September 18, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted via Regulations.gov

Re: Draft FTC-DOJ Merger Guidelines for Public Comment, FTC-2022-0003-0001

Introduction

Public Knowledge appreciates the opportunity to comment on the Department of Justice (DOJ) and the Federal Trade Commission's (FTC) updated merger guidelines (hereinafter "the proposed guidelines" or "the guidelines"). These proposed guidelines are a powerful step forward for the nation's antitrust enforcement agencies. The proposed guidelines much more accurately reflect our modern understanding of the economics of industrial organizations than prior guidelines. The new guidelines can streamline enforcement against anti-competitive mergers and improve the courts and the public's understanding and decision-making. These guidelines support key improvements to the interpretation of antitrust law and economics for which Public Knowledge has been advocating for years.[1]

We support the proposed guidelines' adoption of a single, unified set of guidelines that encompasses all potential mergers, including horizontal, non-horizontal and vertical mergers. All three of these categories of mergers may pose a risk to competition, so it's a valuable improvement that the guidelines take all three types of threats seriously.[2] The proposed guidelines clearly explain the agencies' enforcement priorities, economic reasoning, and legal interpretation in vertical mergers such as input or market foreclosure, as well as for dominant digital platforms, specifically regarding multi-sided platforms and nascent competitors. In

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[1] For more on Public Knowledge's previous comments on merger enforcement, *see* Public Knowledge Inc., Comment Letter on Request for Information on Merger Enforcement (April 21, 2022), https://publicknowledge.org/wp-content/uploads/2022/04/PK-Merger-Guidelines-Comments-42122.pdf, *see also* Public Knowledge, Inc. & Open Technology Institute, Comment Letter on the Draft Vertical Merger Guidelines (February 26, 2020), https://publicknowledge.org/wp-content/uploads/2021/11/VMG-Comments-PK-OTI.pdf.

[2] For more, *see Hearing on Trends in Vertical Enforcement Before the Subcomm. on Competition Pol., Antitrust, & Consumer Rights of the H. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Charlotte Slaiman, Competition Policy Director, Public Knowledge), https://publicknowledge.org/policy/public-knowledge-charlotte-slaiman-testimony-before-senate-judiciary-on-vertical-merger-enforcement/ ("Not all non-horizontal mergers are vertical, yet other types of non-horizontal mergers may also have anti-competitive effects. The Commission should explicitly clarify that the guidelines apply broadly to non-horizontal mergers and not only to vertical mergers.").

addition to these specific improvements to merger analysis, the proposed guidelines better embody the incipiency standard that has been part of antitrust law for almost 100 years.[3]

Vertical Merger Enforcement

Input Foreclosure Presumption

Public Knowledge supports the proposed guidelines' recognition of the **input foreclosure** presumption in merger analysis. When a company buys its input supplier, antitrust enforcement agencies must take note. Guideline five of the proposed guidelines addresses transactions that would give merging parties the ability and incentive to weaken or exclude rivals by **raising costs** of or **degrading access** to services or products rivals may use to compete.[4] Specifically, the proposed guidelines outline how the Agencies determine whether the merged firm would have the ability (assessed through the extent to which the firm can limit or degrade its rivals' access to a related product, service, or customers, and the extent to which the related product, service or customers affects those rivals' competitiveness), and incentive (assessed by asking if the transaction discourages the merged firm from providing rivals with access to the related product or service through structure, history, or probable future of market) to foreclose these inputs.[5] This more nuanced approach to input foreclosure, which considers how dominant firms may degrade access, is a necessary response to modern economic circumstances. Namely, zero-cost markets, or those that provide products or services without monetary cost to the consumer, have equal power to limit access to inputs from their market rivals.

The AT&T/Time Warner transaction was a primary example of input foreclosure. In the face of this transaction, competing cable companies that depended on Time Warner content for their service packages were at a disadvantage; the merged company had an incentive to make it more difficult for rivals to compete by raising the price of Time Warner content or simply not selling it to competitors. Ultimately, despite AT&T's assurances that they would not raise prices nor restrict access to content, they did just that. Two months after the merger, AT&T raised the base price of its DirecTV streaming service by 5 dollars per month.[6] A year afterward, new customers received a scaled down streaming package, keeping HBO, owned by AT&T, but missing many

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[3] *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346 (1922).

[4] Draft Merger Guidelines for Public Comment (proposed Jul. 18, 2023) at 16, ("If the merged firm has the ability and incentive to make it harder for its rivals to compete in the relevant market... [T]he merging parties may put forward evidence that there are no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder for rivals to compete, or that the merged firm will be more competitive as a result of the merger.") (Hereinafter "Merger Guidelines").

[5] *Id*.

[6] Jon Brodkin, *AT&T promised lower prices after Time Warner merger—it's raising them instead*, ARS TECHNICA (Jul. 2, 2018), https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/.

cable channels owned by AT&T competitors such as A+E Networks, AMC Networks, Discovery and Viacom that were available to existing customers.[7]

Another example is the NBCUniversal/Comcast acquisition. In an assessment of the transaction, the Federal Communications Commission (FCC) evaluated how Comcast's sought acquisition of NBC Universal (NBCU) would impact rival Multichannel Video Programming Distributors (MVPDs). Indeed, we saw this concern reflected in the NBCU/Comcast decision, where the FCC found that "by foreclosing or disadvantaging rival programming networks, Comcast can increase subscribership or advertising revenues for its own programming content."[8] The video programming market was concentrated, and NBCU video programming was an input for MVPDs. As a condition of the transaction's approval, the FCC required that Comcast license NBCU content to their cable, satellite and telephone rivals. But unfortunately, as is so often the case, the anticompetitive conduct these conditions were supposed to mitigate happened anyway.[9] Post-merger, Comcast-NBCU created stringent requirements for carriage of their television programming, such as contract demands that forced smaller MVPDs to raise their minimum cable TV prices.[10]

An input foreclosure presumption as found in guideline five helps the public interest, consumers, taxpayers, and antitrust enforcement agencies tremendously. By shifting the burden of production to the merging parties to demonstrate the merger does not create a risk of substantially lessening competition by raising rivals' costs or degrading rivals' access, agencies and merging parties save valuable resources at every stage of a transaction. Moreover, merging parties obtain a certain level of business certainty to make informed decisions about whether a proposed transaction can survive legal scrutiny.

Vertical Foreclosure Presumption

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[7] Michael Hiltzik, *AT&T raises DirecTV Now prices, making chumps of those who backed Time Warner merger*, L.A. TIMES (Mar. 18, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-att-price-rise-20190318-story.html.

[8] Comcast Corp., Gen. Electric Co. & NBC Universal Inc., No. 10-56, F.C.C. 11-4 (Jan. 2011), https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

[9] For more on mergers where predictions of pro-competitive outcomes didn't come to fruition, *see* Letter from American Antitrust Inst. & Public Knowledge to Acting Attorney Gen. Richard Powers (Sep. 2, 2021), https://www.antitrustinstitute.org/work-product/competition-think-tanks-aai-and-public-knowledge-team-up-to-urge-doj-to-carefully-scrutinize-mergers-in-media-entertainment-and-distribution-new-analysis-reveals-multiple-challenges-to-competition-an/.

[10] *See* Jon Brodkin, *Comcast found a way to raise other cable companies' prices, rivals say*, ARS TECHNICA (Oct. 12, 2017), https://arstechnica.com/tech-policy/2017/10/comcast-found-a-way-to-raise-other-cable-companies-prices-rivals-say/, *see also* John Brodkin, *Comcast to be "unleashed" on rivals when NBC merger conditions expire*, ARS TECHNICA (Dec. 15, 2017), https://arstechnica.com/tech-policy/2017/12/comcast-to-be-unleashed-on-rivals-when-nbc-merger-conditions-expire/ ("RCN, along with other mid-sized and smaller MVPDs [multichannel video programming distributors], have faced and continue to face anti-competitive conduct from the combined company. Perhaps the most egregious example is the use of extraordinarily stringent "minimum penetration requirements" for carriage of Comcast-NBCU programming that prevent rivals' attempts to broadly sell a broadcast basic tier of service at a low price. This unusual Comcast-NBCU carriage requirement gives it a competitive advantage over mid-sized and smaller MVPDs and undermines over-the-top competition.").

Public Knowledge also supports the proposed guidelines' inclusion of a **vertical foreclosure** standard under which a merger can be presumed to substantially lessen competition. Vertical foreclosure is exclusion that results when unintegrated downstream rivals are foreclosed from the input supplies controlled by the firm that integrates." Identifying a structural presumption for a certain category of vertical mergers is incredibly valuable for stopping the most harmful vertical mergers efficiently. Of course, as with other presumptions in the guidelines, guideline six identifies transactions that, absent data to the contrary, present a risk of substantially lessening competition and can be disproved by rebuttal evidence that nonetheless "mandates a conclusion that no substantial lessening of competition [is] threatened by the acquisition."[11]

Guideline six of the proposed guidelines identifies firms that exemplify the troubling vertical foreclosure dynamic via a **market share** analysis. A foreclosure share is a share of the related market that is sufficiently controlled by the merged firm and could foreclose rival's access to the related product. Under a market share analysis, if the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence. Alternatively, guideline six outlines a **plus factors** analysis, where those mergers with below a 50% foreclosure share that exhibit certain "plus factors" also provide "a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition."[12]

Public Knowledge supports guideline six, as it properly identifies that a quantitative analysis of foreclosure incentives need not always be necessary to satisfy a prima facie case.[13] Unlike guideline five, guideline six recognizes a structural presumption that does not require proving of ability or incentive to weaken or exclude rivals.[14] Importantly, the guidelines highlight Chief Justice Warren's opinion in *Brown Shoe Co., Inc. v. United States*, which stated that foreclosing competitors from a market previously open to them may stifle competition and limit the "fair opportunity to compete."[15] As antitrust practitioners know, *Brown Shoe* is a staple case in antitrust suits, frequently cited and relied upon today, despite, or perhaps because of, its longevity.

Digital Platforms

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[11] Merger Guidelines at 31.

[12] *Id*.

[13] Steven Salop & Jennifer Sturiale, *Vertical Merger Enforcement in the Draft Merger Guidelines*, PROMARKET (Jul. 28, 2023), https://www.promarket.org/2023/07/28/steven-salop-and-jennifer-sturiale-vertical-merger-enforcement-in-the-draft-merger-guidelines/.

[14] Merger Guidelines at 14 n.47 ("The inquiry in Guideline 6 into vertical market structures is distinct from this ability and incentive analysis.").

[15] *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) (Chief Justice Warren's assessment of input foreclosure has not since been overruled, instead being distinguished in subsequent case, Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485 (Oct. 18, 2004), which held that price differential alone should not override observed market conditions).

At Public Knowledge, we believe that digital platforms create new and unique market realities that demand independent analysis. We applaud the proposed guidelines' account of multi-sided platforms and nascent competitors, which are highly prevalent in digital platform markets.

Multi-Sided Platforms

The proposed guidelines rightfully update merger analysis on **multi-sided platforms.** Multi-sided digital platforms provide services for multiple users that interact through the platform and comprise an interdependent network ecosystem. Guideline 10 depicts that mergers with multi-sided platforms can create competition issues, even when the merger cannot be clearly identified as horizontal or vertical. It explains the proper analysis of competition between platforms, on a platform, or to displace a platform.

Multi-sided platforms often exhibit **network effects**, where "platform participants contribute to the value of the platform for other participants and the operator."[16] Network effects can push these markets towards concentration. Personal social networking platforms are an example where network effects make it very difficult for the market to support more than one large competitor, unless interoperability extends the network effects to the industry as a whole.[17] Recognizing this market dynamic may be key to analyzing an acquisition by a multi-sided platform.

While Google offers search services to users, it also provides access to those users' attention to advertisers and other content providers on the web. Google may have a **conflict of interest** to prefer its own content as results on the search engine. This might happen directly, by the platform giving better placement to its own products, or it may happen through the platform's control of how participants interact, such as Google's preference for Accelerated Mobile Pages and websites that load more quickly, even to the point where the difference was not noticeable to the human eye. Similar to vertical mergers, a platform purchasing a platform participant, or vice versa, may risk a harm competition if it creates or exacerbates a conflict of interest.

Another example can be found in travel booking sites - Sabre and Expedia link airlines, while travelers and travel agents make travel bookings. These companies are so large and powerful, it can be too much to ask for a competitor to simultaneously enter every vertical a digital platform has a presence in. However, a strong competitor active on only one side of the market, or in an adjacent market, can still exert meaningful competitive pressure on a multi-sided and dominant platform provider. Thus, an acquisition of such a company by the two-sided incumbent may cause harm to competition. We saw this with the proposed Sabre-Farelogix transaction, where Sabre (who collects fees from airlines to both aggregate and create offers to travel agencies) was a two-sided platform trying to acquire Farelogix, who developed a system to cut out the Sabre

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[16] Merger Guidelines at 23.

[17]Press Release, Fed. Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed, *see also* Leah Nylen, *Facebook Internal Memo on Rivals Undercuts Antitrust Defense*, BLOOMBERG (Jul 19, 2022), https://www.bloomberg.com/news/articles/2022-07-19/facebook-memo-unearthed-by-congress-undercuts-antitrust-defense#xj4y7vzkg.

middleman, by selling software that allows airlines to make their own offers to travel agencies.[18] The court did not recognize the competitive pressure that Farelogix was exerting on Sabre that would be lost when the merger went through. Antitrust enforcers in the UK went on to block the merger, and Farelogix was purchased by another firm where it can continue to compete against Sabre.[19] It may be useful for the Agencies to examine this market again today as a potential example of the benefits of blocking this complex platform merger to see if more lessons can be taken from it to support stronger enforcement decisions in the future.

Nascent Competitors

Public Knowledge supports the proposed guidelines' acknowledgement of the importance of **nascent competitors** to competition. A nascent competitor is a current competitor whose competitive presence is not fully actualized but could develop into a significant competitor of a dominant firm.[20] Guideline four of the proposed guidelines outlines a framework in merger analysis that considers the reasonable probability of a rival entering the market, if one of the merging parties could be a potential entrant, and if the elimination may influence existing competition. Additionally, guideline seven reinforces a framework for Agencies to examine whether a proposed merger further entrenches or extends a company's dominant position in the market. Both four and seven of the guidelines properly outline the framework to address the elimination of nascent competitors.

Guideline four states that a merger that eliminates reasonably probable future entry of a market competitor, or that eliminates current competitive pressure exerted on other market participants by the "perception that one of the firms might enter"[21] may substantially lessen competition. The Agencies may employ guideline four to address nascent competitors, which play a significant role in digital markets. Digital platform markets are prone to "tipping," where a small, new, or potential competitor can quickly acquire dominant power, and then become difficult to unseat. Once a market "tips" the dominant firm enjoys significant competitive advantages over its rivals and possesses the power to price well above competitive levels, or offer lower quality. At that point, there may be few or no similarly sized direct competitors, but nascent competitors may play an outsized role in the market, providing more competitive pressure than in markets not prone to tipping. Nascent competitors may occupy an incredibly small percentage of a market,

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[18] For more, *see* Charlotte Slaiman, *U.S. v. Sabre Decision Is Wrong About Platform Markets*, PUBLIC KNOWLEDGE (Apr. 9, 2020), https://publicknowledge.org/u-s-v-sabre-decision-is-wrong-about-platform-markets/.

[19] Mitra Sorrells, *Sabre and Farelogix $360m Merger Deal Cancelled*, PHOCUSWIRE (May 1, 2020), https://www.phocuswire.com/sabre-farelogix-merger-terminated, *see also* Press Release, Accelya, Accelya Completes Acquisition of Farelogix (Jul 27, 2020), https://w3.accelya.com/news-views/news/accelya-completes-acquisition-of-farelogix/.

[20] Tracy J. Penfield & Molly Pallman, *Looking Ahead: Nascent Competitor Acquisition Challenges in the "TechLash" Era*, ANTITRUST SOURCE 2 (2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/june-2020/jun20_penfield_6_17f.pdf.

[21] Merger Guidelines at 11 ("[A] merger can eliminate the possibility that entry or expansion by one or both firms would have resulted in new or increased competition in the market in the future. A merger can also eliminate current competitive pressure exerted on other market participants by the mere perception that one of the firms might enter.").

even just one percent; however, according to Fiona Scott Morton "…that is where the competition is coming from. That 99 percent guy is afraid the [little] epsilon is going to become one and attract all the teenagers and there is going to be a flip."[22]

Guideline seven states that, in a market that is already concentrated, Agencies should evaluate whether a merger involving an already dominant firm may substantially reduce the competitive structure of the industry.[23] Agencies would assess this dynamic by evaluating whether one of the merged firms already has a dominant position, and whether the merger may entrench or extend that position. The acquisition of nascent competitors may be targeted for this very purpose - to reduce/eliminate the possibility of a rival replacing them, dominant companies may identify and acquire nascent threats to cement their longevity in the market.

Dominant tech giants have long neutralized emerging nascent competitors that they believe posed a threat to their dominance in the digital market.[24] A key example of this dynamic is Meta, formerly known as Facebook, and its acquisition of Instagram, and Whatsapp.[25] Both Instagram and Whatsapp, while being a mobile photo sharing app and messaging app respectively, were recognized as nascent threats to Facebook, a social media platform, by the CEO and high-ranking officials.[26] As such, the acquisitions cut down nascent competitors and ensured that these platforms did not serve as a replacement for Facebook later down the line.

To the extent that platforms are in winner-take-all or winner-take-most markets, mergers will take place largely between dominant incumbents and very small, nascent, or potential competitors, and between dominant incumbents and firms with complementary rather than

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[22]Fed. Trade Comm'n, *Competition and Consumer Protection in the 21st Century*, (September 13, 2018) https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf. *see also* Dissenting Statement of Comm'r Rohit Chopra Regarding the Publication of Vertical Merger Guidelines, Fed. Trade Comm'n (Jun. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf ("Killer apps quickly become killer acquisitions.").

[23] Merger Guidelines at 18.

[24] *Supra* note 22 at 388 (Statement of Mr. Barry Lynn) ("Back in the '90s, Microsoft didn't really have a great sense of where consumers were going, but in controlling these platforms right now, they can see what are some of the nascent competitive threats, what apps are being downloaded and the like. And that gives them an insight, and we call this the now-casting radar. And that's the concern because they could see trends possibly before the Antitrust Division or the FTC, and they can eliminate those nascent competitive threats, either by buying them or subtly engaging in pressure that the agency won't necessarily pick up, and then you could have a market power problem. So that's why we proposed, then, reversing the burden on mergers.").

[25]C. S. Hemphill & Tim Wu *Nascent Competitors*, 168 UNIV. PA. L. REV. 1879 (2020). *available at* https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/1.

[26] Casey Newton & Nilay Patel, *'Instagram can hurt us': Mark Zuckerberg emails outline plan to neutralize competitors*, THE VERGE (Jul 29, 2020), https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing ("One way of looking at this is that what we're really buying is time. Even if some new competitors springs up, buying Instagram, Path, Foursquare, etc now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.").

competing products.[27] To protect competition in these markets, it's especially important to recognize the harms of acquisitions of potential or nascent competitors and block mergers that might be allowed in other types of markets.[28] As such, the guideline four and guideline seven are essential for merger analysis to accommodate for these previously unassuming, incremental steps toward market dominance.

Additional Anti-Competitive Concerns

Public Knowledge is encouraged by the guidelines' acknowledgement of how firms that provide services on multiple platforms can deprive rivals of platform participants. Specifically, guideline 10 discusses market dynamics that would facilitate the ability of consumers to enjoy several competitor products under the same roof, commonly known as "multi-homing," such as: "tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms."[29]

This addition is the right response to modern concerns presented by **platform annexation.** Coined by Fiona Scott Morton and Susan Athey, platform annexation is a "merger where a dominant platform acquires a company in an adjacent market that makes multi-homing, [or] using multiple service providers at once, more difficult." It creates a conflict of interest, as a dominant provider may feel inclined to limit interoperability with other providers and downgrade "the multi-homing experience" for consumers. As a result, when consumers are forced to choose just a single provider, it will become the dominant provider.[30]

A recent example of the risks of this market structure was highlighted in the lawsuit from state Attorneys General against Google for monopolization of the search advertising market. Among Google's many products is SA360, a search engine monitoring (SEM) tool that facilitates multi-homing. SA360 allows advertisers to easily compare their search engine ads across multiple search engines. However, since SA360 is owned by Google, there's a strong incentive for Google to degrade access to competitor's products through the platform. In the lawsuit, state Attorneys General allege that Google did indeed degrade access to Microsoft's Bing. Advertisers using SA360 could not use an important feature, auction-time or real-time bidding, with Bing.

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[27] For more, see Public Knowledge Letter to Congressman David Cicilline and Congressman Jim Sensenbrenner (Sep. 29, 2020), https://www.congress.gov/116/meeting/house/111072/documents/HHRG-116-JU05-20201001-SD004.pdf.

[28] For more, *see* Public Knowledge Inc., Comment Letter on Request for Information on Merger Enforcement (April 21, 2022), https://publicknowledge.org/wp-content/uploads/2022/04/PK-Merger-Guidelines-Comments-42122.pdf.

[29] Merger Guidelines at 24.

[30] See Slaiman Testimony *supra* note 2, *see also* Susan Athey & Fiona Scott Morton, *Platform Annexation,* 84 Antitrust Law Journal No. 3 (2022). *("*In pursuit of market power, the platform may attempt to exclude independently owned tools that promote multi-homing; for example, the platform may refuse to interoperate with such tools, which in turn reduces the value of the tool to participants and reduces usage of the independent tool in favor of the platform's tool. The final result is that efficient multi-homing is impeded and competition is harmed.")

Public Knowledge applauds the Agencies' explanation of the anticompetitive market impacts of platform annexation in these guidelines. A market with a high degree of multi-homing is much more likely to be a competitively vibrant one. Multi-homing creates competitive pressure on dominant platforms. If they mistreat their platform business users through high fees or onerous terms, those business users have options to gradually disassociate themselves from the dominant platform. We should thus encourage making multihoming as seamless as possible and the guidelines are rightfully drawn to assess potential mergers that may make multi-homing more difficult.[31]

Incipiency Standard

Guideline eight states that mergers should not further a trend toward concentration. It discusses the Supreme Court's **incipiency** standard, which serves as a test under which mergers, acquisitions, and certain anticompetitive practices are prohibited by the Clayton Antitrust Act. The guidelines outline two factors to evaluate mergers consistent with the Court's history and the Clayton Act's goal of "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[32] First, the Agencies consider whether the merger would occur in a market or industry where there is significant tendency toward concentration. Second, the Agencies examine whether the merger would increase existing levels of concentration or pace of that trend. This is a more proactive approach to merger enforcement, as it seeks to prevent consumer harm before it happens and stave off the task of untangling bad mergers in their aftermath.

Risk-based Framework

Throughout the guidelines, the Agencies reference the text of the Clayton Act, stating that mergers which "may substantially lessen competition" are unlawful and that a risk-based framework is appropriate for analyzing mergers. This description of antitrust law is more useful than the framing suggested by the traditional discussion of Type I versus Type II error. That thinking was premised on the idea that courts are engaging in a fundamentally predictive exercise, and that presiding judges must approach mergers by attempting to predict the future: they either err on the side of blocking a merger that would have been pro-competitive, or declining to block a merger that will be anti-competitive. Ultimately, that framing was flawed. Antitrust courts are not charged with the impossible task of predicting the future. Instead, they are making an assessment of risk. Agencies need not show that an anticompetitive outcome is most likely, but rather that the structure and characteristics of the market are such that the merger may substantially lessen competition. To meet their rebuttal burden, merging parties must show that no substantial lessening of competition is threatened by the merger. This is the correct analysis and is reflected throughout the proposed guidelines.

Conclusion

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[31] RFI Comment, *supra* note 29.
[32] *Brown Shoe*, 370 U.S. at 318.

Public Knowledge considers these proposed guidelines a great improvement to modern merger enforcement. The proposed guidelines serve not only as a well-researched and evidence-based update to the guidelines but will also strengthen antitrust enforcement to bring it more in line with Congress' intent behind the Clayton Act. These new guidelines are "entitled to respect" from the courts and can improve the effectiveness of Agency enforcement against anticompetitive mergers.[33]

In addition to these improved merger guidelines, Public Knowledge believes it imperative for Congress to step in with statutory changes. To truly achieve competitive markets in key industries and across the economy, we need more than what existing law can accomplish. Public Knowledge supports legislation like Open App Markets Act, American Innovation and Choice Online Act, the AMERICA Act, and the Competition and Antitrust Law Enforcement Reform Act to further strengthen the statutory framework for antitrust enforcement. Additionally, while these legislative proposals are necessary improvements to our antitrust laws, more legislation is likely needed to meet all the most pressing competition concerns.

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[33] *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant Chevron-style deference. They are "entitled to respect," but only to the extent that they are persuasive"), *see also Skidmore v. Swift & Co*., 323 U. S. 134, 140 (1944).