Federal Trade Commission

The Past and Future of Direct Effects Evidence

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I.

Direct effects evidence is evidence indicating the likely competitive effects of a transaction or practice that is not based on inferences drawn from market concentration alone. Examples of direct effects evidence include an acquiring company's post-merger plans, evidence that competition between the merging parties has led to lower prices or other competitive benefits, changes in prices or output from a consummated merger, and the results of natural experiments.[1]

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* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance preparing this paper.

[1] In this context, a natural experiment refers to a prior change in industry structure – such as a merger, entry, failure, or temporary shutdown – or an analogous change in a related product or geographic market that offers insight into the effects of a proposed merger.

Reliance on direct effects evidence offers a number of advantages over inferences drawn from market definition and concentration. Market definition, of course, is not an end in itself but rather an indirect means of determining the presence of market power or the likelihood that it will be exercised. Focusing on market definition risks obscuring the ultimate question under Section 7 of the Clayton Act, which is whether the transaction is likely to substantially lessen competition. The answer to that question may turn on market definition, but it doesn't have to. By contrast, direct evidence can shed light directly on whether a proposed transaction is likely to facilitate the exercise of market power. For example, we sometimes see projections in acquiring companies' pre-merger documents as to how a transaction will affect the company's prices. That kind of evidence is more probative to me than inferences based on changes in concentration (except perhaps in extreme cases such as mergers to monopoly or duopoly).

Another benefit of direct effects evidence is its potential to help define the relevant market. I have described this as "backing into" the market definition. Others have described competitive effects evidence and market definition evidence as "two sides of the same coin."[2] Both mean the same thing to me: the relevant markets can sometimes be defined through the competitive effects evidence.

I also think a focus on competitive effects is an easier story for a court to understand.[3] A case focused on market definition risks getting bogged down in esoteric fights over critical loss analysis or the SSNIP test. Asking customer witnesses whether they would have switched to an

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[2] Brief of Appellant at 38, FTC v. Whole Foods Market, Inc., No. 07-5276 (D.C. Cir. Jan. 14, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf.

[3] *See generally* Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 Competition Pol'y Int'l 35 (2009) (arguing that generalist judges lack economic training (and often interest) and that, as such, if economic evidence is to be persuasive, it must be communicated in a way that a generalist can understand and must be consistent with other evidence).

alternative in the face of a 5% price increase is not an especially persuasive line of questioning, particularly because customers are not adverse witnesses so a plaintiff generally cannot lead them. Contrast that to the use of documents or testimony showing whether there have been recent competitive interactions between the merging companies resulting in lower prices or other consumer benefits.

This is not to say that all types of direct evidence are created equal. They aren't. For example, the parties' statements, written and oral, may be particularly powerful and probative. So can evidence about what actually happened post-transaction in consummated transactions.

II.

The 1992 Merger Guidelines offered little support for the use of direct effects evidence. Instead, the 1992 Guidelines required that merger analysis proceed in a step-by-step fashion starting with market definition. Only after the market is defined—and the market participants identified and concentration levels determined—are the likely competitive effects of a transaction assessed. On numerous occasions, I argued that the 1992 Guidelines' treatment of market definition as a "gating item" was a mistake and that more emphasis should be placed on direct evidence.[4]

Notwithstanding that direct effects evidence was given relatively short shrift in the 1992 Guidelines, the agencies did in fact consider such evidence in the course of merger review. In addition, the agencies usually avoided the rigid, step-by-step approach described in the 1992 Guidelines to focus instead on the most relevant evidence.

[4] *See, e.g.*, J. Thomas Rosch, Commissioner, Federal Trade Commission, Enforcement Priorities in the New Administration, Remarks at the Global Competition Review's 2009 Competition Law Review at 9-12 (Nov. 17, 2009), *available at* http://www.ftc.gov/speeches/rosch/091117enforceprioritiesremarks.pdf.

As the 2006 *Merger Guidelines Commentary* stated, "the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets."[5] Rather the agencies favor "an integrated approach" where the emphasis is on competitive effects, and "evidence of effects may be the analytical starting point."[6] A merger's competitive effects, according to the *Commentary*, "also may be useful in determining the relevant market."[7] And the *Commentary* asserted that "[i]n some cases, competitive effects analysis may eliminate the need to identify with specificity the appropriate relevant market."[8] The report identified natural experiments and merger simulations as two types of evidence that directly address the core question of whether a merger is likely to create or enhance market power or facilitate its exercise.[9] Indeed, the *Commentary* declared that market definition and concentration often have little relevance in a unilateral effects analysis.[10]

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[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the 1992 Horizontal Merger Guidelines at 2 (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

[6] *Id*. at 2, 10; *see also id*. at 10 ("In some investigations, before having determined the relevant market boundaries, the Agencies may have evidence that more directly answers the 'ultimate inquiry in merger analysis,' i.e., 'whether the merger is likely to create or enhance market power or facilitate its exercise.' (quoting 1992 Guidelines § 0.2)); Darren S. Tucker & Bilal Sayyed**,** *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, Antitrust Source, May 2006, http://www.abanet.org/antitrust/at-source/06/05/May06-Tucker5=24f.pdf ("[T]he Commentary notes that evidence of competitive effects, rather than market definition, may be the analytical starting point in some investigations.").

[7] Commentary at 10 ("Such evidence may identify potential relevant markets and significantly reinforce or undermine other evidence relating to market definition.").

[8] *Id*. at 11.

[9] *Id*. at 10, 25-26. As I have said before, I have some reservations about the extent to which triers of fact can understand merger simulation analyses.

[10] *Id*. at 16.

The FTC has brought several cases that relied to a large degree on direct evidence. In *Evanston*,[11] the Commission challenged a consummated merger between two hospitals in the North Shore suburbs of Chicago. The first count of the complaint alleged that the merger violated Section 7 of the Clayton Act in certain relevant product and geographic markets. The second count charged that the transaction violated the Clayton Act because it enabled Evanston to raise its prices to private payors. Unlike the first count, however, the second count did not allege a particular product or geographic market and did not incorporate the complaint's earlier product market and geographic market allegations by reference.

Both the ALJ and the Commission found liability under Count I but declined to reach the question of whether there was liability under Count II.[12] The Commission's unanimous decision nevertheless acknowledged the clear trend toward the use of direct evidence in lieu of market definition in Section 1 and Section 7 cases. The opinion explained that "market definition is not an end in itself but rather an indirect means to assist in determining the presence or the likelihood of the exercise of market power."[13] The decision observed that a number of courts had "endorsed the use of direct effects evidence to determine, even absent a market definition, whether ongoing *conduct* has facilitated the exercise of market power."[14] The Commission

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[11] Opinion of the Commission, In re Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[12] *Id*. at 86 ("Having found that the evidence is sufficient to define the product and geographic markets, and that complaint counsel has prevailed under Count I, we consider it unnecessary to decide whether the law permits establishing a violation of Section 7 without defining a relevant market.").

[13] *Id*.

[14] *Id*. at 88 (emphasis added).

concluded by saying that "we do not rule out the possibility that a future merger case may lead us to consider whether complaint counsel must always prove a relevant market."[15]

Whether or not Count II in *Evanston* was viable, the relevant market cannot go entirely undefined. As I will explain, the statute requires that the relevant markets be defined. But neither the statute nor the Supreme Court requires that they be defined *upfront* or as a predicate to analyzing the competitive effects of a transaction. As I pointed out in my concurring opinion, "when a merger has been consummated and the evidence shows it has had actual anticompetitive unilateral effects, the law allows liability to be established by direct evidence of those effects, without initially defining a relevant market using Merger Guidelines methodology, at least where, as here, the evidence of anticompetitive effects identifies the 'rough contours' of the market."[16] Although my concurrence was predicated on the fact that the transaction was consummated and had led to actual anticompetitive effects, I also suggested that direct evidence of anticompetitive effects could also be sufficient to identify the contours of the relevant market in some *unconsummated* mergers.

Other recent FTC merger enforcement cases that relied extensively on direct evidence include *Whole Foods*, *Staples*, and *Ovation*.[17] In *Whole Foods*,[18] the agency presented a host of direct evidence, including some colorful statements from the company's CEO, showing close

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[15] *Id.*; *see also id.* at 86-87 (market definition "is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties.").

[16] Concurring Opinion of Commissioner J. Thomas Rosch at 18, In re Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf.

[17] The agency has also found liability based on direct evidence of anticompetitive effects in several recent Section 1 cases, including *Schering-Plough* and *Realcomp*.

[18] *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1(D.D.C. 2007), *rev'd*, 548 F. 3d 1028 (D.C. Cir. 2008).

competition between the merging parties.[19] In *Staples*, the FTC offered evidence at trial that indicated that prices tended to increase as the number of office superstores declined.[20] And in *Ovation*, the agency presented evidence that shortly after the transaction was consummated, prices increased nearly 1,300 percent.[21]

I was not alone in advocating for greater emphasis on use of direct evidence at the FTC. Then-Commissioner Leibowitz joined in my concurring statement in *Evanston* as to the role of market definition.[22] Former Chairman Majoras, who authored the Commission's decision in *Evanston*, asked aloud at a workshop if we are "ready to touch the third rail and discuss whether market definition is necessary in a case in which we can present direct evidence of competitive effects."[23] Several of the panelists in the workshops leading up to the 2010 Merger Guidelines also advocated for greater reliance on direct evidence.

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[19] For example, the company's CEO advised a member of his board that the transaction would help "avoid nasty price wars" in certain local markets and elsewhere opined that Whole Foods was "systematically destroying [Wild Oat's] viability as a business—market by market, city by city." Complaint at 1-2, FTC v. Whole Foods Market, Inc., No. 07-1021 (D.D.C. June 6, 2007), *available at* http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf; Plaintiff Federal Trade Commission's Corrected Brief on Its Motion for Preliminary Injunction at 6, FTC v. Whole Foods Market, Inc., No. 07-1021 (D.D.C. Aug. 1, 2007), *available at* http://www.ftc.gov/os/caselist/0710114/080107corbrief.pdf; *see also* Darren S. Tucker & Kevin L. Yingling, *Too Hot to Handle: Internal Party Documents in Whole Foods and Other Modern Merger Challenges*, Antitrust Source, Oct. 2007, at 7-9.

[20] *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

[21] *FTC v. Lundbeck, Inc.*, Civil Nos. 08-6379, 08-6381, 2010 WL 3810015 (D. Minn. Aug. 31, 2010).

[22] Concurring Opinion of Commissioner Jon Leibowitz, In re Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 6, 2007) ("I believe that the weight of the evidence clearly supports a finding that the merger violated the Clayton Act in the manner identified in Count 2 of the Complaint as well. Consequently, I join in Section II of Commissioner Rosch's concurrence.").

[23] Remarks of FTC Chairman Deborah Majoras at the Unilateral Effects Analysis and Litigation Workshop at 15 (Feb. 12, 2008), *available at* http://www.ftc.gov/bc/unilateral/transcript.pdf.

III.

The 2010 Merger Guidelines made a monumental leap forward with respect to the use of direct evidence in several regards.[24] First, the rigid, step-by-step analytical approach of the 1992 Guidelines is gone. Section 4 of the new Guidelines explains that "[t]he Agencies' analysis need not *start* with market definition."[25] Rather, the Agencies will "consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."[26]

Second, the 2010 Guidelines endorse the use of direct evidence of competitive effects. The Guidelines explain that direct evidence can reduce or eliminate the need to rely on concentration statistics or to define a relevant market using traditional tools.[27] This is clearest in the case where a consummated transaction has resulted in price increases or other anticompetitive effects. Such evidence "can be dispositive."[28] In addition, the Guidelines explain that assessing the likelihood of unilateral effects for differentiated product mergers "need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for

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[24] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Guidelines or Guidelines], *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[25] *Id.* § 4 (emphasis added).

[26] *Id.* § 2; *see also id.* § 1 ("These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.").

[27] *Id.* § 4 ("Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

[28] *Id.* § 2.1.1.

diagnosing unilateral price effects . . . ."[29] The 2010 Guidelines also note that use of direct evidence can be particularly valuable where there are several "reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects."

Third, evidence of anticompetitive effects can also help define the relevant market. Section 4 states that "[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market." Section 2.1.4 similarly notes that evidence of head-to-head competition between merging parties can "inform market definition."

Fourth, the 2010 Guidelines include a new section identifying certain types of direct evidence that the Agencies have found informative in predicting the competitive effects of acquisitions. Those include actual effects observed in consummated mergers, natural experiments, effects of analogous events in similar markets, the existence of substantial head-to-head competition between the merging parties, the motives for the transaction, and the financial terms of the transaction.[30]

Other parts of the Guidelines assert that even certain economic models "need not rely on market definition."[31] The discussion of entry in Section 9 says that the agencies "give substantial

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[29] *Id.* § 6.1.

[30] *Id.* § 2.1.

[31] Section 6.1 states that in a unilateral effects analysis, the agencies may use economic models to predict the upward pricing pressure or the actual price effects resulting from a differentiated products merger. I have previously described my concerns with these economic models. *See* Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, Project No. P092900 (Aug. 19, 2010), *available at*

weight" to "the actual history of entry into the relevant market."[32] Direct evidence of a transaction's likely efficiencies include the buyer's success in achieving projected efficiencies in past transactions, as well as evidence that the transaction was motivated by the expectation of efficiencies. Such motivation could be shown by projections generated in the "usual business planning process" or from a "purchase price in excess of the acquired firm's stand-alone market value."[33]

The 2010 Guidelines do note some important caveats with regard to direct effects evidence. In particular, the new reliance on direct evidence does not mean that the agencies are abandoning market definition. The Guidelines make this point repeatedly.[34] The same is true when the agencies go into court. Section 4 states that "[i]n any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition."[35] So concerns that have been raised about the Agencies using

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http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf. Section 6.1 also explains that a variety of evidence – including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys" – can help identify the extent of direct competition between the merging parties, which is "central to the evaluation of unilateral price effects."

[32] *See also* 2010 Guidelines § 2.1.2. ("[T]he agencies may examine the impact of recent . . . entry . . . in the relevant market.").

[33] *Id*. § 2.1.2; *see also* Merger Guidelines Commentary at 53 ("The best way to substantiate an efficiency claim is to demonstrate that similar efficiencies were achieved in the recent past from similar actions.").

[34] 2010 Guidelines § 5 ("The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects."); *id*. § 5.2 ("The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data."); *id*. § 5.3 ("Market concentration is often one useful indicator of likely competitive effects of a merger."); *id*. § 4 ("[E]valuation of competitive alternatives available to customers is always necessary at some point in the analysis.").

[35] *But see id*. § 1 n.2 ("These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring.").

the 2010 Guidelines as the impetus for urging the courts to abandon market definition are, in my view, misplaced.[36]

In addition, direct effects evidence may play a lesser role when the concern is limited to coordinated interaction. According to the Guidelines, the Agencies will only challenge a merger on coordinated effects grounds if "the merger would significantly increase concentration and lead to a moderately or highly concentrated market."[37] In other words, the structural presumption remains important when considering the potential for coordinated behavior. But that doesn't mean that direct effects evidence is irrelevant. For example, such evidence could show that a merger will enhance an industry's vulnerability to coordinated conduct. The FTC's complaint challenging the CLS/Telecris merger, for example, noted that prior acquisitions in the relevant markets had led to increased prices and reduced output and that a key competitor predicted that the merger would be a "positive stabilizing move within the industry."[38] In addition, prior express collusion or attempts to collude in the relevant market are highly relevant considerations.[39]

IV.

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[36] *See, e.g.*, Leah Brannon & Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?*, Antitrust Source, Oct. 2010, http://www.abanet.org/antitrust/at-source/10/10/Oct10-Brannon10-21f.pdf ("[T]he 2010 Guidelines ask more of the courts than previous versions have, and if recent court decisions are any indication, courts may not be willing to forgo market definitions in Section 7 cases."); Dennis W. Carlton & Mark Israel, *Will the New Guidelines Clarify or Obscure Antitrust Policy?,* Antitrust Source, Oct. 2010, http://www.abanet.org/antitrust/at-source/10/10/Oct10-Carlton10-21f.pdf ("If courts and foreign agencies rely on the 2010 Guidelines as a basis to justify ignoring or downplaying market definition as a tool of merger analysis, this is likely to lead to less effective antitrust policy.").

[37] 2010 Guidelines § 7.1.

[38] Complaint ¶¶ 7, 23-43, In re CSL Limited, Docket No. 9337 (FTC May 27, 2009), *available at* http://www.ftc.gov/os/adjpro/d9337/090527cslcmpt.pdf.

[39] 2010 Guidelines § 7.2.

Despite the 2010 Guidelines' goal of moving away from an upfront structural case and toward the use of direct evidence of a merger's anticompetitive effects, it's not clear to me that agency practice – at least at the FTC – has actually changed much since those Guidelines became effective. Exhibit A in that regard is the Commission's *Polypore* opinion,[40] which follows the analytical approach of the 1992 Guidelines, rather than the 2010 Guidelines.

Polypore, like *Evanston*, involved a consummated merger that resulted in significant price increases. There was also compelling evidence in *Polypore* that the transaction was motivated by an expectation of reduced competition and higher prices. The Commission's decision acknowledged that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits."[41] The opinion also stated that "[i]n a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability without separate proof of market definition."[42] (I would use the word "upfront," instead of "separate," before "proof.") Nevertheless, the Commission's opinion embraced a traditional analytical framework, including precise upfront market definition, before turning to consideration of the transaction's competitive effects.[43]

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[40] Opinion of the Commission, In re Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf.

[41] *Id*. at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)).

[42] *Id*.

[43] *Id*. ("Both Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework. The ALJ relied on the same legal framework in the ID. We find that this framework illuminates the factual record and competitive issues in this case and therefore apply it in this opinion.").

I wrote a concurring opinion praising the rigor of the Commission opinion but lamenting that the Commission had declined to take the opportunity to apply the advances in the 2010 Guidelines. I explained that "especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market."[44]

I would offer several comments about *Polypore*. First, there is no doubt in my mind that the majority opinion, which began by defining the relevant market, was the smart way to secure an appellate victory, particularly given the fact that the decision was issued shortly after issuing the 2010 Merger Guidelines. Second, at the same time, I thought is was important to articulate a contrary approach that would be simpler and arguably more consistent with the new Guidelines so that the courts would have an opportunity to consider this less economic-based approach. It may be that some courts will have to get used to this analysis before adopting it.

V.

Let me next say a few words about how the courts are likely to treat direct effects evidence in future Section 7 cases. As I mentioned before, the Agencies have relied on direct effects evidence in a number of recent merger and non-merger cases. The courts have sometimes been receptive to this approach.

The Supreme Court has held that direct effects evidence can establish a violation of the Sherman Act in a non-merger case, even without proof of market power in a relevant market. In *Indiana Federation of Dentists*, the Court stated that "[s]ince the purpose of the inquiries into

[44] Concurring Opinion of Commissioner J. Thomas Rosch at 5, In re Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeconcurringopinion.pdf.

market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects."[45] The significance of this case has not been lost on the lower courts. In *Toys "R" Us*, the Seventh Circuit upheld the Commission's finding of liability, notwithstanding that the company may have lacked a large market share. The court explained that:

> The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. . . . The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case.[46]

The courts have applied the same logic to Section 7 cases. Over twenty years ago, Judge Posner observed that judicial interpretation of Section 1 of the Sherman Act and Section 7 of the Clayton Act had converged.[47] The D.C. Circuit has twice suggested that a Section 7 violation could be predicated on direct effects evidence. In *Baker Hughes*, Judge (now Justice) Thomas stated that "market share is just a way of estimating market power, which is the ultimate consideration . . . . When there are better ways to estimate market power, the court should use

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[45] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (quotations omitted).

[46] *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *see also Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market"); *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("If a plaintiff can show an actual adverse effect on competition, such as reduced output . . . , we do not require a further showing of market power." (citation omitted)); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993) (plaintiff may avoid a "detailed market analysis by offering proof of actual detrimental effects, such as a reduction of output" (quotations and citation omitted)).

[47] *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990).

them."[48] In the D.C. Circuit's *Whole Foods* decision, Judge Brown (joined by Judge Tatel in this regard) stated that "defining a market and showing undue concentration in that market . . . does not exhaust the possible ways to prove a § 7 violation on the merits."[49]

The district courts have relied on direct effects evidence in evaluating several proposed transactions. The seminal decision in this regard is undoubtedly *Staples*, which determined the relevant product market principally on the basis of the evidence of likely anticompetitive effects.[50]

Thus, the Agencies should be on firm ground when they challenge acquisitions on the basis of direct evidence of anticompetitive effects, whether the transaction is consummated or unconsummated, so long as the direct evidence is sufficient to establish at least the "rough contours" of the relevant market.

VI.

Finally, let me please offer some brief thoughts on future cases that *do* rely on the structural presumption. The Supreme Court's decision in *Brown Shoe* is perhaps best known for its identification of a number of "practical indicia" that can be used to define a so-called "submarket." Since that decision, courts have struggled with the distinction between markets and submarkets, with some rejecting the terminology outright and others proceeding to define submarkets within a broader relevant market. I think the way to reconcile these cases is to recognize that where courts have defined "submarkets," they were in fact defining relevant

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[48] *United States v. Baker Hughes Inc*., 908 F.2d 981, 992 (D.C. Cir. 1990) (quotations omitted). Judge (now Justice) Ruth Bader Ginsburg was also on the *Baker Hughes* panel.

[49] *FTC v. Whole Foods Market, Inc*., 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (dicta). In particular, "it might not be necessary to understand the market definition" in a unilateral effects case involving differentiated products, at least at the preliminary injunction stage. *Id*. at 1036 n.1 (Brown, J.) (dicta).

[50] *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997).

markets under the usual methodology. Thus, I would suggest that the full range of "practical indicia" is pertinent in all merger cases, regardless of whether one is using the term "market" or "submarket."

Also, several of the *Brown Shoe* practical indicia are on the supply-side, which indicates that both demand and supply-side factors should be relevant to determining the relevant market. Nevertheless, our Merger Guidelines take a slightly different approach. Since 1982, the Merger Guidelines have defined relevant markets only with regard to demand-side considerations, and looked to supply-side factors when determining who participates in the relevant market. But regardless of whether we are following *Brown Shoe* or the Merger Guidelines, it is important to consider supply-side substitution, even in unilateral effects cases, where the usual focus is on the degree of substitution between the merging parties' products.

VII.

I'd also like to briefly touch on challenges the FTC faces in some future unilateral effects cases. Under the 2010 Merger Guidelines, mergers that result in an HHI below 1,500 or that involve an increase of less than 100 are described as "unlikely to have adverse competitive effects and ordinarily require no further analysis."[51] I worry that these thresholds, which are generally viewed as safe harbors, may handcuff us from challenging some unilateral effects mergers where the merging parties have low shares but are very close substitutes. This isn't a new concern for me. You will recall that I was critical of the new Guidelines for creating the illusion that these were safe harbors when the Guidelines were issued.[52]

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[51] 2010 Merger Guidelines § 5.3.

[52] Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, Project No. P092900 (Aug. 19, 2010), *available at* http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf.

This concern is exacerbated in potential competition cases. In mergers between potential competitors, one or both of the parties have no current sales, which means that the transaction will not lead to an immediate increase in concentration.[53] Compounding the concern with the HHI requirements in the Merger Guidelines is the Supreme Court's *Marine Bancorporation* case, which requires a showing that the potential competitor would substantially deconcentrate the relevant market.[54] Thus, the perceived safe harbors in the Guidelines and the Supreme Court's *Marine Bancorporation* decision may be impediments to challenging a transaction involving a potential competitor regardless of how inimical to competition the transaction may be.

VIII.

I will conclude by expressing my hope and desire that in the near future the Commission will accept its own invitation in *Evanston* and assess the legality of a transaction based on direct evidence of competitive effects, rather than by defining the precise metes and bounds of the relevant market at the outset of the analysis.

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[53] In potential competition cases, the agencies determine the change in concentration using "projected market shares" of the potential entrant, rather than current shares. 2010 Merger Guidelines § 5.3; *see also* Darren S. Tucker, *Potential Competition Analysis Under the 2010 Merger Guidelines*, Sedona Journal (forthcoming 2011).

[54] *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974).