴ As Furman and Shapiro underscore,⁶⁵ under the Guidelines non-horizontal transactions that enable the acquiring firm to become more efficient and increase their market share to better compete in adjacent markets would be challenged on anticompetitive grounds even if they benefit consumers and workers. The Guidelines would facilitate the challenging of a merger in which a participant seeks to acquire a competitor, or a third-party, to increase efficiencies and better serve consumers, with no other argument than the increase in the acquirer’s market share.

CCIA is concerned that the Agencies’ unwarranted focus on structural presumptions, prioritizing market shares and competitors over efficiencies and actual competition, will end up significantly hurting both businesses - including SMBs - and consumers. The Guidelines’ unbalanced approach to vertical merger enforcement ignores a significant part of antitrust developments and experience in recent years, which would prove problematic and have chilling effects for the antitrust ecosystem and the general economy. As noted above, the Guidelines should bring an evolution rather than a revolution to merger enforcement, taking into account important recent developments in vertical merger analysis.

6. Conclusion

The Guidelines, although an attempt to update and modernize merger guidance, leave numerous fundamental points of concern for companies and consumers. Importantly, the Guidelines’ approach and focus on outdated merger decisions ignores recent case law that emphasizes economic analysis and consumer welfare. A very important question for the Agencies is whether courts, which have generally followed prior versions of the Guidelines due to their consensus nature, will accept this major departure from established economic learning and antitrust principles.

⁶⁴ *Supra*, note 1, Guideline 7.

⁶⁵ *Supra*, note 62.

*

*

*

*

CCIA thanks the Agencies for inviting input on these vital issues and is available to provide any additional information that the Agencies may require.

Respectfully submitted,

Krisztian Katona
Vice President of Global Competition and
Regulatory Policy
Computer & Communications Industry
Association
25 Massachusetts Avenue NW, Suite 300C
Washington, DC 20001
kkatona@ccianet.org