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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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Mrs. Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters, particularly relating to mergers and acquisitions. She is regularly recognized as one of the world's top antitrust lawyers, including being recognized in the 2006–2021 Editions of The International Who's Who of Business Lawyers, as one of the top global competition lawyers, in the first tier ranking of Chambers USA Guide, the "leading individuals" ranking of PLC Which Lawyer Yearbook, Euromoney's Women Business Law's Lifetime Achievement Award in 2019, and the Antitrust Lawyer of the Year for 2016 by Best Lawyers, and Top Lawyer of the Year for 2017 by Cablefax. Mrs. Gotts has written for *The Antitrust Report* for over 25 years.

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Ms. Wong-Ervin is an antitrust partner at Axinn, Veltop & Harkrider. She is a recognized thought leader and has testified before Congress on domestic and international antitrust issues. She has more than sixteen years of experience, including representing defendants and plaintiffs in high-stakes litigations and representing technology companies in domestic and foreign investigations. Koren previously served at the Federal Trade Commission as Counsel for Intellectual Property and International Antitrust and as an Attorney Advisor to Commissioner Joshua Wright.

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Dr. Wang is an Executive Vice President with Compass Lexecon and specializes in antitrust issues in regulatory and litigation settings. She has provided economic analyses on issues of merger review, commercial disputes and antitrust investigation, especially in cross-border matters. She has been involved in casework in a variety of industries, including healthcare, high tech, financial markets, pharmaceuticals, airlines, intellectual property rights and consumer products. Dr. Wang has submitted reports to government antitrust agencies in the United States and in China, and has testified in both Chinese courts and an US congressional hearing. She has published and spoken frequently on antitrust and IP issues, and has been named to the International Who's Who Legal: Competition Economists list numerous times. Dr. Wang has extensive experience working on antitrust matters with Asian regulators. She has advised clients on merger reviews, antitrust investigations and private litigation in APAC countries.

Rebecca Kirk Fair

Analysis Group

Ms. Kirk Fair is a Managing Principal at Analysis Group. Ms. Kirk Fair has over 20 years of experience conducting economic analysis and managing case teams in a broad range of matters. These include major antitrust litigation, merger and agency competition review, intellectual property, false advertising, tax, and class certification. Ms. Kirk Fair specializes in applying market research to the evaluation of competition and substitution patterns to examine potential competitive effects in mergers and but-for outcomes in antitrust litigation. Ms. Kirk Fair has conducted quantitative analysis and performed industry and market research to evaluate competition, pricing, and outputs in connection with merger investigations in the US, Canada, and the EU. Ms. Kirk Fair regularly speaks and writes on the use of surveys in litigation. She has received numerous awards for her accomplishments, including the "40 in Their 40s: Notable Women Competition Professionals" and the Concurrences Antitrust Writing Award for her coauthored article "The Tyranny of Market Shares: Incorporating Survey-Based Evidence into Merger Analysis" *(Corporate Disputes)*.

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Axinn, Veltrop & Harkrider LLP

Mr. Hunsberger, Counsel at Axinn, Veltrop & Harkrider, in Washington D.C.

Mr. Hunsberger's practice focuses on the full range of antitrust matters, including mergers, litigation, government investigations, and antitrust counseling. James has represented clients in a broad range of industries, including telecommunications, chemicals, semiconductors, consumer goods, building solutions, and international shipping. In addition to his significant experience before U.S. courts and agencies, James also has experience dealing with regulators in several other global jurisdictions, including Europe and China. James earned his JD at Georgetown University Law Center, where he was Articles Editor for The Georgetown Law Journal and a Legal Research & Writing Fellow. He holds an undergraduate degree in Economics from Cornell University.

Emily E. Samra

Wachtell, Lipton, Rosen & Katz

Emily Samra is an Associate in Wachtell, Lipton, Rosen & Katz's Antitrust Department. Emily received her B.Sc. in Economics and Financial Mathematics from the University of Michigan. She received her J.D. with High Honors from The University of Chicago Law School, where she was a Kirkland & Ellis Scholar and a member of the Order of the Coif. She also served as a Comments Editor on The University of Chicago Law Review and was a member of the Doctoroff Business Leadership Program. Prior to joining the firm, Emily served as a law clerk for the Honorable Raymond M. Kethledge of the United States Court of Appeals for the Sixth Circuit.

Merger Guidelines Reform: If It Ain't Broke. . . .

Scott Sher and *Alexandra Keck*[*]

I. Introduction

The recent Request for Information on Merger Enforcement ("RFI") from the DOJ and FTC poses questions in search of a problem that does not exist.[1] The RFI suggests that the 2010 Horizontal Merger Guidelines ("*Guidelines*") do not account for certain types of evidence, harms, markets, or competitive effects. But in fact, the *Guidelines* were specifically designed for such adaptability to allow the antitrust agencies to consider a host of evidence and effects. The *Guidelines* emphasize that "merger analysis does not consist of uniform application of a single methodology." Instead, it is a "fact-specific process" where the agencies "apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns."[2] Modern problems facing the agencies are not problems that the *Guidelines* leave the agencies unequipped to address.

Merger review is inherently a predictive exercise that necessitates decision-making based on an uncertain future. As a result, the antitrust agencies make policy decisions about whether to err on the side of generating more Type I or Type II errors. Type I errors are false positives of anticompetitive harm, which reflect overenforcement that may impede pro-competitive mergers, while Type II errors are false negatives of anticompetitive harm, which reflect underenforcement that may hamper competition.[3] The agencies have long grappled with balancing Type I and Type II errors—within the flexible framework set forth by the *Guidelines*.[4] For example, in dissenting from the FTC's decision to close its investigation into Google's acquisition of DoubleClick, then-Commissioner Pamela Jones Harbour stated that while the merger had the "potential to create some efficiencies," it had "greater potential to harm competition" and "threaten[] privacy."[5] Harbour opined that by failing to impose conditions, the Commission was "asking consumers to

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[*] Scott and Alexandra are attorneys at Wilson Sonsini Goodrich & Rosati in Washington, DC.

[1] U.S. Dep't of Justice and Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

[2] U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[3] Policy choices that are more tolerant of Type II errors are often desirable in nascent markets and markets based on new technology, where the FTC has recognized "uncertainty about the path of competition and the durability of early leads in market share." Statement of the Commission Concerning Google/AdMob, at 2 (May 21, 2010), https://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf; *see also* Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1666 (2013) ("Some more thoughtful and knowledgeable commentators criticize antitrust on grounds of the comparative economic costs of overenforcement and underenforcement errors: because digital platform markets have characteristics that make it particularly difficult for antitrust authorities to assess the effects of conduct in those markets, the likelihood of overenforcement is high.").

[4] William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 914 (2009) ("In making the predictions associated with merger control, agencies face two basic types of risks. They improvidently may forbid a transaction that, if allowed to go forward, would improve economic performance, or they may fail to prohibit or amend a combination that will damage rivalry with respect to price, quality, or innovation.").

[5] *Google/DoubleClick*, Dissenting Statement of Commissioner Pamela Jones Harbour, at 12 (Dec. 20, 2007),

bear too much of the risk of both types of harm."[6] If the agencies are now more concerned with Type II errors, they need only evaluate deals more critically using the tools and rubric already set out by the *Guidelines*.[7]

Two of the RFI topics, discussed below, relate to types and sources of evidence that the agencies consider when reviewing mergers.[8] The RFI questions whether the *Guidelines* leave the agencies ill-equipped to assess non-price effects and whether they overemphasize quantitative evidence. They do neither.

II. Non-Price Effects

The current *Guidelines* address non-price effects, and agency actions under the *Guidelines* have not narrowly focused on the predicted price effects of a merger. Rather, the agencies have long assessed non-price effects, such as the merger's effect on innovation, quality, and service levels.[9] Using existing merger analysis tools, the agencies have required divestment of research assets and pipeline R&D projects, as well as mandatory licensing of overlapping activities when a merging party may have the incentive to cut off rivals' access to necessary intellectual property.[10] The agencies have also assessed whether companies acquiring large patent portfolios will commit to providing downstream competitors with access to standard essential patents.[11]

The merger between Genzyme Corporation and Novazyme offers one example of the FTC scrutinizing post-merger innovation incentives rather than price effects. The FTC analyzed

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https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[6] *Id*. In the acquisition by Time Warner and Comcast of Adelphia, Commissioners Leibowitz and Harbour noted that "caution is warranted particularly in close cases where there are strong countervailing efficiencies or procompetitive benefits . . . where the real possibility of competitive harm exists, consumers should not bear the risks inherent in [the agency's] inability to know the future." *Time Warner/Comcast/Adelphia*, Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part), at 3 (Jan. 31, 2006), https://www.ftc.gov/system/files/documents/public_statements/417731/0510151twadelphialeibowitz_harbour.pdf.

[7] Timothy J. Muris and Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE, at 4 n.23 (Apr. 2010) ("There will always be close cases on which no set of guidelines can provide only one answer to a merger's legality. Moreover, decision makers differ about how they value Type I / Type II error, about the quantum of evidence necessary to settle an investigation short of litigation, and about the level of risk they should bear when challenging a merger in federal court.").

[8] U.S. Dep't of Justice and Fed. Trade Comm'n, Request for Information on Merger Enforcement, at 3 (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

[9] *See, e.g.*, Complaint at 2-3, *In the Matter of Nvidia/Arm*, No. 9404 (F.T.C. Dec. 6, 2021); Complaint at 7, *In the Matter of Illumina, Inc., and GRAIL, Inc.*, No. 9401 (F.T.C. Mar. 30, 2021); Complaint at 11, *In the Matter of Illumina Inc. and Pac. Biosciences of California*, No. 9387 (F.T.C. Dec. 17, 2019); Complaint at 4, 20, *United States v. Bayer AG*, No. 1:18-cv-01241 (D.D.C. May 29, 2018); Complaint at 2-3, 9, *In the Matter of Otto Bock HealthCare North America, Inc.*, No. 9378 (F.T.C. Dec. 20, 2017); Complaint at 16, 18, *United States v. Deere & Company*, No. 1:16-cv-08515 (N.D. Ill. Aug. 31, 2016); Complaint at 4-6, *In the Matter of DaVita, Inc.*, No. 4334 (F.T.C. Sept. 2, 2011).

[10] *See, e.g.*, Press Release, Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (May 29, 2018), https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; *In the Matter of Amgen Inc. and Immunex Corp.*, No. C-4043 (F.T.C. July 12, 2002), http://www.ftc.gov/os/2002/07/amgencomplaint.pdf.

[11] *See* Closing Statement, Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp., and Research in Motion Ltd. (Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

whether the merger would increase R&D or improve R&D efficiency. Balancing the risk between overenforcement and underenforcement errors was particularly important given the proposed merger would unite the only two companies developing critical treatments for a rare disease.

The FTC's 3-1-1 decision showcased the majority and dissent's differing enforcement priorities and differing views of the harm from Type I and Type II errors. Chairman Timothy Muris used an error-cost framework to weigh the probability of merger harms versus merger benefits and found the merger would save more patients' lives than it would put at risk.[12] Muris determined that Genzyme had no incentive to slow the development of Novazyme's research program, and blocking the merger would impede innovation, resulting in overenforcement or a Type I error.

Commissioner Mozelle Thompson disagreed.[13] Although Thompson was also concerned about innovation, he found that allowing the merger to proceed would actually eliminate competition to innovate, resulting in underenforcement or a Type II error. Commissioner Thompson concluded the merger extinguished the race-to-market that had spurred innovation, eliminated Genzyme's need to make a superior product, and incentivized Genzyme to delay development of Novazyme's product. Commissioner Pamela Jones Harbour, who did not participate in the vote but did issue a separate statemen, echoed the importance of the race to innovate, and noted that "[c]ompetition drives innovation, and enforcers should aim to preserve innovation."[14] The statements of Commissioners Thompson and Harbour reveal a concern about Type II errors in innovation markets, while the statement of Chairman Muris reveals a concern about Type I errors.

The agency has also accounted for non-price effects in vertical mergers. For example, the FTC voted 4-0 to block the proposed merger of Illumina and Grail. Illumina sells next-generation gene sequencing (NGS) equipment, while Grail is developing a multi-cancer early detection (MCED) test using Illumina's NGS platform.[15] The FTC claimed that the acquisition would diminish innovation in the U.S. market for MCED tests. In particular, the FTC alleged a vertical theory of harm, claiming the merger would give Illumina the ability and incentive to disadvantage or foreclose MCED competitors from access to Illumina's critical NGS technology. Post-acquisition, the FTC alleged, Illumina would be able to monitor each company developing a test using its NGS platform and would have the incentive to kill products that took business from Grail.[16] The FTC further argued that Illumina may have the incentive to refuse or delay licensing agreements

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[12] In a statement closing the FTC's investigation, Muris compared "two alternative states of the world," where there were "strong reasons to believe that the merger will benefit patients in the first state of the world, without a basis for concluding that the merger is likely to result in net harm to patients in the alternative state of the world." Statement of Chairman Timothy J. Muris in the *Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc.*, Fed. Trade Comm'n, FTC File No. 021 0026, at 23 (Jan. 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf.

[13] Statement of Commissioner Mozelle W. Thompson in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc., Fed. Trade Comm'n, FTC File No. 021 0026 (Jan. 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./thompsongenzymestmt.pdf.

[14] Statement of Commissioner Pamela Jones Harbour in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc., Fed. Trade Comm'n, FTC File No. 021 0026, at 1 (Jan. 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./harbourgenzymestmt.pdf.

[15] Complaint, *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 9401 (F.T.C. Mar. 30, 2021).

[16] *Id.* ¶ 14.

required to sell certain distributed versions of the MCED tests.[17] Just over a year earlier, the FTC also voted 5-0 to block Illumina's proposed acquisition of Pacific Biosciences, claiming that the acquisition would eliminate a nascent competitive threat and would harm competition by reducing the company's incentive to innovate.[18]

III. Quantitative Evidence

The *Guidelines* allow the agencies to use both quantitative and qualitative evidence complementarily. Contrary to the RFI's suggestion, the *Guidelines* do not overemphasize quantitative evidence to the exclusion of other evidence. However, quantitative evidence is important to both the agencies and the merging parties. Indeed, the agencies often use quantitative evidence to demonstrate competitive effects and bring cases that may not otherwise be obvious. In many merger reviews, both quantitative evidence (such as econometric analysis) and qualitative evidence (such as internal company documents, product characteristics and usage, and evidence of barriers to entry) play a crucial role in the agencies' ability to successfully block mergers.

The merger of Bazaarvoice and PowerReviews provides an example of qualitative evidence sounding the death knell to a merger. Bazaarvoice documents reflected an anticompetitive transaction rationale and supported a narrow product market of ratings and review platforms. Internal Bazaarvoice documents repeatedly referred to PowerReviews as Bazaarvoice's primary competitor,[19] referenced military themes in its detailed plans to destroy PowerReviews,[20] and even showed pricing directed solely at PowerReviews.[21] The court noted that "anticompetitive rationales infused virtually every pre-acquisition document describing the benefits of purchasing PowerReviews."[22] The court was persuaded by this qualitative evidence and concluded that Bazaarvoice made the acquisition to eliminate competition and bolster its market position.

The agencies also rely on quantitative evidence to establish their claims of anticompetitive effects, even when the merger may not appear facially anticompetitive based on qualitative evidence alone. For instance, in the proposed merger of Staples and Office Depot in 1997, the FTC sued to block the deal and alleged a narrow market of the sales of office supplies through office superstores.[23] Since office products are the same regardless of the seller, the court remarked that it was "difficult to overcome the first blush or initial gut reaction" to such a narrow market.[24] However, econometric evidence confirmed this narrow market. The FTC presented pricing evidence showing that both parties priced products higher in markets where the other party was

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[17] *Id.* ¶¶ 11, 49.

[18] Complaint, *In the Matter of Illumina, Inc., and Pacific Biosciences of Cal., Inc.*, No. 9387 (F.T.C. Dec. 17, 2019).

[19] *See, e.g.*, *United States v. Bazaarvoice, Inc.*, Case No. 13–cv–00133, 2014 WL 203966, at *15 (N.D. Cal. 2014) (discussing a document that stated the "Pros" of the deal were "[elimination of [Baazaarvoice's] primary competitor" and "relief from price erosion").

[20] *Id.* at *14 (detailing "warlike language" used by Bazaarvoice, including an email stating that the "BV battleship (or AC-130 gunship, rather) and its guns have kicked in and lead rain is starting to drop on PR. . .").

[21] *Id.* at *12 ("Bazaarvoice created pricing guidelines to steal 'marquee' PowerReviews customers 'at all costs,' " and "sought to fend off the PowerReviews assault by 'building moats' around its most significant customers").

[22] *Id.* at *19.

[23] *Federal Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

[24] *Id.* at 1075.

not present, and this quantitative evidence ultimately convinced the court to adopt the FTC's proposed product market and competitive effects.[25]

IV. Guidance and Transparency

The *Guidelines* proclaim their intention "to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions."[26] While it is always welcome to consider changes to the *Guidelines* in substance or process, predictability remains crucial for business and for the agencies. Businesses need to understand what actions are legal, and enforcement consistency and clarity enables informed business decisions and better self-policing. The agencies, too, benefit from a framework that promotes even application of the law across administrations and that is accepted by the courts.[27]

Courts recognize that agency guidelines are not binding law, but courts embrace the *Guidelines* because they agree with the sound analytical framework that is consistent with both precedent and the language of the statute. Courts may be less apt to follow guidelines that appear to deviate from well-established law or that introduce new concepts not contemplated at the time of the statute's drafting. The *Guidelines*, for example, state that market definition is not a required step to establish a violation of the Clayton Act, and the analytical focus of merger review should instead be on competitive effects.[28] Nonetheless, courts have continued to require traditional market definition.

In *City of New York v. Group Health*, the court explicitly rejected the plaintiff's attempt to sidestep traditional market definition, finding it "inadequate as a matter of law."[29] Although the plaintiff's expert claimed that the upward pricing pressure test could be used instead of the traditional structural approach of defining relevant markets and calculating shares, specifically pointing to the *Guidelines* as sound precedent supporting the analysis, the court responded that its own research had "not revealed a single decision of a federal court adopting the test."[30] Moreover, in light of the law's "clear requirement" that a plaintiff allege a product market, the "absence of authority" was "hardly surprising."[31] Similarly, in *FTC v. LabCorp*, the court rejected the view that market definition is not required, stating that the FTC's prima facie case must include "[e]vidence establishing undue concentration in the relevant market."[32] In denying the FTC's request for a preliminary injunction, the court suggested that the FTC's failure to define a relevant market could

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[25] *See id.* at 1078 ("[T]he evidence presented by the Commission shows that even where Staples and Office Depot charge higher prices, certain consumers do not go elsewhere for their supplies. This further demonstrates that the sales of office supplies by non-superstore retailers are not responsive to the higher prices charged by Staples and Office Depot in the one firm markets.")

[26] Horizontal Merger Guidelines, *supra* note 2, at § 1.

[27] *See* Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, Regarding the Request for Information on Merger Enforcement, Fed. Trade Comm'n, at 1 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

[28] *See* Horizontal Merger Guidelines, *supra* note 2, at § 4.

[29] *City of New York v. Group Health*, No. 06 Civ. 13122, 2010 U.S. Dist. LEXIS 60196, at *14 (S.D.N.Y. May 11, 2010), *aff'd*, 649 F.3d 151 (2d Cir. 2011).

[30] *Id.* at *18 n.6.

[31] *Id.*

[32] *Fed. Trade Comm'n v. Lab. Corp. of Am.*, No. 10-1873, 2011 U.S. Dist. LEXIS 20354, at *35–*36 (C.D. Cal. Feb. 22, 2011).

result in the dismissal of the case.[33] These decisions underscore that judicial acceptance of merger guidelines is neither rapid nor automatic; radical change will invite additional skepticism.

V. Conclusion

The principles set forth in the *Guidelines* are grounded in sound legal and economic principles and help signal to businesses how mergers will be reviewed. Importantly, the principles in the *Guidelines* also provide sufficient flexibility for enforcers to apply the *Guidelines* to match enforcement priorities that may shift over time.[34] If the agencies are more tolerant of Type I errors, the *Guidelines* allow this adaptability. If, on the other hand, the agencies are more tolerant of Type II errors, the *Guidelines* also allow for this. Consistency of central antitrust enforcement principles over time is essential.[35] Ultimately, under the current *Guidelines*, the agencies are well equipped to address non-price effects such as innovation and are well positioned to analyze both qualitative and quantitative evidence.

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[33] *Id.* In another case just after the guidelines were issued, the court ruled against the FTC and found that the FTC failed to prove that two drugs were in the same market. *See FTC v. Lundbeck, Inc.*, Civil No. 08-6379, 2010 U.S. Dist. LEXIS 95365, at *57–*58 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011).

[34] Timothy J. Muris and Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE, at 4 (Apr. 2010) ("Antitrust analysis is highly fact dependent, and the flexibility (and generality) of the Guidelines reflects this crucial point. To be durable, law enforcement guidelines should reflect the existing consensus views of academics and professionals.").

[35] William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 135 (2009) ("Reckless drivers careen. Good public policy does not."); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377, 477 (2003) ("The story of modern U.S. federal enforcement has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.").