THE OVERLAPPING MARKETS FALLACY

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INTRODUCTION

Market definition has been one of the most litigated antitrust issues for decades because it so often "determines the result of the case."[1] As the U.S. Department of Justice Antitrust Division put it during the Obama administration, "[f]requently, the government alleges narrow markets, the defendants describe broad markets, and the court must choose between the competing approaches."[2] Courts must choose between these competing approaches because, outside the per se context, "determination of the relevant market is a necessary predicate to a finding of a violation" of the antitrust laws.[3]

Apparently no longer. In a surprising about-face, the DOJ and Federal Trade Commission now assert that courts do *not* need to choose between competing market definitions advanced in litigation. For example, in one recent case the FTC argued that "plaintiffs need not disprove alternative relevant markets proposed by the Defendant" because "a larger market in no way precludes the existence of a submarket . . . for antitrust purposes."[4] Or, to put it in economic terms, the agencies assert that it could be true both that a defendant is competitively constrained by several firms in a broader market *and* by only a subset of those firms in a narrower submarket. A few scholars have taken similar positions.[5] In the past few years, both agencies have tried this tack, with mixed

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[1] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992).

[2] United States' Pretrial Mem. at 15–16, United States v. AB Electrolux, No. 15-cv-01039, (D.D.C. Dec. 18, 2015), ECF No. 378; *see also, e.g.*, Debra A. Valentine, Former General Counsel, Fed. Trade Comm'n, Antitrust in a Global High-Tech Economy: Address to the ABA Law Practice Management Section (Apr. 30, 1999), www.ftc.gov/news-events/news/speeches/antitrust-global-high-tech-economy ("[W]e can't determine whether a firm exercises market power unless we know to what other products and to what other geographic areas consumers would turn if Firm A tried to raise price or reduce output.").

[3] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." (quoting United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957)); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) ("To assess this evidence [of direct anticompetitive effects in a Sherman Act case], we must first define the relevant market.").

[4] Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss at 44, FTC v. Syngenta Crop Protection AG, No. 22-cv-00828 (M.D.N.C. Oct. 5, 2023), ECF No. 150 (cleaned up).

[5] *See, e.g.*, David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 329 (2020) ("[I]dentifying a unique or best relevant market is not a factual question that needs to be resolved in antitrust cases and investigations.").

results. Although some courts have firmly rejected agency efforts to "have its cake and eat it too,"[6] a few district courts have followed the suggestion that a court can avoid choosing among the litigants' competing approaches by endorsing them both.[7]

The new Merger Guidelines double down on this claim. They assert that "[m]ultiple overlapping markets can be appropriately defined relevant markets"[8] and provide an example involving nested product markets from "food" all the way down to "premium low-fat chocolate chip cookies."[9] The Guidelines also assert that this position reflects "applicable legal precedent" and that "legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified."[10] To support the overlapping markets claim, the Guidelines cite the "submarkets" dictum in the 1962 case *Brown Shoe Co. v. United States*.[11] Thus, the agencies appear to view the two terms as synonymous, and we follow suit here.[12]

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[6] *See* United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 150 n.49 (D. Mass. 2024). The court ultimately found a Section 7 violation in the government's proposed city-pair geographic markets, *id.* at 164, but rejected the government's proposal to consider non-overlap routes "simultaneously" because it would "amplify" an overlapping "national geographic market" that the defendant advanced and the court rejected, *see id.* at 148–50 & n.49.

[7] *See, e.g.*, FTC v. IQVIA Holdings Inc., 710 F.Supp.3d 329, 354 (S.D.N.Y. 2024) (concluding that "for purposes of this section 13(b) proceeding, the FTC has met its burden with respect to market definition" because the agency need only "raise some question of whether HCP programmatic advertising is a well-defined market" (cleaned up)); FTC v. Meta Platforms, Inc., 654 F. Supp. 3d 892, 914, 941 (N.D. Cal. 2023) (accepting defendant's proof of a broad market, citing *Brown Shoe* for the proposition that a broad market can include relevant submarkets, and finding the FTC's proposed submarket, but denying the FTC's request for a preliminary injunction for lack of likely anticompetitive effect in the relevant market); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 895–96, 901 (E.D. Mo. 2020) (accepting the premise that "the FTC does not have to be concerned (at least at the market definition phase) with disproving Defendants' claim that SPRB coal competes with natural gas and other fuels in a broader energy market" and crediting defendants' evidence that "SPRB coal providers compete *both* among themselves in a market for SPRB coal *and* against other fuels in a broader market for electricity generation," but nonetheless finding "a distinct market for SPRB coal in which consumers likely would be forced to accept a SSNIP"). *But see, e.g.*, United States v. Sabre Corp., 452 F. Supp. 3d 97, 139–40 (D. Del. 2020) (rejecting the proposed submarket as both legally inconsistent with *Amex* and factually unsupported), *vacated on other grounds*, 2020 WL 4915824 (3d Cir. July 20, 2020).

[8] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES 40 n.77 (2023) [hereinafter MERGER GUIDELINES (2023)] (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

[9] *Id*

[10] *Id.* at 4.

[11] *Id.* at 40 n.77 (citing *Brown Shoe*, 370 U.S. at 325). Although not the focus of this article, the new Guidelines also adopt a "back to the future" stance on many other areas of merger policy, including concentration thresholds, presumptions, efficiencies, and conglomerate merger effects.

[12] That is, consistent with the agencies' approach in the Guidelines, for purposes of this article we view "submarkets" and "overlapping markets" as synonymous. As such, our discussion of submarkets necessarily addresses all manner of overlapping markets, including

As we explain in this article, overlapping markets are not the law today, nor have they been for many years. Rather, they are every bit as erroneous as the famous Cellophane fallacy.[13] Although the agencies cite a passage from *Brown Shoe* in support, that discussion is a dictum; indeed, the Court did not define any overlapping markets in that case. And in subsequent cases the Court first avoided and then repudiated submarkets. Lower courts initially approached the issue inconsistently but, since the mid-1980s, have typically either rejected overlapping markets outright or avoided the issue. The Areeda and Hovenkamp treatise accurately sums up this history when it defines the term "submarket" as a concept previously "used to identify artificially narrow groupings of sales on the basis of noneconomic criteria having little to do with the ability to raise price above cost."[14] *Ohio v. American Express Co.* (*Amex*) encapsulated much of this history; there, the district court rejected DOJ's proposed travel and entertainment submarket, the DOJ abandoned the overlapping submarket before the court of appeals in favor of "separate" narrow markets, and the Supreme Court held that one and only one relevant market can be defined in two-sided transaction markets.[15]

We argue that the legal rule announced in *Amex*, which we dub the "One Market per Transaction" (OMT) Rule, actually applies to a far broader range of cases. As we define it, the OMT Rule requires that a factfinder assign a particular transaction of a particular product to no more than one relevant antitrust market.[16] To riff on an example in the Merger Guidelines,[17] if a court finds that wholesale sales of chocolate chip cookies to grocery stores compete

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price-discrimination markets. See *infra* Part III.B.1 for an explanation of non-overlapping price-discrimination markets permitted under our proposed OMT Rule.

[13] *See, e.g.*, Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007); Lawrence J. White, *Market Power and Market Definition in Monopolization Cases: A Paradigm Is Missing*, *in* ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 913 (Wayne D. Collins ed., 2008).

[14] PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 913a, Lexis (database updated Sept. 2024).

[15] 138 S. Ct. 2274, 2287 (2018).

[16] Our use of the term "transaction" warrants elaboration. Of course, a "transaction" literally may encompass multiple products, services, or geographies of competitive significance. For example, in a merger where A sells coffee, milk, and sugar, and where B sells coffee and sugar, some customers may purchase both coffee and sugar together. That fact does not require them to be in the same relevant antitrust market. If A and B account for a large portion of the sales of coffee and also of sugar, both markets could be asserted in the same case; the OMT Rule does not suggest otherwise.

[17] *See* MERGER GUIDELINES (2023), *supra* note 8, at 40 n.77 ("For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger, and the fact that one area comprises a relevant market does not mean a larger, smaller, or overlapping area could not as well.").

in a relevant market for wholesale sales of desserts to grocery stores in the United States, then the OMT Rule would prohibit those sales from also being included in another relevant antitrust market for wholesale sales of chocolate chip cookies to grocery stores in the city of Baltimore.

Thus, the market definition holding in *Amex* articulated a standard already routinely applied, but not well understood, by lower courts. The economic intuition of the OMT Rule is simple: If a defendant's sales to a particular customer or customer group are constrained by four competitors, then that is the market, and no smaller market can be defined around only two of those four competitors, nor a broader market around eight competitors.[18] Or to borrow other language from *Amex*, when assessing the competitive effects of challenged conduct, a court "must first define the relevant market" and identify the firms that compete in it.[19]

Therefore, under the OMT Rule, a given transaction—meaning a particular sale of a specific product or service—can be allocated to no more than one relevant antitrust market. As in *Brown Shoe* itself, where the Court defined separate markets for men's, women's, and children's shoes,[20] product sales may still be grouped into multiple *non-overlapping* relevant markets. The OMT Rule is also flexible enough to account for a range of other circumstances, including entry, exit, technological change, and price discrimination. Applying the OMT Rule is fairly straightforward in both conduct and merger cases.

Going forward, courts should formally recognize and apply the OMT Rule. Doing so would help courts simplify the market definition exercise, clarify judicial reasoning, and reduce the risk of error. The Guidelines should be revised to delete the inaccurate description of overlapping markets and, in future iterations, should adopt and apply the OMT Rule.

The OMT Rule has several implications for antitrust enforcement. First and foremost, it would reinforce and clarify the existing requirement that courts resolve disputes regarding the scope of the relevant market. Second, the OMT Rule may require litigants to approach market definition with greater rigor and consistency, as otherwise they may be tempted to use overlapping markets to bring otherwise contradictory claims, such as a monopolization claim in a narrow (sub)market and a nascent or potential competition claim in a broader one.[21] This dynamic may be greatest when firms offer a wide range of

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[18] See *infra* Part I.C for commentary on this principle.

[19] *See Amex*, 138 S. Ct. at 2285.

[20] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) ("[W]e conclude that the record supports the District Court's finding that the relevant lines of commerce are men's, women's, and children's shoes.").

[21] For example, establishing that a defendant has monopoly power in a narrow market necessarily means that the competitors beyond the metes and bounds of that market do not

products and services, such as is often the case with large technology (or "Big Tech") companies.[22] Third, it may further increase the frequency with which enforcers carve out narrower but non-overlapping markets.

The remainder of this article proceeds chronologically. Part I recounts the history of the submarkets doctrine and overlapping markets, from *Brown Shoe* through the agencies' latest Guidelines. Part II describes the *Amex* case, which provides a clear explanation of why courts, scholars, and enforcers have heretofore rejected overlapping markets as conceptually "unsound."[23] Part III explains why courts can and should formally adopt and apply the OMT Rule today. Part IV identifies some potential implementation issues and enforcement implications.

I. MOST COURTS AND COMMENTATORS HAVE COME TO REJECT THE LOGIC OF OVERLAPPING MARKETS BUT STRUGGLE TO ARTICULATE WHY

The history of overlapping markets begins and ends with submarkets. Submarkets were introduced in 1962 by the Supreme Court in a dictum in the *Brown Shoe* case and then in dicta in other merger and monopolization cases. The concept quickly fell out of favor, first among academics and then at the Court. By the early 1970s, the Court had repudiated geographic submarkets and cast doubt upon product submarkets. Early decisions in the lower courts were inconsistent, sometimes endorsing overlapping markets, sometimes rejecting them wholesale, and sometimes splitting the difference.

Although never well established, the tide shifted conclusively against submarkets (and therefore overlapping markets) in the 1980s. During that decade, three doctrinal developments clarified market definition and marginalized submarkets: (i) the hypothetical monopolist test, (ii) the rationalization of the *Brown Shoe* criteria with cross-elasticities of demand, and (iii) the smallest-market principle. Thereafter, a consensus quickly emerged that the term submarket was unnecessarily confusing; a proposed submarket either was, or

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competitively constrain it. Therefore, it is difficult to see how the acquisition of a firm that is not present in that market or unlikely to enter it in the near future—i.e., a firm that does not competitively constrain the monopolist—can nonetheless lessen competition. Either the firm is, or is not, a competitive constraint.

[22] *See, e.g.*, Frame-Wilson v. Amazon.com, Inc., 591 F. Supp. 3d 975, 989–90 (W.D. Wash. 2022) (noting that plaintiffs' proposed "U.S. retail ecommerce market" covers "approximately 600 million" different products).

[23] RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 129 (1976 ed.); *see also* Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 186 (1992) (citing and discussing this and related passages). The passage remains unchanged in the expanded second edition. *See* RICHARD A. POSNER, ANTITRUST LAW 152 (2d ed. 2001) ("The 'submarket' approach is unsound.").

was not, a relevant antitrust market in its own right. By the 1990s, enforcers viewed submarkets as an anachronism; if a proposed "submarket" qualifies as a relevant market, and the challenged conduct is found unlawful on that basis, then no further analysis is necessary. Thus, most courts avoid defining overlapping markets, though typically without a detailed explanation. The result is economically and legally sound, but the reasoning frequently sparse.

A. ALL OF THE SUPREME COURT PRECEDENTS SUGGESTING SUBMARKETS ARE EITHER DICTA OR HAVE BEEN REPUDIATED

The U.S. Supreme Court first coined the term "submarket" in the 1962 case *Brown Shoe Co. v. United States* in an effort to resolve an inconsistency in its earlier *duPont* precedents.[24] In the 1956 *duPont* (*Cellophane*) case, the Court did not find unlawful monopolization in a broad market for flexible packaging materials, rejecting the government's contention that the products must be "substantially fungible" to compete in the same relevant market.[25] But in the 1957 *duPont-GM* case, the Court declared a merger unlawful on the basis of its likely effect on a narrow market for automotive fabrics and finishes, thereby rejecting defendants' contention that the market should include other kinds of industrial fabrics and finishes.[26] In an effort to harmonize the broad market approach in *Cellophane* with the narrow market approach in *duPont-GM*, as well as earlier cases on the topic,[27] the Court stated in *Brown Shoe* that, "within [a] broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[28] And so began the concept of product submarkets.

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[24] *See* Lawrence C. Maisel, *Submarkets in Merger and Monopolization Cases*, 72 GEO. L.J. 39, 42–44 (1983) (describing these cases and arguing that when "[f]aced with a choice between the conflicting approaches to market definition in the *Cellophane* and *duPont-GM* cases, the *Brown Shoe* Court adopted them both"); Werden, *supra* note 23, at 157 ("This dictum [in *Brown Shoe*] gave birth to the submarket concept as an explanation for the delineation of markets within markets and resolved the seeming inconsistency between *duPont-General Motors* and *Cellophane* by holding that the former involved such a submarket, while the latter involved 'outer boundaries' of the market."); James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 704 (1995) ("*Brown Shoe* essentially accepted both the *Cellophane* and *General Motors* standards.").

[25] *See* United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 394–95 (1956).

[26] United States v. E.I. duPont de Nemours & Co. (*duPont-GM*), 353 U.S. 586, 593–95, 607–08 (1957).

[27] *See, e.g.*, Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953) ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."); United States v. Columbia Steel Co., 334 U.S. 495, 508–11 (1948) (describing the parties' competing contentions regarding both product and geographic aspects of "the relevant market").

[28] 370 U.S. 294, 325 (1962) (citing *duPont-GM*, 353 U.S. 586).

Ironically, the Court did not find any product submarkets in *Brown Shoe* itself. Rather, the Court expressly considered and rejected attempts to define narrower submarkets based on price or quality distinctions.[29] The Court declined the defendants' suggestion that "medium-priced shoes do not compete with low-priced shoes,"[30] and it therefore concluded that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists."[31] It therefore defined three non-overlapping markets for men's, women's, and children's shoes.[32]

Over the next decade, the Court typically recognized submarkets as a viable concept but declined to apply it. For example, in *Continental Can*, the Court grappled with the *Brown Shoe* submarket indicia, noting that glass and metal containers had "different characteristics which may disqualify one or the other," different production facilities and techniques, and so forth.[33] Yet this was a merger of a can producer and a glass container producer, so the question was whether *that* combination was anticompetitive. The Court found substantial competition between the two, and accordingly defined a single "relevant product market [for] the combined glass and metal container industries and all end uses for which they compete."[34] Lacking a record upon which to define narrower end-use markets (other than beer containers, which the Court declined to define anyway),[35] the Court nonetheless mused that "[t]here may

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[29] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] United States v. Cont'l Can Co., 378 U.S. 441, 450 (1964).

[34] *Id.* at 457.

[35] The Court lacked a record to find different facts both (1) because the government did not produce reliable sales data below, making the task of calculating accurate market shares difficult if not impossible, and (2) because the government failed to grapple with the practical indicia for each of these end-use markets. *See Cont'l Can*, 378 U.S. at 456. The district court was more favorably disposed toward the proposed beer container market but rejected Section 7 liability there on other grounds. *See* United States v. Continental Can Co., 217 F. Supp. 761, 783 (S.D.N.Y. 1963) ("In the lines of commerce denominated containers for the soft drink, canning, toiletry and cosmetic, medicine and health, and household and chemical industries, moreover, [the government's] proof was also altogether deficient as to practical indicia showing that such product markets as these in fact exist. It failed to establish that these were relevant lines of commerce."); *id.* at 795 (noting that plaintiffs established prima facie that there was a relevant product market for beer containers comprised of both cans and bottles, but defendants' motion to dismiss this claim following the close of the government's case was due to the failure to show a substantial lessening of competition in that market given Atlas-Hazel's negligible share of glass bottles and even smaller share of sales in any combined can-and-bottle market); *id.* at 797–98 (finding "no evidence to establish that [containers for the soft drink industry] is a separate and distinct product market"); *id.* at 800 (noting that "the Government abandoned its claim that there was . . . a line of commerce" for "containers for the canning industry" and that after the close of the government's case it unsuccessfully "attempted to substitute an entirely different line of commerce" for "glass containers and metal cans used to pack hermetically sealed foods"); *id.* at

be some end uses for which glass and metal do not and could not compete," and the definition of the broad market for "metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together, for, 'within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.'"[36] Thus, the Court formally defined only one broad market and found it unlawful based upon a combined 25% share.[37] It nodded at submarkets but failed to define any.[38]

The Court followed a similar approach in three other cases. In *United States v. Aluminum Co. of America*, the district court defined a combined product market for both copper and aluminum electrical conductors (wires), found the parties' market shares in that market quite low, and found the transaction lawful.[39] On appeal, the Court rejected the combined market in favor of narrower markets, which it deemed "submarkets," in part because it found "aluminum and copper conductor prices do not respond to one another."[40] But because cross-elasticity of demand determines the "outer boundaries" of the market,[41] the Court's conclusion that aluminum and copper pricing do not respond to each other (and therefore have a low cross-elasticity of demand) means they cannot be in the same broader market;[42] in other words, the Court's reasoning foreclosed the existence of markets broader than the "submarkets."

803–06 (rejecting the government's proposed product markets for three other end uses because the government provided incomplete statistics as to the "size and scope of the product market said to be embraced within these three lines of commerce" and because the government failed to establish that the proposed markets met any of the *Brown Shoe* practical indicia, including no evidence of "any reasonable interchangeability of use or cross-elasticity of demand between containers made of these different materials").

[36] *Cont'l Can*, 378 U.S. at 457–58 (quoting *Brown Shoe*, 370 U.S. at 325).

[37] *See id.* at 461.

[38] In a merger of just glass container producers, the relevant market may well be different (e.g., glass containers excluding cans, or separate markets for various end uses), but *Continental Can* involved sellers of both "metal and glass container[s]," and the *single* market analyzed was one that included both of their products. *See id.* at 456–57.

[39] *See* 377 U.S. 271, 274–75 (1964); *id.* at 282–83 (Stewart, J., dissenting).

[40] *See id.* at 276.

[41] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

[42] Commentators today dispute the evidence on interchangeability, with Phillip Areeda and Herbert Hovenkamp indicating the evidence may have supported only even narrower markets and Muris suggesting it supported only a broader market. *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 14, ¶ 530f ("[The] Court's aggregation into one 'market' of bare and insulated aluminum conductor in order to show large shares for the merging firms was indefensible."); Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes* 68 (Am. Enter. Inst., AEI Economics Working Paper 2023-05, 2023) ("To find a violation, the Court needed to define some market in which the merging parties had a sufficient presence. First, to remove from the denominator the copper products that Alcoa did not sell, it found there were separate submarkets for aluminum and copper conductors, although there was no dispute that there was

In *United States v. Grinnell Corp.*, the Court stated in a dictum that there may also be submarkets in Sherman Act cases.[43] But it declined to "pursue that question" in *Grinnell*, finding instead that accredited central station service was a market and that "defendants have not made out a case for fragmentizing the types of services into lesser units."[44] The Court opted to treat the admittedly different services as a cluster market.[45]

Finally, in *United States v. General Dynamics Corp.*, the DOJ asserted a coal submarket within a broader energy market, but the Court declined to reach the question.[46] Although "under normal circumstances a delineation of proper geographic and product markets is a necessary precondition" to assessing a Section 7 claim, the Court found that the DOJ had failed to prove a violation even if the Court accepted what the district court had deemed an "unrealistic" proposed market.[47] Justice Douglas and three other justices dissented in part because they would have reversed the district court's market definition analysis. Justice Douglas quibbled in particular with the district court's conclusion that, having found a market for "interfuel competition" among energy sources, *Continental Can* "compel[led]" the district court to reject the government's proposed submarket.[48] In other words, the district court believed *Continental Can* barred overlapping markets and submarkets,[49]

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interchangeability in production between these products. The Court itself had found in *Brown Shoe* that such interchangeability should be relevant in market definition, but it ignored the interchangeability here." (footnotes omitted)).

[43] *See* 384 U.S. 563, 572 (1966) ("In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act[,] there may be submarkets that are separate economic entities. We do not pursue that question here." (citation omitted)).

[44] *Id.* at 572.

[45] *See id.* at 572–73 ("The different forms of accredited central station service are provided from a single office and customers utilize different services in combination. We held in *United States v. Philadelphia Nat. Bank* that 'the cluster' of services denoted by the term 'commercial banking' is 'a distinct line of commerce.' There is, in our view, a comparable cluster of services here." (citation omitted) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1964)).

The OMT Rule accounts for cluster markets by allowing aggregation "up" into cluster markets when warranted. All it requires is that once aggregated into a cluster market, those sales cannot be double counted by allocating them a second time to an overlapping market.

[46] *See* 415 U.S. 486, 510 (1974).

[47] *See id.* at 510–11.

[48] *See id.* at 513 (Douglas, J., dissenting) ("The court below concluded that 'the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination.' The court rejected the Government's hypothesis of coal as a submarket for antitrust purposes as 'untenable,' finding that *United States v. Continental Can Co.* 'compel[s] this court to conclude that since coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass interfuel competition.' I read *Continental Can* to import no such compulsion." (citations omitted) (first quoting *United States v. Cont'l Can Co.*, 378 U.S. 441, 450 (1964); and then quoting *United States v. Gen. Dynamics Co.*, 341 F. Supp. 534, 556 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486 (1974)).

[49] *See Gen. Dynamics*, 341 F. Supp. at 555–56 ("The competitive battle waged by various forms of energy, as documented in this litigation, is similar to the demonstrated competition between glass and metal containers in the *Continental Can* decision. Applicable here are the

and the Supreme Court declined—over Justice Douglas's pointed dissent—to say otherwise.

The evolution in the Court's approach to geographic submarkets was more uneven. The Court initially adopted the concept in *United States v. Pabst Brewing Co*.[50] There, the DOJ alleged three levels of nested geographic markets: the United States as a whole, the three-state area of Wisconsin, Illinois, and Michigan, and the State of Wisconsin individually.[51] Although the district court noted that another court had previously accepted the DOJ's definition of *five* levels of nested markets and submarkets in the *Bethlehem Steel* case,[52] it found substantial differences in the steel and beer markets, defined only a single nationwide market,[53] and found the transaction lawful in it. (The district court in particular faulted the DOJ for offering "no testimony from either economists or experts in the beer industry in support of its position as to the relevant geographic market," nor producing a single fact witness "knowledgeable in this industry" that could testify to competitive effects.[54]) The Supreme Court reversed, finding (despite the apparently sparse record) each of the three nested geographic markets.[55] The Court also found that the transaction produced unlawful concentration in all three of the geographic markets, with market shares of 4.49% of the national market, 11.32% of the three-state market, and 23.95% of the Wisconsin market.[56]

Yet the Court almost immediately moved away from the practice of defining overlapping geographic markets. In two separate banking cases decided in 1974, less than ten years after *Pabst Brewing*, the Court drew geographic markets narrowly and rejected the definition of a broader, overlapping geographic

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Supreme Court's considerations which compelled the conclusion that an interindustry line of commerce existed . . . . These considerations also compel this court to conclude that since coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass interfuel competition." (citing *Cont'l Can*, 378 U.S. at 453)).

[50] *See* 384 U.S. 546 (1966).

[51] *See* United States v. Pabst Brewing Co., 233 F. Supp. 475, 477 (E.D. Wis. 1964), *rev'd*, 384 U.S. 546 (1966).

[52] *See id.* at 485 ("[T]he court [in *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958)] held that the appropriate relevant markets as to four of the products or lines of commerce involved included, but were not limited to the United States as a whole, a submarket thereof—the northeast quadrant of the United States, a submarket of that submarket—Michigan, Ohio, Pennsylvania, and New York, a submarket of that latter submarket—Michigan and Ohio, and two submarkets of the latter submarket—(1) Michigan and (2) Ohio.").

[53] *See id.* at 480–92.

[54] *See id.* at 495.

[55] United States v. Pabst Brewing Co., 384 U.S. 546, 551–52 (1966) ("In accord with our prior cases, we hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of § 7 in each and all of these three areas." (footnote omitted)).

[56] *Id.* at 551–52.

market.[57] In the first, *United States v. Marine Bancorporation, Inc.*, the DOJ pleaded two overlapping geographic markets, one for the Spokane, Washington metropolitan area and another for the state of Washington as a whole.[58] The district court found only a localized banking market for Spokane, and the Supreme Court affirmed, noting that "the relevant geographic market or appropriate section of the country is the area"—singular—"in which the acquired firm is an actual, direct competitor."[59] In the second, *United States v. Connecticut National Bank*, the Court reversed a district court decision defining the geographic market as the State of Connecticut as a whole.[60] In so doing, the Court concluded:

> The State cannot be the relevant geographic market, however, because CNB and FNH are not direct competitors on that basis (or for that matter on any other basis pertinent to this appeal). The two banks do not operate statewide, nor do their customers as a general rule utilize commercial banks on that basis.[61]

The Court thus remanded the matter with instructions to "determine pursuant to the localized approach denoted above the geographic market"—again, singular—in which each of the merging parties "operates and to which the bulk of its customers may turn for alternative commercial bank services."[62] It made no mention of the *Brown Shoe* submarket indicia.[63]

In sum, there is no Supreme Court precedent actually holding that courts may define overlapping *product* markets. The Court endorsed the concept of overlapping product submarkets in dicta frequently but never found any and repudiated the concept *sub silentio* in its last major merger case (*General Dynamics*). And *Ohio v. American Express Co.*,[64] described below in Part II, goes even further. The Court took a similar tack with geographic markets, shifting from initial enthusiasm of overlapping submarkets to repudiation in less than ten years. Nor were mergers unique; the Court also mentioned

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[57] *See, e.g.*, Maisel, *supra* note 24, at 69–71.

[58] *See* 418 U.S. 602, 614, n.11, 619–20 (1974).

[59] *Id.* at 622. In a footnote, the Court attempted to resuscitate its *Pabst* holding, noting that "*Pabst* in reality held that the Government had established three relevant markets in which the acquired firm actually marketed its products—a single State, a multistate area, and the Nation as a whole." *Id.* at 621 n.20.

[60] *See* 418 U.S. 656, 672–73 (1974).

[61] *Id.* at 667.

[62] *Id.* at 668.

[63] To similar effect, the Court in *United States v. Falstaff Brewing Corp.* defined a single regional beer market in which "national, regional, and local" firms competed. 410 U.S. 526, 549 (1973) (Marshall, J., concurring in the result). Unlike in *Pabst*, the presence of geographically dispersed competitors apparently did not justify overlapping geographic markets.

[64] 138 S. Ct. 2274 (2018).

submarkets, but failed to find any, in the monopolization case *United States v. Grinnell Corp.*[65]

B. UNEVEN EARLY APPLICATION OF SUBMARKET DOCTRINE

Following *Brown Shoe*, lower courts and enforcers spent the next two decades searching for a workable way to implement submarkets. Confusion reigned.

Some courts defined submarkets.[66] In one of the earliest cases, the Third Circuit accepted the definition of separate submarkets for "higher priced baseballs" and "low priced baseballs."[67] In 1970, the Sixth Circuit affirmed the definition of a broad market for vending machines and a submarket in bottle vending machines,[68] but rejected defendant's attempt to define an even narrower submarket—which would have eliminated the overlap between the merging parties—for bottle vending machines sold to Coca-Cola distributors.[69] In 1979, the Seventh Circuit affirmed finding a relevant submarket for "drive-thru retail photo processing . . . in the Indianapolis metropolitan area" within a broader market for "conventional retail[]" photo processing in that area.[70]

Other courts rejected submarkets. In a banking case, for example, the DOJ asserted the traditional commercial banking cluster market and seven additional product submarkets, in each case further separated into three separate

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[65] *See* 384 U.S. 563, 572 (1966) ("In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act[,] there may be submarkets that are separate economic entities. We do not pursue that question here." (citation omitted)).

[66] Based upon our review, cases defining submarkets appear to be fairly rare, and others agree. *See, e.g.*, 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 625 & nn.178–80 (9th ed. 2021) (collecting cases questioning "whether the markets at issue are genuine submarkets or simply markets defined too narrowly" and thereby rejecting proposed submarkets) (citing, inter alia, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1118–19 (N.D. Cal. 2004); Worldwide Basketball & Sport Tours v. NCAA, 388 F.3d 955, 963 (6th Cir. 2004); T. Harris Young & Assocs. v. Marquette Elecs., 931 F.2d 816, 824–25 (11th Cir. 1991); Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 (9th Cir. 1989); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 553–54 (1st Cir. 1974)).

[67] *See* A. G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585, 591–603 (3d Cir. 1962).

[68] *See* Seeburg Corp. v. FTC, 425 F.2d 124, 126, 128–29 (6th Cir. 1970) (affirming a finding of an overall market consisting of manufacturers of vending machines and a submarket of manufacturers of bottle vending machines).

[69] *See id.* at 129 ("The overall market and the submarket found by the Commission may readily be described in terms of these criteria—but significantly, the submarket contended for by Seeburg (one consisting solely of Coca-Cola bottlers) cannot be, except by reference to the single characteristic of 'distinct customers.' The findings of the Commission concerning the relevant markets are affirmed."); *see also* United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 552, 557 (1971) (rejecting separate markets for printing of Sunday color comics for newspapers and for feature syndicates, holding both were in a single non-overlapping market).

[70] *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 712–14 (7th Cir. 1979); *see also* United States v. Gillette Co., 828 F. Supp. 78, 83 (D.D.C. 1993) (finding for defendants but stating: "Therefore, the court finds that plaintiff has met its burden of demonstrating that a submarket with a price range of $50 to $400 may be segregated out of the larger fountain pen market for Clayton Act purposes").

geographic areas for New York City, the New York metropolitan area, and a national market.[71] The district court rejected the DOJ's 24 markets and submarkets in favor of two non-overlapping markets: a regional market for retail commercial banking in the New York metropolitan area, and a separate national market for wholesale commercial banking.[72] Likewise, in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, the Ninth Circuit rejected definition of separate submarkets for telephone equipment sold to (a) "independent telephone operating compan[ies]" and (b) "industrial, governmental, and new common carrier[s]" because the equipment sold to each customer group was "identical."[73] The Ninth Circuit therefore rejected as economically "irrelevant" the presence of two of the seven *Brown Shoe* practical indicia, different customers and industry recognition.[74] In another case, the Eleventh Circuit rejected a proposed product submarket for "EKG recording paper" sold to hospitals with 200 or more beds in part because "there is no difference in the paper sold to those hospitals from that sold to smaller hospitals, clinics, and doctors' offices."[75] Among many other examples, courts also rejected proposed submarkets for health maintenance organizations,[76] "self-serve, cash-only gasoline" filling stations,[77] "all system software that will execute the NOVA instruction set,"[78] individual oil pipe handling tools,[79] and "submersible liquid manure pumps and mix hoist systems."[80]

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[71] *See* United States v. Mfrs. Hanover Tr. Co., 240 F. Supp. 867, 895 & n.80, 898 (S.D.N.Y. 1965).

[72] *See id.* at 899–901 (finding the area of effective competition for retail banking customers to include both the City of New York and its suburbs, but not the rest of the country); *id.* at 918 ("Accordingly, we conclude that the relevant geographic area of effective competition for all wholesale accounts is the entire United States, regardless of the customer's location. Thus, we must deal with two geographic markets and the problem of ascertaining the competitive effect of this merger in each.").

[73] *See* 518 F.2d 913, 932–33 (9th Cir. 1975); *accord* T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 824–25 (11th Cir. 1991) ("While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the *product* sold to those customers.").

[74] *See Int'l Tel. & Tel. Corp.*, 518 F.2d. at 932.

[75] *See T. Harris Young*, 931 F.2d at 824–25 & n.16.

[76] *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598–99 (1st Cir. 1993).

[77] *See* Rebel Oil Co. v. Atl. Richfield Co., 808 F. Supp. 1464, 1467–68 (D. Nev. 1992), *aff'd in relevant part*, 51 F.3d 1421 (9th Cir. 1995).

[78] *See In re* Data Gen. Corp. Antitrust Litig., 529 F. Supp. 801, 819 (N.D. Cal. 1981), *aff'd in part, rev'd in part sub nom*, Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984).

[79] United States v. Hughes Tool Co., 415 F. Supp. 637, 642 (C.D. Cal. 1976) (rejecting all "of the government's eighteen proposed submarkets").

[80] H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1537–40 (8th Cir. 1989) (quoting jury's special verdict responses). For more extensive discussion, see Keyte, *supra* note 24, at 713–15 (discussing these and other cases).

One district court synthesized several submarket decisions into a broader principle. In the *Super Premium Ice Cream* litigation, the district court rejected application of the *Brown Shoe* practical indicia to define submarkets when "price variances or product quality variances" are "actually a *spectrum* of price and quality differences" and are therefore "economically meaningless" distinctions that cannot support the definition of narrower submarkets.[81] Thus, in that case the alleged price and quality distinction between "super premium" ice creams and other ice creams was actually a continuum and, like the continuum in *Brown Shoe* itself, could not support finer submarkets defined around price or quality distinctions.[82]

Between these extremes, some courts split the difference. Sometimes that approach favored plaintiffs.[83] Other times splitting the difference favored defendants.[84]

Finally, some courts used the nomenclature of submarkets but defined only a single relevant market. In one of the earliest such cases, the FTC defined, and the D.C. Circuit affirmed, a solitary "florist foil submarket."[85] Other examples during this era include a single relevant "household steel wool submarket"[86] and a single relevant submarket for "large mining excavator loaders."[87]

Submarkets also spawned several legal oddities. Two illustrate the wide and often contradictory range of outcomes.

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[81] *In re* Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962); United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 145–46 (N.D. Cal. 1966), *aff'd*, 385 U.S. 37 (1966); Ron Tonkin Grand Turismo v. Fiat, 637 F.2d 1376, 1379–80 (9th Cir. 1981); JBL Enters. v. Jhirmack Enters., Inc., 509 F. Supp. 357, 371–72 (N.D. Cal. 1981), *aff'd*, 698 F.2d 1011 (9th Cir. 1983); and Beatrice Foods v. FTC, 540 F.2d 303, 309–10 (7th Cir. 1976)), *aff'd mem. sub nom.* Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990).

[82] *See id.* ("This is that case [where distinctions are economically meaningless]. The record demonstrates that all grades of ice creams compete with one another for customer preference and for space in the retailers' freezers. . . . There is significant overlap among the various grades and brands. All grades of ice cream compete for both retail shelf space and for consumers' attention. The various adjectives used to describe brands of ice creams do not alone establish separate markets.").

[83] *See, e.g.*, United States v. Kennecott Copper Corp., 231 F. Supp. 95, 96, 100–01, 106 (S.D.N.Y. 1964) (enjoining the transaction and accepting two markets and one (of two) proposed submarkets), *aff'd per curiam*, 381 U.S. 414 (1965).

[84] *See, e.g.*, United States v. Gillette Co., 828 F. Supp. 78, 83–84 (D.D.C. 1993) (rejecting a proposed submarket for "premium fountain pens" because premium fountain pens competed with other kinds of pens in a broader market for "all premium writing instruments" in which competitive harm was unlikely).

[85] *See* Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962).

[86] *See* Gen. Foods Corp. v. FTC, 386 F.2d 936, 940–41 (3d Cir. 1967).

[87] *See* Harnischfeger Corp. v. Paccar Inc., 474 F. Supp. 1151, 1157 (E.D. Wis. 1979), *aff'd*, 624 F.2d 1103 (7th Cir. 1979).

First, courts on occasion found submarkets even when there was no competitive overlap, and therefore scant legal relevance. For example, in *United States v. Lever Brothers Co.*, the DOJ pleaded a relevant market for "heavy duty detergents" in which both merging firms competed before the transaction.[88] The district court found both this market and a relevant submarket—advanced by Defendants—for "low sudsing heavy duty detergents" in which the buyer had not participated before the merger,[89] i.e., it was a "three-to-three" merger. Even in the broader market, the court found no Section 7 violation, relying both on evidence that the seller was a flailing firm and that the buyer had invested heavily to compete more effectively against Proctor & Gamble and other firms.[90] The narrower market was therefore superfluous.

Second, enforcers sometimes pleaded single-brand submarkets. For example, in *United States v. CBS Inc.*,[91] a case initially brought under Richard Nixon and subsequently refiled,[92] the DOJ alleged both a market for "national commercial television network prime time entertainment programs," a submarket for those programs broadcast on ABC, and another submarket for those programs broadcast on CBS.[93] The district court denied defendant's motion to dismiss the submarkets, concluding that "a relevant submarket in one's own products will exist if such a submarket is (a) sufficiently distinct in commercial reality, and (b) is relatively immune from competition of substitutes, or (c) was acquired by means that show

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[88] 216 F. Supp. 887, 901 (S.D.N.Y. 1963) ("[T]he Court concludes that the proof submitted established a relevant market of heavy duty detergents and a relevant submarket of low sudsing heavy duty detergents.").

[89] *Id.* at 898 ("By transferring the product to Lever the product remained available and remained in active competition with the products of Procter & Gamble and Colgate. At the time of the transfer of the asset there were three firms in the market of low sudsing heavy duty detergents: Procter & Gamble, Colgate and Monsanto. After the acquisition there were three firms in the market of low sudsing heavy duty detergents: Procter & Gamble, Colgate and Lever; and by virtue of Lever's experience, expertise and substantial financial position it was in a much better position to compete in this market than Monsanto had ever been.").

[90] *Id.* at 899 ("The reality of the situation in 1956 was that Lever, which had no low sudsing detergent, acquired a low sudsing detergent from a company which was no longer an effective competitor in that submarket. By so doing the brand remained an active brand in a competitive market. The product remained available for the housewife. The acquisition aided, rather than impeded, competition.").

[91] 459 F. Supp. 832 (C.D. Cal. 1978).

[92] *See* W. Wallace Kirkpatrick, *Antitrust Enforcement in the Seventies*, 30 CATH. U. L. REV. 431, 437 n.9 (1981) (describing the lineage of the *NBC*, *CBS*, and *ABC* cases from filing to dismissal, refiling, and eventually consent decrees); *see also* United States v. NBC, Inc., No. 74-3601, 1977 WL 1531 (C.D. Cal. Nov. 28, 1977); United States v. CBS Inc., No. 74-3599, 1980 WL 1936 (C.D. Cal. July 3, 1980); United States v. ABC, Inc., No. 74-3600, 1980 WL 2013 (C.D. Cal. Nov. 14, 1980).

[93] *See CBS*, 459 F. Supp. at 835.

an attempt to monopolize."[94] Today, single-brand markets are believed to be rare.[95]

C. EARLY SCHOLARLY CRITIQUES

Commentators critiqued the submarkets doctrine from the beginning. At least three strands emerged.

First, many commentators observed that the discussion in *Brown Shoe* that established submarkets is a dictum. For example, attorney William F. Upshaw wrote a few years after *Brown Shoe* that "the 'product submarket' dictum would only make sense if the Court were *accepting* Brown's argument" that "men's, women's and children's shoes were inappropriate 'lines of commerce' because within each class significant 'price/quality' and 'age/sex' differences existed," thereby warranting a finding of separate markets.[96] "In view of the fact that Brown's argument was *specifically rejected* by both the lower court and the Supreme Court, the dictum was entirely unwarranted."[97] Others made the same observation.[98]

The insight that *Brown Shoe* itself did not define any submarkets, and therefore that its discussion of the concept was a dictum, was lost in later years. In 1983, Lawrence C. Maisel argued that "[t]he holding in *Brown Shoe* . . . that smaller relevant markets—submarkets—can exist within broader relevant markets should be overruled."[99] Likewise, the 2023 Merger Guidelines—which

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[94] *See id.* at 838–39.

[95] *See, e.g.*, Keyte, *supra* note 24, at 706–07 & nn.50–53 (collecting cases rejecting markets for products like "Yamaha pianos," "Rolex watches," and "Lladro figurines" and concluding that "numerous courts, especially in the distribution context, have rejected single-brand markets as a matter of law"); ABA ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 617–18 (9th ed. 2021).

Single-product aftermarkets are an exception, at least theoretically. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 485–86 (1992) (concluding that a single-brand aftermarket for Kodak copier parts and service cannot be rejected as a matter of law, but also accepting that the facts may subsequently show "that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects."). *But see, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 571–72 (1972) (analyzing competition in a multi-brand aftermarket for spark plugs).

[96] William F. Upshaw, *The Relevant Market in Merger Decisions: Antitrust Concept or Antitrust Device?*, 60 NW. U. L. REV. 424, 467 (1965).

[97] *Id.*

[98] *See, e.g.*, Bryce J. Jones, *New Thrust of the Antimerger Act: The* Brown Shoe *Decision*, 38 NOTRE DAME L. REV. 229, 240–41 (1963).

[99] Maisel, *supra* note 24, at 71. Yet elsewhere in the same article Maisel recognized that the Court did not define any submarkets in *Brown Shoe*. *See id.* at 44 ("[W]hen in *Brown Shoe* it came time to apply submarket analysis to the facts of the case, the Court found itself unable to exclude significant competition from the relevant market.").

purport to cite "applicable legal precedent"[100]—rely on *Brown Shoe* as the sole legal authority for their overlapping markets claim.[101]

Second, many viewed the *Brown Shoe* concept of overlapping markets as economically incoherent. As George Hall and Charles Phillips explained, "[i]f a market is to be determined on economic grounds, then it is the unit which encompasses the supply and demand function. To assert that there are markets-within-markets avoids, rather than solves, the problem of specifying what the demand and supply relationships are between the merging firms."[102] George and Rosemary Hale likewise observed:

> Enlarging and reducing the market concept, like opening and closing the iris of a camera over a concentric area, merely indicates indecision. If the line of commerce is men's shoes, it should not also be men's golf shoes: if one boundary is right, the other must be wrong. As suggested above, however, one could choose two lines of commerce: men's golf shoes and girls' ballet slippers.[103]

We will return later to Hale and Hale's last insight—that economic principles may support narrow but non-overlapping markets like men's golf shoes and girl's ballet slippers.

The argument that markets-within-markets are economically incoherent predates even *Brown Shoe*. In response to the *Bethlehem Steel* merger decision,[104] which defined many permutations of overlapping product and geographic markets, economist Morris Adelman objected:

> It is a pathetic illusion that the market is whatever the courts choose to call it. The market, like the weather, is simply there, whether we only talk about it or do something . . . . This confusion between the legal standard and the economic fact is writ large in the Bethlehem

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[100] MERGER GUIDELINES (2023), *supra* note 8, at 4. The prior draft version of the guidelines was more forceful yet, asserting that the citations were "to binding legal precedent." U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES 5–6 (2023), www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf ("These Guidelines include citations to binding legal precedent. Citations to court decisions in these Guidelines do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools to new learning, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Guidelines therefore cite binding propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities.").

[101] MERGER GUIDELINES (2023), *supra* note 8, at 39–40 nn.75–77 (citing *Brown Shoe*, 370 U.S. at 324–25).

[102] George R. Hall & Charles F. Phillips Jr., *Antimerger Criteria: Power, Concentration, Foreclosure and Size*, 9 VILL. L. REV. 211, 219 (1964) (footnote omitted).

[103] G.E. Hale & Rosemary D. Hale, *A Line of Commerce: Market Definition in Anti-Merger Cases*, 52 IOWA L. REV. 406, 426 (1966).

[104] United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

> Steel opinion, which . . . . sinks below error into chaos. If the northeast quadrant [of the continental United States] is a market area—is the locus of supply-demand forces that determine the price—then the other two areas are not. The evidence that sustains any one of the three market concepts necessarily condemns the others.[105]

Third, many commentators warned that the concept of overlapping markets vested courts with such wide discretion that it threatened to endorse a wide range of disparate and contradictory results. For example, in 1962, the economist Bryce Jones warned:

> The problem [with *Brown Shoe*'s endorsement of both broader markets and submarkets within them] is that some courts will find in the former dictum an authorization to approve of any submarket definition provided there is some evidence that the submarket is distinctive. Other courts, however, may require the proposer of a narrow submarket definition to demonstrate, according to the latter *Brown* [*Shoe*] dictum, that the submarket is not drawn in such a way as to exclude competitive products and suppliers. There is no escape from the conclusion that either interpretation is tenable in terms of the *Brown* [*Shoe*] decision.[106]

Complaints only intensified as lower courts attempted to apply the submarket doctrine. In 1964, Hall and Phillips deemed it "an intellectual monstrosity" that was "judicially useful by providing almost unlimited authority to the courts in choosing a market."[107] Likewise in 1966, Hale and Hale declared "[w]hat is objectionable is the broadening and narrowing of product definitions in order to achieve desired results in calculating market shares."[108] Richard Posner initially was no kinder, arguing:

> The "submarket" approach is unsound. If the "outer boundaries" of the market include only the product's good substitutes in both consumption and production—which seems a fair reading of *Brown Shoe*'s reformulation of the cellophane test—then a submarket would be a group of sellers from which sellers of good substitutes in consumption or production had been excluded, and these exclusions would deprive any market-share statistics of their economic significance.[109]

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[105] M.A. Adelman, *The Antimerger Act: 1950-60*, 51 AM. ECON. REV. 236, 237 (1961) (citations omitted); *see also* Werden, *supra* note 23, at 145 (quoting this portion of Adelman for the proposition that he "strongly objected to the use of markets within markets").

[106] Jones, *supra* note 98, at 240–41.

[107] Hall & Phillips Jr., *supra* note 102, at 219.

[108] Hale & Hale, *supra* note 103, at 426.

[109] POSNER, *supra* note 23, at 129; *see also* Werden, *supra* note 23, at 186 (citing and discussing this and related passages).

Writing a few years later with William Landes, Posner took a softer tone, stating that the submarket concept is "harmless" and "unobjectionable" so long as it "signifies [a] willingness in appropriate cases to call a narrowly defined market a relevant market for antitrust purposes" and courts take care to give "appropriately less weight . . . to market shares computed in such a market."[110] Yet Posner and Landes lamented that this "vital" qualification "has unfortunately escaped the explicit attention of the courts,"[111] and therefore endorsed analysis based on elasticities of demand when they are available.[112]

D. DEVELOPMENTS IN THE 1980S SUBSTANTIALLY DIMINISHED THE VALIDITY OF SUBMARKETS

In the 1980s, three developments brought some order to the chaos and rationalized submarkets: (i) the hypothetical monopolist test (HMT), (ii) the rationalization of the *Brown Shoe* indicia with cross-elasticities of demand, and (iii) the smallest-market principle.

First, the hypothetical monopolist test provided a direct means to apply cross-elasticities of demand to market definition. Developed in the late 1970s[113] and introduced as the "most innovative and controversial aspect" of the 1982 Horizontal Merger Guidelines,[114] it quickly became the standard process for defining markets.[115] At its core, the HMT relies upon cross-elasticities

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[110] William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 978 (1981).

[111] *Id.*

[112] *Id.* ("We pointed out [earlier in the article] that there is a range of possible markets of varying breadth that can be used in an antitrust case. A broad market is one in which distant substitutes for the product of the firm whose market power we are trying to measure are included. A narrow market is one where only close substitutes are included. The choice is largely immaterial so long as it is recognized that the market elasticity of demand varies inversely with the breadth of the market. . . . When the only fact known about market power in a particular case is market share, the danger is acute that if a submarket approach is used the finder of fact will exaggerate the defendant's market power. But if the elasticity of demand and supply can be estimated (even if only roughly), then, as emphasized repeatedly in this Article, it is unimportant whether the market is defined broadly or narrowly.") (footnote omitted).

[113] *See* U.S. DEP'T OF JUST., COMPETITION IN THE COAL INDUSTRY: REPORT OF THE UNITED STATES DEPARTMENT OF JUSTICE PURSUANT TO SECTION 8 OF THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1975, at 26–27 (May 1978) ("A geographic market, for antitrust purposes, is an area within which the sellers of a product could maintain significantly higher prices if they combined to form a monopoly. Generally speaking, the smaller the area encompassed by the market, other things being equal, the more likely it is that buyers within the area will be able cheaply to import the product from sellers outside the area. This puts a limit on how much a hypothetical monopoly within an area could raise prices. . . . The same principle governs product markets, but instead of a geographic area it is a range of similar goods that are included in the product market."). (Many thanks to Greg Werden for this reference.)

[114] William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIF. L. REV. 618, 622 (1983).

[115] The HMT emerged from several earlier studies. *See* William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 11 n.26 (2000) (crediting Kenneth Boyer,

of demand, and therefore under *Brown Shoe* sets the "outer boundary" of the candidate market. The HMT has been widely adopted outside the United States.[116] When the 1982 Guidelines were released, concerns were expressed that the HMT would result in much broader markets and would tend to crimp antimerger enforcement.[117] The exact opposite has proven true—with many tiny markets defined and no need for "submarkets."

Second and relatedly, the newfound application of demand elasticities in the HMT led courts to downplay and harmonize the *Brown Shoe* practical indicia with the HMT approach. Starting with the D.C. Circuit's 1986 decision in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*—authored by Judge Robert H. Bork—several courts concluded that the *Brown Shoe* practical indicia are merely "evidentiary proxies for direct proof of substitutability"[118] and therefore should produce the same market proven via cross-elasticities of demand.[119] This was precisely as the DOJ intended; as AAG Baxter explained in 1983, the HMT sought to avoid the "ad hoc character" of the *Brown Shoe* indicia by appealing to direct examination of "whether a significant and nontransitory increase in the price . . . would be profitable" and resorting, "where such data are not available," to the indicia's "indirect or second-best evidence."[120] The proxy view set out in the 1982 Guidelines and

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George Hay, and Greg Werden). Lawrence White and Tad Lipsky were also important in developing the 1982 Guidelines.

[116] *See, e.g.*, Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 259–63 (2003) (detailing adoption in guidelines issued by enforcers in Australia, Canada, New Zealand, and the United Kingdom).

[117] *See, e.g.*, Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402 (1983).

[118] *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986); *accord* H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1540 (8th Cir. 1989) (citing and adopting *Rothery Storage*).

[119] For example, each of the three opinions filed in the *Whole Foods* case accepted the *Rothery Storage* view that the *Brown Shoe* indicia, if they were relevant at all, were necessarily proxies for demand substitution evidence. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1039 (D.C. Cir. 2008) (Brown, J.) ("We look to the *Brown Shoe* indicia, among which the economic criteria are primary." (citing *Rothery Storage*, 792 F.2d at 219 n.4)); *id.* at 1045 (Tatel, J., concurring) (crediting evidence of demand substitution as "direct evidence that Whole Foods and Wild Oats occupy a separate market from conventional supermarkets" and then noting that the *Brown Shoe* practical indicia supported the same result); *id.* at 1058–59 (Kavanaugh, J., dissenting) ("As demonstrated in this Court's most recent merger case, the practical indicia test of *Brown Shoe* no longer guides courts' merger analyses because it does not sufficiently account for the basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine.").

[120] Baxter, *supra* note 114, at 623–24; *see also, e.g.*, Keyte, *supra* note 24, at 699–700 (contrasting the *Brown Shoe* practical indicia as "a somewhat rudderless standard that is subject to result-oriented analysis" with the "[m]ore recent[]" 1992 Horizontal Merger Guidelines that, through the HMT and smallest-market principle, were "intended to link the market definition inquiry more closely to the ultimate goal of preventing the exercise of market power and to create a benchmark for the degree of interchangeability required to place products in the same product market"); Jonathan B. Baker, *Stepping Out in an Old* Brown Shoe*: In Qualified Praise*

Rothery Storage is now widely accepted, even by enforcers[121] and occasional supporters of submarkets.[122] As Jonathan Baker put it, the indicia "would not have drawn sharp criticism from commentators" if they had been "exclusively [] applied as proxies for substitutability" rather than applying them "blindly" so as "to define inappropriately narrow submarkets within the outer bounds of markets properly defined with reference to substitution possibilities."[123]

Third, the smallest-market principle collapsed the outer and inner boundaries of the market into a single product market. Under this now-familiar approach, the HMT is conducted "inside-out," iterating from the smallest candidate product outward. Although often treated as prudential, it also ensures that once an outer boundary of the market is fixed (by reference to cross-elasticities of demand), then under *Brown Shoe* itself, no broader markets can be defined beyond it. And because the process starts from the smallest plausible market, smaller submarkets are implausible. Applying these principles together yields one, and only one, relevant product market for a given grouping of sales[124]—albeit typically a fairly narrow one.[125] The related "Circle Principle" ensures that all relevant competitive constraints are included within the relevant market.[126]

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of Submarkets, 68 ANTITRUST L.J. 203, 205–06 (2000) (noting that six of the seven practical indicia "vary in their probative value, and are not necessarily the only evidence that can be brought to bear, but they could all reasonably be read to suggest an inquiry into buyer substitution," and that they therefore "can be interpreted as 'evidentiary proxies for direct proof of substitutability'" as set out in *Rothery Storage* (footnotes omitted) (quoting *Rothery Storage*, 792 F.2d at 218)).

[121] *See, e.g.*, Plaintiff Federal Trade Commission's Proposed Conclusions of Law ¶ 37, FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007) (No. 07-cv-01021), ECF No. 162-2 ("Because it is usually difficult to measure cross-elasticities of demand, courts also have identified 'practical indicia' of product market boundaries, such as [the practical indicia listed in *Brown Shoe*]. These 'practical indicia' are 'evidentiary proxies for direct proof of substitutability' among products." (quoting *Rothery Storage*, 792 F.2d at 218)).

[122] *See, e.g.*, Baker, *supra* note 120, at 206.

[123] *Id.*

[124] Gregory J. Werden, *Market Delineation Under the Merger Guidelines: A Tenth Anniversary Retrospective*, 38 ANTITRUST BULL. 517, 531 (1993) [hereinafter Werden, *Market Delineation*] (explaining that the smallest-market principle identifies "the one and only relevant market for the antitrust market subsequence" and related analysis); *id.* at 544–45 (discussing the history of the smallest-market principle); Gregory J. Werden, *The Use and Misuse of Shipments Data in Defining Geographic Markets*, 26 ANTITRUST BULL. 719, 721 (1981) [hereinafter Werden, *Use and Misuse*] (proposing a smallest-market principle for geographic markets); Kenneth D. Boyer, *Is There a Principle for Defining Industries?*, 50 S. ECON. J. 761, 763 (1984) (proposing an alternative approach for selecting a single relevant market around the "ideal collusive group").

[125] *See generally* Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55 (2021).

[126] *See, e.g.*, Bryan Keating, Jonathan Orszag & Robert Willig, *The Role of the Circle Principle in Market Definition*, ANTITRUST SOURCE (Apr. 2018) at 1, 1–3, www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/apr18_full_source.pdf (describing the smallest-market principle, the circle principle, and the interaction between them in both the 1992 and

Commentators generally cheered these developments. Former DOJ Assistant Attorney General Donald Baker and future FTC General Counsel Bill Blumenthal declared the HMT the "most important contribution" to the Guidelines.[127] Professors Larry Sullivan, Janusz Ordover, and Bobby Willig had similar praise in the same symposium issue of the *California Law Review*,[128] and economist Franklin Fisher—who later served as an expert witness for the DOJ in *United States v. Microsoft Corp.*[129]—deemed it a "major step in the direction of sanity."[130] Writing several years later, future FTC Chairman Robert Pitofsky deemed these developments (and particularly the HMT) "bold and thoughtful"[131] but nonetheless worried, along with others,[132] that they would produce markets that were too broad.[133]

Veteran DOJ economist Gregory Werden, who was heavily involved in the drafting of the 1982 Guidelines, also both anticipated these developments and cheered their adoption. In 1981, Werden noted that the hypothetical monopolist test may "yield markets within markets" but, when coupled with the

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2010 Horizontal Merger Guidelines); GREGORY J. WERDEN, GERRYMANDERING REDUX: THE RELEVANT MARKET UNDER THE DRAFT MERGER GUIDELINES 5 (2023), www.mercatus.org/media/167276/download?attachment (tracing the provenance of the circle and smallest-market principles to the 1982 Merger Guidelines and describing how they combined "to generate a unique relevant market").

[127] Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 322 (1983).

[128] *See* Lawrence A. Sullivan, *The New Merger Guidelines: An Afterword*, 71 CALIF. L. REV. 632, 638 (1983); Janusz A. Ordover & Robert D. Willig, *The 1982 Department of Justice Merger Guidelines: An Economic Assessment*, 71 CALIF. L. REV. 535, 539 (1983).

[129] *See* Steve Lohr & Joel Brinkley, *Pricing at Issue as U.S. Finishes Microsoft Case*, N.Y. TIMES, Jan. 6, 1999, at C1 (describing Professor Fisher's testimony for the government as "its last witness in the Microsoft trial").

[130] Franklin M. Fisher, *Horizontal Mergers: Triage and Treatment*, J. ECON. PERSPS., Fall 1987, at 23, 28.

[131] Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1864 (1990).

[132] *See, e.g.*, Robert G. Harris & Thomas M. Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CALIF. L. REV. 464, 486 (1983) ("At every one of the major steps and at most of the subsidiary ones, the Guidelines use procedures which have the effect of increasing the size of the market, and therefore of reducing the shares of the merging firms in the market."); NAT'L ASS'N OF ATT'YS GEN., HORIZONTAL MERGER GUIDELINES § 4 n.31 (1987), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,405 ("[T]he process of market definition in the Justice Department's Guidelines will, in many respects, overstate the bounds of both the geographic and product markets in relation to the actual workings of the marketplace.").

[133] *See* Pitofsky, *supra* note 131, at 1822–23 ("[T]he Guidelines opt for market definitions that are overinclusive, and therefore systematically create the appearance of diminished market power."). *But see* Werden, *Market Delineation*, *supra* note 124, at 551–52 (reviewing the 15 merger matters litigated by the DOJ between the introduction of the 1982 Guidelines and 1993—finding that the courts rejected the DOJ's proposed markets as too broad twice, as too narrow four times, and "either adopted the market proposed by the Department or found the merger unlawful in a larger market" in the remaining nine cases—and therefore concluding there was "no support for the proposition that the Department delineated overly broad markets").

narrowest-market principle, it yields a single relevant market, which "is the smallest group of products and geographic area that constitutes a market."[134]

E. The Emergence of a Consensus Against Overlapping Markets

Already wary of submarkets,[135] courts applied these three principles to move even more definitively away from submarkets.[136] One district court deemed the "sub" prefix superfluous.[137] Or as the Fourth Circuit put it:

> The use of the term "submarket" is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result.[138]

This sentiment was widely shared. For instance, Professor Ernest Gellhorn and future FTC Chair William Kovacic criticized submarkets as "an irresistible tool for courts and enforcement agencies to gerrymander markets to achieve preferred outcomes."[139] Thus most academics argued against the use of submarkets. The Areeda and Hovenkamp treatise expressly cautions against "a return to *Brown Shoe*'s language of 'submarkets,'" which it defines as a historical term that "has been used to identify artificially narrow groupings of

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[134] Werden, *Use and Misuse*, *supra* note 124, at 721, 727 n.13; Werden, *supra* note 23, at 189 (discussing his 1981 paper and placing it in the context of the 1982 Guidelines and other commentary); *id.* at 194–95 ("The Guidelines' Smallest Market Principle states that the one and only relevant market for the antitrust market subsequence and the corresponding candidate market sequence 'generally' is the smallest element in the antitrust market subsequence, that is, the only one contained in each of the others.").

[135] *See, e.g.*, Werden, *supra* note 23, at 183 (noting a "decline" in courts' "delineation of markets-within-markets" between 1962 and 1982 and distinguishing between product "markets-within-markets," which "were uncommon throughout the period," and geographic submarkets, which were defined "frequently" in "the earlier part of this period, but there was a tendency not to do so in the latter part" (footnote omitted)).

[136] *See, e.g.*, Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 797 (2006) ("Courts found submarkets to be a convenient concept with which to find liability, whereas commentators were frustrated by the concept's imprecision and apparent tension with the conventional market definition. After 1982, the courts appeared to retreat from *Brown Shoe* and toward more economics-based views of market definition." (footnote omitted)).

[137] *See In re* Air Passenger Comput. Rsrvs. Sys. Antitrust Litig., 694 F. Supp. 1443, 1458 n.9 (C.D. Cal. 1988) ("The term submarket will not be used in this memorandum because the prefix 'sub' merely creates confusion and is superfluous."), *aff'd sub nom.* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

[138] Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 355 n.5 (4th Cir. 1983).

[139] ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 378 (4th ed. 1994) (quoted in Baker, *supra* note 120, at 206).

sales on the basis of noneconomic criteria having little to do with the ability to raise price above cost."[140] Instead:

> Although degrees of constraint do in fact vary, the "market" for antitrust purposes is the *one* relevant to the particular legal issue at hand. If a narrower grouping of substitute products or producers adequately constrains the defendant, this narrower grouping is the "relevant market." Speaking of "submarkets" merely confuses the issue . . . .[141]

By 1995, a federal district court felt confident enough to declare that "the emerging consensus of antitrust scholars and case law seems to be that the term 'submarket' is unnecessary."[142] Reflecting the three developments discussed above, the court noted that "[w]hether you call it a submarket or a broad product market, it is still the relevant market for antitrust purposes and must be marked by reasonable interchangeability and cross-elasticity of demand."[143] Former FTC Commissioner Roscoe Starek III and his advisor Stephen Stockum reached the same conclusion the same year, describing submarkets a "discredited" approach bereft of any "rigorous methodology," "subject to abuse," and ultimately "relegated to the history books" by the 1982 Guidelines.[144]

The "emerging consensus" has not shifted much since then.[145] Today, courts generally reject overlapping markets proposed by enforcers.

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[140] AREEDA & HOVENKAMP, *supra* note 14, ¶ 913a.

[141] *Id.* ¶ 533; *see also id.* ¶¶ 533c–d, g.

[142] Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1154 n.9 (W.D. Ark. 1995), *aff'd sub nom.* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180 (8th Cir. 1998).

[143] *Id.*

[144] Roscoe B. Starek III & Stephen Stockum, *What Makes Mergers Anticompetitive?: "Unilateral Effects" Analysis Under the 1992 Merger Guidelines*, 63 ANTITRUST L.J. 801, 814–15 (1995) ("A frequently expressed concern with the Guidelines' new unilateral effects analysis is that it may be used as a tool for rehabilitating discredited 'submarket' analysis. Submarket analysis, which was prevalent prior to the 1982 Guidelines, was an attempt to assert that firms with small market shares in the relevant market wielded market power because they have a much higher market share in a narrower product category, which came to be known as a submarket. Because neither the agencies nor the courts had created a rigorous method for determining the boundaries of a submarket generally, the approach was subject to abuse. When the 1982 Guidelines created a standardized, economically meaningful methodology for market definition, submarket analysis was relegated to the history books." (footnote omitted)).

[145] Commentators occasionally cite as an exception *Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993). *See, e.g.*, Baker, *supra* note 120, at 207 & n.18 (asserting that the case stands for the proposition that "a court is entitled to identify a violation of the antitrust laws based on harmful effects in any market, even one that is not the smallest"). In fact, it was the Commission, not "a court," that first defined a market broader than the defendant urged. On a petition for review, the Ninth Circuit affirmed that finding because it found the Commission's definition of a combined ISOS and CAL/HYPO market was based on "plausible" reasons and supported by substantial evidence. *See Olin*, 986 F.3d at 1304. Although the parties stipulated to a narrower submarket for ISOS alone, *see id.* at 1297, the reviewing court did not affirm—let alone affirmatively define—it or any other potentially overlapping markets.

A few courts have rejected proposed overlapping submarkets outright. For example, and as discussed in further detail below, in *Amex* the DOJ pleaded a submarket for card services sold to "travel and entertainment" merchants, failed to establish it at trial, and abandoned it on appeal. The Second Circuit then rejected even the plaintiffs' broader proposed market as too narrow, effectively rejecting submarket status even there.[146]

More commonly, however, courts avoid overlapping markets by focusing upon a single, dispositive relevant market without deciding whether the other candidate market also qualifies as a relevant antitrust market. For example, in *United States v. AT & T Inc.*,[147] the DOJ alleged that both a broad video market and a narrower video submarket met the HMT and the *Brown Shoe* factors.[148] Yet the district court and the court of appeals focused upon the "submarket," which both courts deemed the "primary" market.[149] Because the transaction was lawful in that narrower market, it would also be lawful in a broader market (where market shares were lower), and there was no need to consider one.

Several other DOJ cases are similar. In *United States v. H & R Block, Inc.*, the district court noted the parties' differing views on the relevant product market, explained that "[c]ourts have sometimes referred to such markets-within-markets as 'submarkets,'" and avoided the issue by finding that the government's narrower proposed market "is the relevant product market in this case."[150] In *United States v. Bertelsman SE & Co.*, the district court accepted DOJ's proposed market for "anticipated top-selling books," and found a violation of Section 7 on that basis, without grappling with the DOJ's broader

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[146] The Second Circuit suggested in dicta in an earlier case that "submarkets do exist." *See Bogan v. Hodgkins*, 166 F.3d 509, 516 (2d Cir. 1999). Yet following many other courts, the Second Circuit there nonetheless rejected a proposed submarket for "experienced [Northwestern Mutual Life Insurance] agents" in the New York metropolitan area on the facts, and particularly evidence of substantial substitution to and from other insurance carriers. *Id.* ("In the end, the problem with the Bogans' proposed submarket is that other insurance companies compete for the services of experienced NML agents, as is clearly evidenced by the Bogans having found other work after being terminated from NML.").

[147] 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

[148] *See* Proposed Conclusions of Law of the United States ¶¶ 33–34, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 17-cv-02511), ECF No. 127, www.justice.gov/media/962011/dl?inline.

[149] *See AT & T*, 310 F. Supp. 3d at 195 ("Here, the Government defines the primary relevant product market as the 'Multichannel Video Distribution' market, and the relevant geographic markets as the approximately 1,200 local markets in which residents have access to video offerings from the same set of multichannel video programming distributors."); United States v. AT&T, Inc., 916 F.3d 1029, 1032–33 (D.C. Cir. 2019) ("The relevant market definition is also undisputed by the government and the defendants. . . . The district court accepted the government's proposal that the product market is the market for multichannel video distribution.").

[150] 833 F. Supp. 2d 36, 51–52 & n.8 (D.D.C 2011).

(and overlapping) proposed market for all books.[151] Most recently, in *United States v. United States Sugar Corp.*, the district court found two narrow (and adjacent) markets proposed by the defendants and rejected the DOJ's contention that they were merely submarkets of a broader refined-sugar market; the Third Circuit affirmed.[152]

The courts also focus upon a single relevant market in many FTC cases. For example, in the 1997 case *FTC v. Staples, Inc.*, the agency established an office-superstore market by proving that the defendant imposed a small but significant nontransitory increase in price (SSNIP) in geographic areas where it did not face competition from other office superstores.[153] The court therefore found this purported submarket, and not a broader market that included other sellers of office supplies, to be "the relevant product market for antitrust purposes."[154] In a subsequent speech, then-Bureau of Economics Director Jonathan Baker suggested that district court used "the old construct of a submarket"—not to "return to the past by defining a narrow market" —but rather as a "legal hook for reaching unilateral competitive effects from a merger among the sellers of close substitutes."[155] Commissioner Thomas Leary also viewed *Staples* and other cases as efforts to address unilateral effects in "small market segments," and therefore not about the presence or absence

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[151] The unusual result may be explained, at least in part, by the parties' decision to litigate market definition on the basis of the *Brown Shoe* practical indicia and without reference to the HMT or other demand substitution evidence. *See* United States v. Bertelsman SE & Co., 646 F. Supp. 3d 1, 25 (D.D.C. 2022) ("Courts evaluate relevant product markets in the monopsony context in two ways: by considering qualitative, 'practical indicia' as described by the Supreme Court in the *Brown Shoe* case; and by examining 'supply substitution' and applying the 'hypothetical monopsonist test,' which are discussed in detail, *infra*. The parties in this case focus their arguments on whether 'practical indicia' support the finding of a market to publish 'anticipated top-selling books.' Because the parties choose to fight on the battlefield of 'practical indicia,' that is where the Court begins its analysis." (citation omitted)).

[152] *See* 73 F.4th 197, 207 (3d Cir. 2023) (noting that "the District Court did not disregard the broader line of commerce in refined sugar; it simply determined that distinguishing between industrial and retail sales more accurately described the reality of the market"). The Third Circuit also rejected DOJ's argument that the district court merely found submarkets and that "the existence of submarkets does not negate a broader market," Reply Brief of Appellant United States at 23, *U.S. Sugar*, 73 F.4th 197 (3d Cir. 2023) (No. 22-2806), ECF No. 76, noting that the DOJ's various citations to *Brown Shoe* and other cases "are not on point." *U.S. Sugar*, 73 F.4th at 207.

[153] 970 F. Supp. 1066, 1075–76 (D.D.C. 1997) (discussing the "compelling evidence" that "prices are 13% higher than in three firm markets where it competes with both Office Depot and OfficeMax").

[154] *Id.* at 1075.

[155] Jonathan B. Baker, Former Director, Bureau of Econ., Fed. Trade Comm'n, Econometric Analysis in FTC v. Staples: Address Before the American Bar Association's Antitrust Section Economics Committee (July 18, 1997), www.ftc.gov/news-events/news/speeches/econometric-analysis-ftc-v-staples. Professor Baker viewed other opinions in the same light. *See, e.g.*, *id.* n.13 (describing *Olin Corp. v. FTC*, 986 F.2d 1295, 1303–04 (9th Cir. 1993), as "another example of a court using the submarket concept to reach unilateral competitive effects").

of overlapping markets or submarkets.[156] Reflecting this view, a subsequent district court cited *Staples* for the principle that "the term 'submarket' can be used interchangeably with 'relevant product market' and the analysis is the same regardless of which term is used."[157]

The district court also used the nomenclature of a "submarket" to define the only relevant antitrust market in *FTC v. Cardinal Health, Inc.*[158] There, the district court found a "distinct submarket" for drug wholesaling within "the larger, overall industry,"[159] deemed the submarket "the relevant product market"—singular—"in which to assess the likely competitive effects of the proposed mergers,"[160] found harm, and enjoined the merger.[161] In a subsequent report to the antitrust bar, then-Bureau of Competition Director Bill Baer ignored the submarkets nomenclature entirely, explaining that the government argued for a market, the defendants "argued for a broader market," and "[t]he court found the narrower market that we urged."[162]

Two recent FTC cases followed the same script. In *FTC v. Tronox Ltd.*, the district court defined what it called a "submarket" and, citing the narrowest-market principle, deemed it the only relevant market for antitrust analysis.[163] Likewise, in *FTC v. Peabody Energy Corp.*, the district court adopted the FTC's narrower proposed market for a particular kind of coal—which it deemed "an 'economically significant submarket'"[164]—and noted that "the narrowest market principle determines which of the qualifying markets a court should use for the rest of its merger analysis."[165] In both cases the district court used the narrowest-market principle to choose a single market, found the transaction unlawful based on its likely effect in that market, and determined further analysis was unnecessary.

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[156] *See* Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 117 (2002) ("It is only fair to acknowledge the argument that the potential for troublesome 'unilateral effects,' articulated for the first time in the 1992 Guidelines, is a backdoor way of focusing on small market segments (once called 'submarkets'), with a consequent potential for inflating concentration statistics and creating new enforcement opportunities." (footnote omitted)).

[157] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 n.6 (D.D.C 2004).

[158] 12 F. Supp. 2d 34 (D.D.C. 1998).

[159] *Id.* at 49.

[160] *Id.*

[161] *Id.* at 66–68.

[162] *See* William J. Baer, Former Director, Bureau of Competition, Fed. Trade Comm'n, Report from the Bureau of Competition at the ABA Spring Meeting (Apr. 15, 1999), www.ftc.gov/news-events/news/speeches/report-bureau-competition-3.

[163] 332 F. Supp. 3d 187, 201–02 (D.D.C. 2018).

[164] 492 F. Supp. 3d 865, 901 (E.D. Mo. 2020) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

[165] *Id.* at 896.

Thus, with a few scholarly exceptions,[166] courts and commentators today generally disfavor submarkets.[167] Although not always clearly explained, this disfavor appears to be based upon a recognition that (i) the doctrine as applied is incoherent, and (ii) subsequent developments have harmonized the two strands of *Brown Shoe* to create a workable approach to market definition. Although enforcers sometimes allege overlapping markets and submarkets, courts avoid them, instead focusing upon a single market and addressing alternatives only rarely. And in the rare instance where a court has used the term "submarket," like *Staples* and *Cardinal Health*, all understood that "submarket" to be the *only* relevant market.

F. THE 2023 MERGER GUIDELINES ATTEMPT TO REBRAND AND RESUSCITATE SUBMARKETS

The new Merger Guidelines ignore this history. In a brief footnote, the Guidelines assert that "[m]ultiple overlapping markets can be appropriately defined relevant markets,"[168] citing *Brown Shoe* as "applicable legal precedent."[169]

During the public comment phase, this passage attracted two critical comments. First, former DOJ economist Greg Werden noted the claim and found it wanting.[170] He first explained that the Court's opinion in *Times-Picayune*

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[166] For example, David Glasner and Sean Sullivan argue for two adjustments that they acknowledge "may seem like tectonic changes." Glasner & Sullivan, *supra* note 5, at 327. First, they argue that "a distinct relevant market should be defined for each theory of harm in a trial or investigation." *Id.* Second, they argue that courts and defendants should take "a subordinate role . . . in market definition" and that "the choice of relevant markets should be left to the plaintiff." *Id.* In so doing, Glasner and Sullivan recognize "the disfavored status of *Brown Shoe* submarkets" among courts and scholars. *Id.* at 329.

Jonathan Baker has offered mixed opinions. *Compare* Baker, *supra* note 120, at 206 (criticizing, in the year 2000, cases using the submarket doctrine "to define inappropriately narrow submarkets within the outer bounds of markets properly defined with reference to substitution possibilities"), *with* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 184 (2019) ("Almost invariably, a competitive effects allegation can be analyzed in multiple markets, including overlapping or nested markets, each satisfying the hypothetical-monopolist test.").

As described further below, we are concerned here primarily with testing the legal foundation for overlapping markets.

[167] *See, e.g.*, 1 ABA SECTION OF ANTITRUST LAW, *supra* note 66, at 625 & nn.178–80 (collecting cases questioning "whether the markets at issue are genuine submarkets or simply markets defined too narrowly" and thereby rejecting proposed submarkets); AREEDA & HOVENKAMP, *supra* note 14, ¶ 913a (defining the term "submarket" as a concept previously "used to identify artificially narrow groupings of sales on the basis of noneconomic criteria having little with the ability to raise price above cost"); Herbert Hovenkamp (@Sherman1980), X (Aug. 24, 2024, 3:10 AM), x.com/Sherman1890/status/1827257053338886612 (stating that submarkets are "an economically illiterate concept whose likely effect is to throw fact finders off track").

[168] MERGER GUIDELINES (2023), *supra* note 8, at 40 n.77 (citing *Brown Shoe*, 370 U.S. at 325).

[169] *Id.* at 4.

[170] *See* Gregory J. Werden, *Comments on Draft Merger Guidelines*, REGULATIONS.GOV (Aug. 11, 2023), www.regulations.gov/comment/FTC-2023-0043-0624.

Publishing Co. established a narrowest-market principle and that *Tampa Electric Co.* defined the market as "the area of effective competition."[171] He then noted:

> The definite article [in *Tampa Electric*] is critical in "the area of effective competition." There is only one, and it excludes the products and areas "to which, within reasonable variations in price, only a limited number of buyers will turn." The relevant market could never be food or baked goods. The relevant market could be cookies or premium cookies, but it could not be both.[172]

Werden therefore exhorted his former colleagues to omit the claim, warning that the concept risks "a return to [the] Dark Ages" of the 1960s, which were "for market delineation [what] the early 16th Century was for anatomy . . . and astronomy."[173]

A comment from the New York City Bar also mentioned the "multiple markets" claim in passing. The Bar noted with concern that the new Guidelines proposed to (and subsequently have) adopted "a host of other criteria" beyond the HMT and the *Brown Shoe* practical indicia, which the Guidelines assert that the "Agencies may (or may not) consider in defining narrower or broader markets than one would define" otherwise.[174]

II. *AMERICAN EXPRESS* AND THE "ONE MARKET PER TRANSACTION" RULE

Despite the apparent harmonization of the two *Brown Shoe* tests into an approach capable of yielding a single relevant market, courts continue to struggle with market definition. When faced with competing proposed markets, courts still struggle to choose between them.[175]

The Supreme Court provided a solution in the recent *Amex* case: in two-sided transaction markets, a given transaction can only be attributed to one relevant product market, and therefore cannot be double counted in both a

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[171] *Id.* at 23 (citing Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953); and Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 327–28 (1966)).

[172] *Id.*

[173] *Id.* ("New [Merger Guidelines] should omit the [draft Merger Guidelines'] passages quoted above [and instead] assert the Smallest Market Principle (see Appendix 3 comments).").

[174] Yee Wah Chin & Rachel Webb, Antitrust & Trade Reg. Comm., N.Y.C. Bar Ass'n, *Report on Department of Justice and Federal Trade Commission Draft Merger Guidelines*, REGULATIONS.GOV, at 3 (Sept. 17, 2023), www.regulations.gov/comment/FTC-2023-0043-1565.

[175] For instance, the three-judge panel of the D.C. Circuit in *Whole Foods* issued three separate opinions expressing different views on the relevant market. *See generally* FTC v. Whole Foods Mkt., 548 F.3d 1028 (D.C. Cir. 2008) (Brown, J.); *id.* at 1042 (Tatel, J., concurring); *id.* at 1051 (Kavanaugh, J., dissenting).

market and one or more submarkets. In so doing, the Court considered and rejected the dissent's proposal to define relevant submarkets on each side of the two-sided transaction platform. Notably, the DOJ's own position shifted during the course of the litigation, quickly abandoning an overlapping submarket for services to travel and entertainment merchants in favor of a position that if there are "multiple" relevant product markets, they must be "distinct" or "separate" from each other.[176]

Although *Amex* itself concerned a *two-sided* transaction market, we describe separately in Part III why this rule is consistent with precedents that apply more broadly.

A. PROCEEDINGS BEFORE THE DISTRICT COURT AND COURT OF APPEALS

In a complaint filed in 2010, the DOJ and 18 states alleged that the major credit-card networks violated Section 1 of the Sherman Act by imposing various restraints upon merchants who accept their cards.[177] The plaintiffs alleged these restraints "impede merchants from promoting or encouraging the use of a competing credit or charge card with lower card acceptance fees," thereby reducing competition.[178]

The plaintiffs initially alleged that these practices harmed consumers in two relevant product markets: (1) a market for "General Purpose Card network services" sold to merchants, and (2) a price-discrimination submarket "consisting of General Purpose Card network services provided to merchants in travel and entertainment [(T&E)] businesses."[179] Plaintiffs acknowledged that these markets overlapped, stating that the narrower market for services "provided to T&E merchants could be called a 'submarket' of the broader market for [general purpose credit and charge (GPCC)] card network services provided to all merchants."[180] Visa and

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[176] *See* Redacted Final Form Brief of Plaintiffs-Appellees at 83, United States v. Am. Express Co., 838 F.3d 179 (2d. Cir. 2016) (No. 15-1672), ECF No. 267 [hereinafter U.S. 2d Cir. *Amex* Brief] (arguing that "numerous decisions defin[e] multiple distinct markets when conduct affects multiple sets of non-interchangeable products"); Brief for the United States as Respondent Supporting Petitioners at 38 n.7, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454) [hereinafter U.S. SCOTUS *Amex* Brief] ("An antitrust case may implicate multiple, separate markets composed of products that are not substitutes.").

[177] *See* Complaint, United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015) (No. 10-cv-4496), ECF No. 1; Amended Complaint, *Am. Express*, 88 F. Supp.3d 179 (No. 10-cv-4496) [hereinafter *Amex* Amended Compl.].

[178] *Amex* Amended Compl., *supra* note 177, ¶ 2.

[179] *Id.* ¶ 33–50.

[180] Plaintiffs' Pre-Trial Memorandum at 34 n.70, *Am. Express*, 88 F. Supp.3d 179 (No. 10-cv-4496).

Mastercard settled these allegations via consent decree; American Express opted to litigate.[181]

The district court found a broader market for GPCC card network services sold to merchants but rejected the proposed submarket for GPCC card network services sold to T&E merchants.[182] Although the district court accepted the principle that there may be price-discrimination markets, plaintiffs' submarkets theory failed both for lack of proof that the rates were discriminatory and for lack of clear boundaries identifying "which merchant industries would be included [in the submarket] and which would not."[183] Ultimately, the district court concluded that Amex's restraints violated Section 1 in the broader GPCC card network services market,[184] and Amex appealed.

On appeal the DOJ shifted its position subtly. Before the district court it had defined overlapping markets – one for GPCC card services network services sold "to merchants" and a submarket for those services sold "to T&E merchants." But before the Second Circuit, the DOJ argued that "numerous decisions defin[e] multiple distinct markets when conduct affects multiple sets of non-interchangeable products."[185] For support, it noted that in *Brown Shoe*, "the Supreme Court analyzed the impact of the merger *separately* in men's shoes, women's shoes, and children's shoes"[186] and that the Second Circuit considered no fewer than five distinct product markets in *Berkey Photo, Inc. v. Eastman Kodak Co*.[187]

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[181] *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 149 (E.D.N.Y. 2015) ("Visa and MasterCard entered into consent decrees with the Government, pursuant to which they voluntarily agreed to remove or revise the bulk of their challenged restraints. Defendants American Express Company and American Express Travel Related Services Company . . . elected to litigate Plaintiffs' challenge to their anti-steering rules . . . ." (citation omitted)). Note that the Visa and MasterCard settlements might have been strategic. Merchants may want to steer Amex-card wielders to Visa or MasterCard since Amex's discount rate tends to be higher. That perspective does not apply in the reverse.

[182] *Id.* at 151 (finding a "market for GPCC card network services" but concluding that "Plaintiffs' attempt to define a submarket for GPCC card network services provided to merchants in travel and entertainment industries . . . is unavailing"); *see also id.* at 170–71.

[183] *Id.* at 186–87 ("Plaintiffs have not established that American Express, or any of its competitors, are able to charge discriminatory prices in the industries that would appear to comprise Plaintiffs' proposed T & E submarket. Though a hypothetical monopolist likely would be able to isolate and impose higher prices in such industries, the court lacks a reliable basis for inferring that those prices would not be driven by cost differences associated with serving T & E merchants. Additionally, Plaintiffs have not clearly defined the contours of their proposed submarket. It is not apparent which merchant industries would be included in a 'travel and entertainment' submarket and which would not . . . ." (citation omitted)).

[184] *Id.* at 238–39.

[185] U.S. 2d Cir. *Amex* Brief, *supra* note 176, at 83.

[186] *Id.* (emphasis added).

[187] *Id.* (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325–28, 336 (1962); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 269 (2d Cir. 1979)).

The Second Circuit reversed the judgment of the district court, agreeing with Amex that the relevant market encompassed both the merchant side *and* the issuer side of Amex's platform.[188] Applying the HMT to determine "the relevant market,"[189] the Second Circuit noted that "feedback effect[s]" require inclusion of both sides of the platform to determine whether a hypothetical monopolist could profitably increase prices by a SSNIP.[190] Because the plaintiffs had failed to meet their burden to prove harm in the broader market, the Second Circuit reversed the judgment of the district court and remanded with instructions to enter judgment for Amex.[191]

B. PROCEEDINGS BEFORE THE SUPREME COURT

The plaintiff states (but initially not the DOJ) then sought certiorari, which the Supreme Court granted. In its merits brief, the DOJ abandoned any pretense that there may be overlapping markets and submarkets. Rather, the DOJ renewed its argument that a market encompassing both sides of the platform is necessarily too broad because "[a]n antitrust case may implicate multiple, separate markets composed of products that are not substitutes," citing *Brown Shoe*, and that in these circumstances courts must "consider the impact of the challenged action in each of the relevant markets."[192] In reply, the DOJ further clarified that the Court "should reaffirm the rule that an antitrust market 'consists only of goods that are reasonably close *substitutes* for one another'" and argued the "cardholder side" and "merchant side" must not "belong in

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[188] United States v. Am. Express Co., 838 F.3d 179, 196–97 (2d Cir. 2016) ("The District Court's definition of the relevant market in this case is fatal to its conclusion that Amex violated § 1. . . . The District Court erred in excluding the market for cardholders from its relevant market definition.").

[189] *Id.* at 199 ("If the hypothetical monopolist can impose this SSNIP without losing so many sales to other products as to render the SSNIP unprofitable, then the proposed market is the relevant market. By contrast, if consumers are able and inclined to switch away from the products in the proposed market in sufficiently high numbers to render the SSNIP unprofitable, then the proposed market definition is likely too narrow. . . .").

[190] *Id.* at 199–200 ("The District Court . . . should have considered the extent to which even a low level of merchant attrition might cause some cardholders to switch to alternative forms of payment. Application of the HMT to a two-sided market must consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition.").

[191] *Id.* at 206–07 ("Plaintiffs bore the burden in this case to prove net harm to Amex consumers as a whole—that is, both cardholders and merchants—by showing that Amex's nondiscriminatory provisions have reduced the quality or quantity of credit-card purchases. Given the District Court's explicit finding that neither party provided reliable evidence of Amex's costs or profit margins accounting for consumers on both sides of the platform, and given evidence showing that the quality and output of credit cards across the entire industry continues to increase, we conclude that Plaintiffs failed to carry their burden to prove a § 1 violation.").

[192] U.S. SCOTUS *Amex* Brief, *supra* note 176, at 38 n.7 (citing *Brown Shoe*, 370 U.S. at 325–26).

the same market" because "Amex sells those services separately, to different groups of consumers in very different competitive environments."[193]

The Supreme Court affirmed the judgment of the Second Circuit.[194] The Court first noted the unique features of two-sided transaction platforms like Amex, including the fact that these platforms facilitate a "single, simultaneous transaction between participants" on both sides of the platform.[195] As the Court put it: "Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."[196] For this and other reasons, the Court held that "'[i]n two-sided transaction markets, only one market should be defined.'"[197] In so doing, the Court rejected the dissent's view that plaintiffs may have met their burden by showing effects on one side only if it qualifies as a relevant submarket.[198]

III. COURTS CAN AND SHOULD ADOPT THE "OMT" RULE

We recognize that *Amex*, although a Supreme Court decision of recent vintage, is controversial. But even those hostile to the decision largely agree that the concept of *overlapping* relevant markets makes no sense.[199] The OMT Rule reflects the intuition embedded in a long line of cases stretching back to *General Dynamics*, *Marine Bancorporation*, *Connecticut National Bank*, and *Rothery Storage*.[200] Therefore, although *Amex* formally applied the rule to

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[193] Reply Brief for the United States at 18, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454) (citing AREEDA & HOVENKAMP, *supra* note 14, ¶ 565a); *see id.* at 18–19 ("Amex does not sell 'transactions.' It sells merchant and cardholder services to different customers, who pay for those services in different ways. Collapsing those two nonsubstitutable services into a single market would only cloud the inquiry.").

[194] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018).

[195] *Id.* at 2286 ("But two-sided transaction platforms, like the credit-card market, are different. . . . For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. . . . It cannot sell transaction services to either cardholders or merchants individually.").

[196] *Id.* at 2287.

[197] *Id.* (quoting Lapo Filistrucchi, Damien Geradin, Eric Van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 302 (2014)).

[198] *Id.* at 2301 (Breyer, J., dissenting) ("In a merger case [considering both sides of the market] makes sense, but is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket." (citing Brown Shoe v. United States, 370 U.S. 294, 325 (1962)).

[199] *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 14, ¶ 913a (cautioning against "a return to *Brown Shoe*'s language of 'submarkets.'").

[200] *See* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Conn. Nat'l Bank, 418 U.S. 656 (1974); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986).

two-sided transaction markets, courts can and should apply the principle far more broadly. Applying the principle broadly would lead to more consistent outcomes and substantially reduce the risk of error.

A. APPLYING THE OMT RULE

To state it concisely, we define the proposed OMT Rule as follows: Each transaction—typically a sale of an individual product—involving the subject product or service can be allocated to no more than one relevant antitrust market.[201]

Three examples illustrate how to apply the OMT Rule. Consider first a simple example with relatively few transactions: a merger of two suppliers of oil drilling rigs, of which only a few dozen are sold each year.[202] In this case, the OMT Rule would use as the relevant "transaction" each sale of an oil drilling rig. Antitrust analysis then proceeds for each transaction or grouping of such transactions. If the evidence indicates that all U.S. customers choose among essentially the same set of suppliers, and that they would not defeat a SSNIP by an HMT by substituting to any other alternatives in sufficient numbers, then the relevant antitrust market may be "U.S. sales of oil drilling rigs," and it should encompass the relevant oil drilling rig products sold by those suppliers.[203] Under the OMT Rule, none of those dozens of transactions could be "double counted" by including them in a narrower submarket for oil drilling rigs weighing more than 100 tons, or a broader market for fossil fuel mining equipment.[204] Rather, each of those transactions must be allocated to no more than one relevant antitrust market.

The same principles apply when there are far more transactions. Consider a merger of two U.S. suppliers of "broadline" foodservice distribution,

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[201] Note that this formulation does not require that every transaction be allocated to a market. For example, if two merging parties together sell ten different product lines, but only one of them is relevant to assessing competitive effects, then the plaintiff should not be required to define relevant markets and allocate transactions for each of the nine irrelevant product lines.

[202] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982, 986 (D.C. Cir. 1990) (evaluating a merger of competing manufacturers of "hardrock hydraulic underground drilling rigs" and noting that only 22 such rigs were sold in the United States in 1986, 43 in 1987, and 38 in 1988).

[203] *See id.*

[204] The problem of double counting is particularly acute when, as in the current environment, enforcers rely upon presumptions based implicitly or explicitly upon market shares. *See, e.g.*, MERGER GUIDELINES (2023), *supra* note 8, § 2.1 (using market shares, both explicitly and implicitly via HHIs, to presume competitive harm above certain thresholds). If some sales are double counted, then the resulting market shares would be overstated, impairing courts' ability to rely upon those shares (or derivative metrics like HHIs) to assess market power or presumptions.

a service which entails the delivery of thousands of different food products to individual restaurants.[205] In the aggregate, there are hundreds of thousands—if not millions—of these deliveries each year involving thousands of individual products like bread and eggs. In this scenario, the OMT Rule may define the relevant "transaction" as an individual delivery to an individual customer location, and then aggregate from there. If "national" customers only use national broadline foodservice providers, then it may be appropriate to define a separate market around transactions involving national customers, and again the OMT Rule would ensure those transactions are not double counted in any local broadline foodservice market.

Finally, consider a merger of two breweries located in Milwaukee, Wisconsin.[206] Both firms sell nationwide, and both firms compete against breweries located in other states. If beer consumers in Wisconsin would defeat a SSNIP by an HMT of Wisconsin beers by substituting in sufficient numbers to beer brewed out of state by Anheuser-Busch, The Boston Beer Company, and other national breweries, then there cannot be a Wisconsin beer market.[207] The OMT Rule would ensure that any transactions allocated to the relevant market—likely a national market—are not double counted in an overlapping regional or local market.

Defining non-overlapping geographic markets is consistent with the approach that the Federal Reserve Bank uses today in bank mergers. For example, Figure 1 illustrates the 13 non-overlapping geographic markets that the Federal Reserve Bank uses when assessing bank mergers in the territory of the Federal Reserve Bank of New York:

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[205] *See, e.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1, 16, 26 (D.D.C. 2015) (evaluating a merger of competing broadline foodservice distributors who each "offer thousands of distinct items for sale . . . in a wide array of product categories, including canned and dry goods, dairy, meat, poultry, produce, seafood, frozen foods, beverages, and even janitorial supplies such as chemicals, cleaning equipment, and paper goods" and approaching market definition with the perspective that "what is relevant for consideration here is not any particular food item sold or delivered by Defendants, but the full panoply of products and services offered by them that customers recognize as 'broadline distribution'").

[206] *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546, 550–51 (1966) (evaluating the merger of two breweries located in Milwaukee, Wisconsin in the relevant markets for "the beer industry throughout the Nation, in the three-state area of Wisconsin, Illinois, and Michigan, and in the State of Wisconsin").

[207] *See* United States v. Pabst Brewing Co., 233 F. Supp. 475, 480–88 (E.D. Wis. 1964) (accepting a national geographic market because "the parties are agreed" on it but rejecting the government's three-state and one-state geographic submarkets).

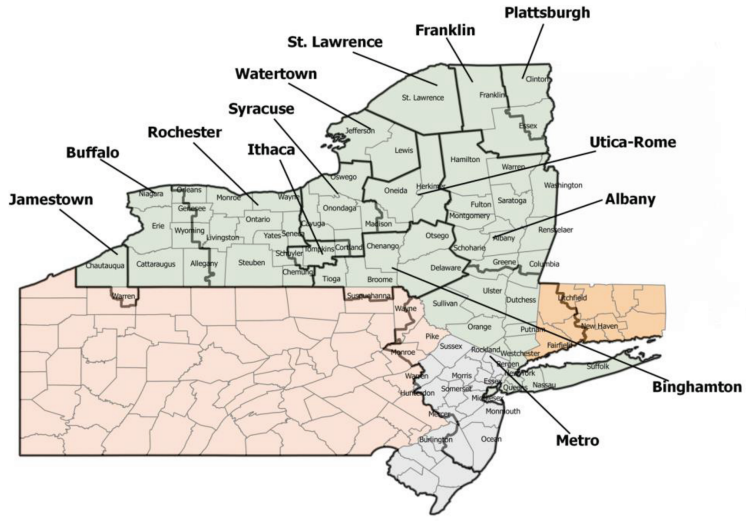

FIGURE 1: NON-OVERLAPPING GEOGRAPHIC MARKETS, NEW YORK FEDERAL RESERVE AREA[208]

Graphically, the OMT Rule bars what you might call "wedding cake" markets that have overlapping tiers. Figure 2 illustrates graphically how the OMT Rule operates.

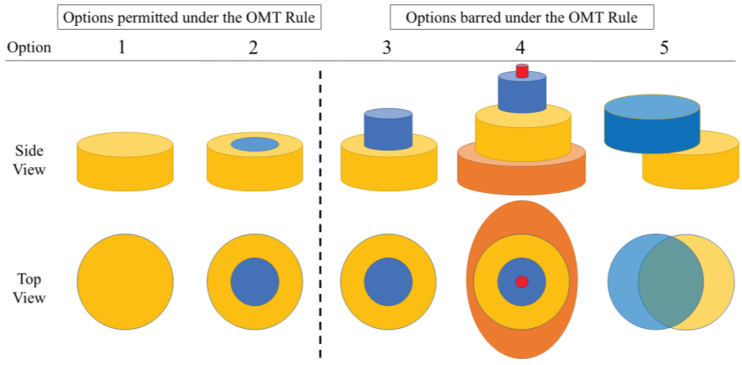

FIGURE 2: CORRECT AND INCORRECT MARKETS UNDER THE OMT RULE[209]

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[208] *Banking Markets in the New York Area of the Second Federal Reserve District* (illustration), NEWYORKFED.ORG, www.newyorkfed.org/medialibrary/media/banking/map-2014.pdf; Federal Reserve Bank of New York, *Second Federal Reserve District Banking Markets*, www.newyorkfed.org/banking/ma_bankingmarkets.html.

[209] Note: Each circle encompasses many individual transactions. The height of the cake corresponds to the number of overlapping markets for at least some transactions.

Options 1 and 2 are both compliant with the OMT Rule. They are flat because they allocate each transaction to one and only one relevant antitrust market, as required by the OMT Rule. Option 1 corresponds to the oil rig market, and Option 2 to the non-overlapping markets for national and local broadline service.

Options 3, 4, and 5 violate the OMT Rule. Options 3 and 4 are tiered because they allocate some transactions—those toward the center—into multiple overlapping markets simultaneously, and therefore do not comply with the OMT Rule. To continue with the beer example using Option 4, imagine a Milwaukee beer market (the inner-most concentric circle), a Wisconsin beer market (the middle concentric circle), a Midwestern beer market (the outer concentric circle), and a national beer market (the egg-shaped outer oval). Option 3 would define overlapping regional and national markets, whereas Option 4 would define four layers of overlapping markets. As described above, defining the market in this manner would inconsistently assume *both* that beer consumers in Milwaukee can substitute to any other national beer company (the outer-oval market) *and* that their choices are more restricted in three other inconsistent ways (the three smaller concentric-circle markets). Option 5 illustrates an overlap taking the form of a Venn Diagram—say, a regional market for beer brewed in Milwaukee and another largely overlapping regional market for beer brewed in Chicago. Defining the market in this manner would again violate the OMT Rule.

B. COURTS CAN ADOPT OUR PROPOSED RULE

There is no impediment to judicial adoption. The OMT Rule reflects the current state of the law, from *Amex*, *Marine Bancorporation*, and *Connecticut National Bank* to decades of lower court precedents. The OMT Rule neatly fits both legal precedent and the prevailing legal and economic commentary, and courts today already apply it implicitly. Applying the OMT Rule explicitly would clarify and simplify the market definition exercise.

1. *Our Proposed OMT Rule Is Consistent with Legal Precedent*

The OMT Rule is consistent with recent legal precedents, from Supreme Court cases to recent trial court decisions.

As described above in Part I.A, the Supreme Court precedents never conclusively established submarkets and have since repudiated them. *Brown Shoe* established the concept only in a dictum, and similar cases like *Continental Can* are no more authoritative.[210] Indeed, in those cases the Court defined non-overlapping markets—men's, women's, and children's shoes in *Brown Shoe*,

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[210] *See supra* Part I.A.

and a combined metal and glass container market in *Continental Can*.[211] As such, the proposed rule is entirely consistent with the early cases.

The OMT Rule is also consistent with the slightly different approaches that the Supreme Court has taken to geographic and product submarkets. Regarding geographic submarkets, the Supreme Court actually found geographic submarkets in *Pabst Brewing*, but then effectively overruled that precedent in *Marine Bancorporation* and *Connecticut National Bank*.[212] As the Court put it in *Marine Bancorporation*, "the relevant geographic market or appropriate section of the country is the area"—singular—"in which the acquired firm is an actual, direct competitor,"[213] which is perfectly consistent with a "one transaction, one market" rule. Regarding product submarkets, after the dicta of *Brown Shoe* and *Continental Can*, the Court declined to defend it when the dissent raised it in *General Dynamics*, and expressly rejected its applicability to the facts of *Amex*.[214] In sum, more than fifty years of Supreme Court precedent supports our proposed rule.

The OMT Rule is also consistent with lower courts' general aversion—discussed above in Part II.E—to defining overlapping markets. When in recent times litigants have proposed overlapping markets and submarkets, courts have routinely avoided defining overlapping markets and instead have focused on a single dispositive market, typically the narrowest option found to be valid. This is also consistent with the Areeda and Hovenkamp treatise, which notes in the context of *Aspen Skiing* that if small geographic areas are separate relevant markets, then "[w]hether some larger area is also a relevant market [is] irrelevant."[215] This again is consistent with the OMT Rule.

Finally, the OMT Rule is also consistent with various fact patterns found in lower court precedents, including (i) price-discrimination markets, (ii) changes in market structure over time, (iii) product differentiation, and (iv) goods subject to multiple transactions.

Regarding price-discrimination markets, our proposal neatly fits the way leading cases like *FTC v. Sysco Corp.* approach the topic. There the FTC alleged, and the district court found, a price-discrimination market for broadline foodservice sold to national customers and another (non-price-discrimination)

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[211] *See supra* notes 29–38 and accompanying text.

[212] *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622 (1974); United States v. Conn. Nat'l Bank, 418 U.S. 656, 666–71 (1974).

[213] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622 (1974). In a footnote, however, the Court acknowledged its *Pabst* holding, saying "*Pabst* in reality held that the Government had established three relevant markets in which the acquired firm actually marketed its products—a single State, a multistate area, and the Nation as a whole." *Id.* at 622 n.20.

[214] *See supra* notes 46–49, 194–98 and accompanying text.

[215] AREEDA, HOVENKAMP, *supra* note 14, ¶ 533g (discussing the facts at issue in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

market for broadline foodservice sold to other, largely local, customers.[216] These were not submarkets and did not overlap. The Areeda and Hovenkamp treatise also endorses the idea, illustrating the concept with an example involving two different distribution channels for pharmaceutical products.[217]

Regarding changes in the scope of the market over time, our proposal would permit the definition of different markets at different points in time. For example, the Second Circuit concluded in *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.* that entry can fragment an erstwhile broader product market into smaller non-overlapping product markets.[218] The coal mining cases likewise grappled with significant changes in market structure and market shares over time.[219]

Our proposal likewise would permit distinctions (when warranted) among differentiated products. As even cautious proponents of submarket doctrine concede, "defining a narrow market" using the *Brown Shoe* practical indicia is "a controversial use of the submarket concept" that can "readily appear to reflect result-oriented gerrymandering."[220] Whatever the relative merits and risks associated with market definition involving differentiated products, the OMT Rule would allow courts to take a fact-based approach. If one or more

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[216] *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 24 (D.D.C. 2015) ("The FTC contends that for national customers the geographic market is nationwide. For local customers, it argues that the geographic market is localized near Defendants' distribution centers."); *id.* at 37–48 (analyzing and adopting the proposed price-discrimination market for national broadline customers). The DOJ also defined channel-specific submarkets in GE/Electrolux, but the merger was abandoned before the question could be litigated. *See* Complaint ¶¶ 20–26, United States v. AB Electrolux, No. 15-cv-01039 (D.D.C. July 1, 2015), ECF No. 1 (defining separate markets for different distribution channels of the same product).

[217] AREEDA & HOVENKAMP, *supra* note 14, ¶ 533d (describing, under the heading of price-discrimination markets, a situation in which "[t]here might then be at least two markets relevant to judging the defendant's power over price: sales of its branded pharmaceutical generally," in which managed care organizations may "authorize a single pharmaceutical within a grouping," and "sales to pharmacies," who must "carry a full line of all brands, even if they are substitutes, because they must be ready to fill prescriptions on demand"); *see also* Baker, *supra* note 120, at 207–09 (discussing the use of *Brown Shoe* practical indicia to identify price-discrimination markets and citing as an example *Ansell Inc. v. Schmid Laboratories, Inc.*, 757 F. Supp. 467 (D.N.J. 1991), *aff'd*, 941 F.2d 1200 (3d Cir. 1991)).

[218] *See* 386 F.3d 485, 496–500 (2d Cir. 2004) (concluding that a branded product and its generic equivalents were "in separate markets for antitrust analysis" because "once Barr entered the market, the market became segmented so that Coumadin and Barr each had smaller, distinct customer groups" and because "[a]fter the initial segmentation, Barr's price was impacted much more by Geneva's entry than by Coumadin").

[219] *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 506 (1974) (discussing the role of "changes in the patterns and structure of the coal industry and in [defendant's] coal reserve situation"); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 n.6 (D.D.C 2004); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 889 (E.D. Mo. 2020) (evaluating evidence of future likely coal-fired plant closures and past regulatory changes as part of a demand elasticity and HMT analysis).

[220] *See* Baker, *supra* note 120, at 210–11, 215–16.

differentiated products would effectively constrain a hypothetical monopolist, then courts applying our proposed rule should include them in the relevant market, and courts likewise should exclude them if they would not effectively constrain a hypothetical monopolist. For example, in *FTC v. Arch Coal, Inc.*, the district court accepted that coal from the Southern Powder River Basin (SPRB) of Wyoming was economically differentiated from coal from other basins but rejected the FTC's attempt to further limit the relevant market to coal of a particular heat content (8800 Btu) mined there.[221] Given these findings, and carefully avoiding the definition of overlapping product markets, the district court concluded "that the relevant product market is no broader and no narrower than SPRB coal."[222]

Perhaps least controversially, our proposal would permit distinctions (again when warranted) around transactions at different levels of a distribution chain. For example, distinctions between wholesale and retail sales are common,[223] and the OMT Rule would permit definition of separate markets for each of them.

2. *The OMT Rule Is Consistent with Economic and Legal Commentary*

The OMT Rule is also consistent with the economic and legal commentary described earlier in Part II.C. As noted there, many scholars—from economists like Adelman and Werden to attorneys like Areeda, Maisel, Pitofsky, and Posner—have rejected the concept of overlapping markets as economically incoherent. Our proposal comports with all of those rejecting overlapping markets, while still allowing for the delineation of multiple markets.

Although all of the discussion provided earlier is relevant, a few examples amply illustrate the point. George and Rosemary Hale contemplated narrow but non-overlapping markets in 1966, writing "one could choose two lines of commerce: men's golf shoes and girls' ballet slippers."[224] In the 1970s, Richard Posner rejected overlapping markets.[225] In 1983, Lawrence Maisel likewise anticipated our proposal when he wrote that price-discrimination markets "are not submarkets of a broader market; they are relevant markets in their own right that encompass all of the products that significantly limit the market power of the merging firms in selling to those customers,"[226] and noted in particular that transactions to different customer groups may fall in different

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[221] *See* 329 F. Supp. 2d 109, 121–23 (D.D.C. 2004).

[222] *Id.* at 123.

[223] *See supra* note 217 for examples from both Baker and the Areeda & Hovenkamp treatise used to illustrate price-discrimination markets.

[224] Hale & Hale, *supra* note 103, at 426.

[225] *See supra* notes 109–12 and accompanying text.

[226] Maisel, *supra* note 24, at 57.

relevant markets.[227] Maisel also endorsed the 1982 Guidelines because, as he described, they were "designed to define a single product market, not markets within markets,"[228] even in the case of price discrimination.[229] And Greg Werden, one of the architects of the 1982 Guidelines, outlined support for that view.[230]

C. COURTS SHOULD ADOPT OUR PROPOSED OMT RULE

Adopting our proposed OMT Rule would clarify and improve the market definition exercise.

The OMT Rule is clear, relatively easy to administer, internally consistent, and predictable. The kind of transaction-level data required to institute the OMT Rule is common in today's economy and therefore allows litigants and courts to accurately aggregate and disaggregate the market as necessary to appropriately evaluate each market on its own merits.

The OMT Rule also imposes necessary rigor on the market definition exercise. It requires litigants to clearly delineate the bounds of their markets and to allocate transactions, and ultimately competitive harms and benefits, among them. It also requires courts to choose among competing definitions and therefore avoids situations in which a court accepts both litigants' views of the market simultaneously. For example, if plaintiffs allege that defendants could exercise market power in a particular coal market, and defendants respond by asserting that the relevant market is "all energy" and that they have no market power in it, then the court must resolve that dispute by choosing between those two inconsistent options. Either other fuel sources constrain the pricing of that kind of coal, in which case the market is broader than all coal, or they do not; it cannot be both.[231] The OMT Rule would require the court to review the evidence and find the facts.

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[227] *Id.* at 56–57 (describing different competitive constraints facing an aluminum manufacturer when selling to soft drink manufacturers and aircraft manufacturers).

[228] *See id.* at 57.

[229] *Id.* at 58 (noting the Guidelines' statement that "the Department will consider defining additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power," but explaining that "it would be misleading to call those narrower markets 'submarkets'" because "they are independent markets in which the seller faces different or less effective competition than he faces in selling his product to other customers" (quoting U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 1982 MERGER GUIDELINES § II.A (1982), www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf)).

[230] *See* Werden, *supra* note 23, at 181–89.

[231] For example, the OMT Rule would have helped clarify the reasoning the court applied in *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865 (E.D. Mo. 2020). There the court found that "coal competes with natural gas and renewables in a broader energy market," but "there is *also* a distinct competitive market among SPRB coal producers that satisfies the applicable criteria for market definition." *Id.* at 886. Despite this apparently contradictory finding, the district court then applied the narrowest-market principle to find that the narrower "SPRB coal is the relevant

The OMT Rule is also unbiased. It does not favor broad markets or narrow markets, plaintiffs or defendants. Rather, it requires that the markets be internally consistent—if a defendant's widget is competitively constrained by four rival products, then it is not also constrained by a subset of two of those four, or by a superset of eight. The facts, including the economic evidence, will point the way.

D. THE AGENCIES SHOULD REVISE THE GUIDELINES

The agencies should amend the Guidelines. As a first step, they should delete the inaccurate claim that multiple overlapping markets may be defined. If and when the agencies issue new Guidelines, they should expressly adopt the OMT Rule, with accompanying citations to applicable precedents, including *Amex*. References to the dictum in *Brown Shoe* should be expunged, and any new references to other cases from that era—such as *Pabst Brewing*—should reflect subsequent developments, including *General Dynamics*, *Marine Bancorporation*, *Connecticut National Bank*, and *Amex*.

IV. IMPLEMENTATION AND IMPLICATIONS

Implementing the OMT Rule is fairly straightforward but may require courts and litigants to take care when undertaking tasks "downstream" of market definition, such as calculating market shares and assessing competitive effects. In this Part, we offer several notes on implementation and sketch a few likely implications of the Rule.

A. NOTES ON IMPLEMENTATION

We also offer several notes on how courts and enforcers may implement the OMT Rule.

First, courts should "net out" market-share data to obtain shares that match the contours of the alleged markets. For example, if the agencies carve out a narrower (and non-overlapping) price-discrimination market from a broader market, then those sales should be subtracted from both the numerator and the denominator of the broader market to avoid double counting. Note, however, that netting out would not be necessary for markets pleaded in the alternative because a court following OTM would ultimately define one or more non-overlapping markets from among the alternatives.

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product market in which to evaluate the competitive effects of the proposed [transaction]." *Id.* at 885. The court therefore effectively rejected the all-energy market in favor of the narrower SPRB coal market.

The FTC's case in *Sysco* provides a useful illustration of how this analysis can be done. There, the agency alleged both a market for broadline foodservice to local customers and a price-discrimination market for broadline foodservice to national customers. At trial the FTC's economist separately tabulated sales to national and local customers,[232] yielding separate (non-overlapping) market shares. Thus, when plaintiffs allege multiple (non-overlapping) markets, courts should require them to prove non-overlapping market shares.

Second and relatedly, courts should also net out competitive effects and assess both potential harms *and* potential efficiencies on an OMT basis. Thus, the plaintiff would need to establish a prima facie case in each non-overlapping market, and the defendant would need to rebut any such showing. In this effort, the proof must be appropriately calibrated to the market in question. To return to the *Sysco* example, the FTC could not have proven harm in the national-customer market by estimating a generalized price effect applicable to all customers (national and local customers alike).[233]

Third, courts should assess potential remedies on the same OMT basis. For example, if the plaintiff alleges two non-overlapping markets but fails to establish competitive harm in one of them, then any remedy should generally be limited to the one market in which the plaintiff prevailed. For example, if a plaintiff establishes competitive harm in the Dallas and Houston markets, but not in Austin or San Antonio, then absent special circumstances[234] it would be inappropriate to require a remedy in Austin or San Antonio. The same principle applies to non-overlapping product markets.

Fourth, if plaintiffs believe a merger (or other conduct) would be unlawful under two or more different ways to define the market(s), then courts should allow plaintiffs to plead each set of non-overlapping markets in the alternative. For example, given the market shares found by the court in *Sysco*, the FTC may have won the case if it had alleged a single, broader market encompassing all broadline foodservice sales—without the national/local distinction it made at trial. In such circumstances, the OMT Rule should not be applied to require the plaintiff to litigate only one option; if the transaction is unlawful whether the relevant product falls in one broad market or two narrower

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[232] *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 53–55 (D.D.C. 2015) (describing Dr. Mark Israel's methodology for calculating national-customer market shares and noting that a separate third-party estimate from Technomic was helpful but "did not segregate national and local broadline customers"); *see id.* at 56–61 (describing a similar methodology for calculating local customer market shares).

[233] Among other problems, a generalized price increase applicable to all customers would conflict with the claim that national customers are subject to price discrimination and therefore appropriately fit in a different market.

[234] We recognize that there may be exceptions to this general rule, *e.g.*, for facilities that serve multiple markets simultaneously.

markets, the plaintiff should be allowed to litigate each option, so long as the court ultimately chooses one, and some recent decisions support the practice.[235] Ironically, our proposal here is more lenient than Judge Brown's decision in *Whole Foods*, where she asserted "the FTC may have alternate theories of the merger's anticompetitive harm, depending on inconsistent market definitions," but ultimately "the FTC would have to proceed with only one of those theories."[236]

B. LIKELY IMPLICATIONS

The OMT Rule has several likely implications for antitrust enforcement. Here we briefly sketch three.

First, the OMT Rule may reinforce and clarify the existing requirement that courts resolve disputes regarding the scope of the relevant market. Thus, we expect to see even fewer cases in which a court credits a defendant's evidence of a broad market but nonetheless defines a narrower market and assesses competition within it.[237] Either the market is broad or it is narrow, but it is not both. Recognizing that there is one market, not several overlapping markets, will also simplify planning and litigation efforts. Litigation should be simpler as a result.

Second and relatedly, the OMT Rule may require enforcers to allege markets with greater rigor and consistency across matters. Under the agencies' current (erroneous) approach, they may be tempted to define overlapping markets to simultaneously bring otherwise contradictory claims, such as a monopolization claim in a narrower market and a nascent or potential competition claim in a broader one. In some cases, there may be a way to square that circle, such as by focusing on different transactions or carving out a narrower and non-overlapping market. Thus, although the OMT Rule may not rule out any particular case or theory, it will require greater clarity and consistency in the way enforcers allege and prove the market. It will also inhibit agency

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[235] *See, e.g.*, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 299–309 (D.D.C. 2020) (noting defendant's argument that "[t]he FTC could have pleaded or argued for alternative markets," that this position is "not without support," noting that even if the government's proposed market is incorrect, "the record may still contain evidence of an alternative relevant product market in which to analyze the merger's competitive effects," evaluating two potential alternative relevant product markets, and finding non-overlapping markets for particular end uses of hydrogen peroxide, but concluding that the agency failed "to sufficiently define a relevant geographic market" for each end use); Frame-Wilson v. Amazon.com, Inc., 591 F. Supp. 3d 975, 989 (W.D. Wash. 2022) (denying in part and granting in part a motion to dismiss where the plaintiff alleged a "U.S. retail ecommerce market" and "[a]lternatively" seven non-overlapping "U.S. ecommerce retail submarkets: (1) home improvement tools; (2) men's athletic shoes; (3) skin care; (4) batteries; (5) golf; (6) cleaning supplies; and (7) kitchen and dining products").

[236] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.).

[237] *See, e.g.*, *infra* note 7 and accompanying text.

gamesmanship, preventing switches to narrow submarkets when the broader market definition is itself found too narrow.

Third and relatedly, the OMT Rule may further increase the frequency with which enforcers define non-overlapping price-discrimination markets.[238] Price-discrimination markets are already fairly common. But with overlapping markets off the table, price-discrimination markets become an attractive alternative way to define both narrow and broad—but not overlapping—product markets simultaneously.

CONCLUSION

The submarket concept is wrong as a matter of economics and has led to faulty decision-making in the past. The courts have largely and appropriately rejected it in recent years. The agencies' recent efforts to revive and rebrand it are unfortunate and, we hope, will be rejected and—eventually—replaced by a more rigorous approach based on sound economics.

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[238] *See, e.g.*, Ian Simmons, Sergei Zaslavsky & Lindsey Freeman, *Price Discrimination Markets in Merger Cases: Practical Guidance from* FTC v. Sysco, ANTITRUST, Fall 2016, at 40, www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/anti_fall2016_fullissue.pdf (arguing that the enforcement agencies are asserting "narrow 'price discrimination markets' . . . in a growing number of merger investigations and enforcement actions").