The Fall of Structural Evidence in FTC and DOJ Merger Review

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With the collapse of the AT&T/T-Mobile merger, the FTC's investigation of the $34 billion merger of Express Scripts and Medco Health Solutions became the biggest story last year in antitrust merger enforcement. Opponents, largely competitors, lobbied and litigated against the deal based on large market shares and other structural evidence of market concentration in the pharmacy benefit management (PBM) business.[1] Yet when the FTC cleared the deal, the Commission's detailed closing statement made scant mention of market share, market concentration, or other traditional structural evidence.[2]

The near omission of structural evidence from the Express Scripts/Medco closing statement was not an oversight. FTC staff remarks and our own experience representing Medco in the transaction show that the closing statement accurately reflects the course of the investigation. Very little time was spent on structural issues. The FTC's decision on Express Scripts/Medco represents a significant, visible sign that structural evidence no longer plays the role it once did in agency merger analysis.

The agencies are now brushing past structural evidence in merger investigations. The FTC's approach in Express Scripts/Medco contrasts with the DOJ's approach to Oracle/PeopleSoft, a merger that was challenged following similar 3-to-2 complaints. The agencies' closing statements on other recent scrutinized mergers confirm the declining significance of structural evidence. Competitive effects analysis—not inferences from market structure—is the primary rationale for the agencies' decision to clear visible, heavily investigated transactions. Likewise, the DOJ and FTC merger guidelines over time have deemphasized market structure and increased the emphasis on competitive effects analysis, particularly the form of analysis that drove the FTC to close Express Scripts/Medco. Market structure evidence remains a screening tool during the initial Hart-Scott-Rodino Act waiting period and continues to be the focal point in agency merger litigation. But even in merger litigation, competitive effects analysis is growing in stature.[3]

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[1] Complaint ¶¶ 2, 104–10, Nat'l Ass'n of Chain Drug Stores et al. v. Express Scripts, Inc., No. 12-395 (W.D. Pa. Mar. 2012), *available at* http://ia601204.us.archive.org/30/items/gov.uscourts.pawd.202195/gov.uscourts.pawd.202195.1.0.pdf; http://www.pbmwatch.com (opposition website containing links to articles opposing deal, letters from politicians opposing the deal, and other materials).

[2] Statement of the Fed. Trade Comm'n Concerning the Proposed Acquisition of Medco Health Solutions, Inc. by Express Scripts, Inc. (Apr. 2, 2012) [hereinafter FTC Closing Statement], *available at* http://www.ftc.gov/os/2012/04/120402expressmedcostatement.pdf.

[3] Joseph F. Wayland, Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Litigation in the Antitrust Division, Remarks at Georgetown Law Global Antitrust Enforcement Symposium 12–14 (Sept. 19, 2012), *available at* http://www.justice.gov/atr/public/speeches/287117.pdf (discussing use of company documents to show head-to-head competition and anticompetitive effects in litigating H&R Block/TaxAct); Interview with Alison Oldale, Deputy Dir. for Antitrust, Bureau of Econ., Fed. Trade Comm'n, Antitrust Source, June 2012, at 5, http://www.americanbar.org/publications/the_antitrust_source.html (stating that the FTC complaint in Graco/ITW focused on competitive effects).

FTC Clears Express Scripts/Medco over Opposition Focused on Structural Evidence

Express Scripts and Medco are large PBMs hired by employers to manage prescription drug plans for their employees. PBMs negotiate rates with retail pharmacies and establish retail pharmacy networks. PBMs often operate their own pharmacies (mail order pharmacies) in competition with retail pharmacies. PBMs also negotiate pricing with drug manufacturers to assure access to competitively priced drugs. As such, PBMs serve a purchasing function (relative to pharmacies and drug manufacturers) and also sell benefit services to employers and others. PBMs over the years have heard allegations of both monopsony and market power on the sell side.[4]

Close Scrutiny. Express Scripts/Medco was closely scrutinized by the FTC, State Attorneys General, Congress, and a group of competitors opposed to the merger. The opponents to the transaction consisted largely of retail pharmacies that competed with the mail order pharmacy businesses of PBMs. Eventually, industry trade associations filed a preliminary injunction action in federal court to block the merger.[5] The merger received FTC clearance and closed before the federal court ruled against the preliminary injunction motion.[6]

In particular, the FTC cleared the merger in spite of its view that Express Scripts/Medco's combined share exceeded 40 percent in a highly concentrated market consisting of full-line PBM services . . .

The main message of opponents was that the transaction was an unlawful 3-to-2 merger in an alleged market of full-service nationwide PBM services for large private employers, such as Fortune 500 companies.[7] In this purported market, the merger would create a firm with a share exceeding 80 percent, according to opponents.[8] They dismissed other competitors, outside the big three, as "niche," "mid market," or "second tier."[9] As sellers of retail pharmacy services to PBMs, opponents also raised a monopsony concern that the merger would lead to a lowering of retail pharmacy reimbursement, allegedly threatening the viability of retail pharmacies.[10]

The FTC Response. The FTC rejected opponents' claims in its detailed closing statement, placing far greater weight on competitive effects analysis than on structural inferences advanced by opponents to the transaction.[11] In particular, the FTC cleared the merger in spite of its view that Express Scripts/Medco's combined share exceeded 40 percent in a highly concentrated market consisting of full-line PBM services,[12] and that the merger "was over the HHI threshold of 2500 and therefore presumptively anticompetitive."[13]

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[4] http://www.pbmwatch.com (materials with allegations against PBMs contained at "PBM Litigation Overview" and "Industry White Papers").

[5] Complaint, *supra* note 1.

[6] Mem. Order, Nat'l Ass'n of Chain Drug Stores et al. v. Express Scripts, Inc., No. 12-395 (W.D. Pa. Apr. 25, 2012) (denying motion for preliminary injunction), *available at* http://www.appliedantitrust.com/08_mergerII/case_studies/express_scripts/express_scripts_wdpa_order4_25_2012.pdf.

[7] Complaint, *supra* note 1, ¶ 81 (describing relevant market). The other member of the so-called big three is CVS Caremark. *Id.* ¶ 16.

[8] *Id.* ¶¶ 2, 104–114.

[9] *Id.*; *see also* David Balto, The Express Scripts/Medco Merger: Cost Savings for Consumers or More Profits for the Middlemen? Testimony, Dec. 6, 2011, Before the U.S. Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights at 6, *available at* http://www.judiciary.senate.gov/pdf/11-12-6BaltoTestimony.pdf; Letter from the Am. Antitrust Inst. to the Fed. Trade Comm'n at 2–3 (Nov. 30, 2011), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/FTC%20Letter%20ExpressScriptsMedco.11.30.11.pdf.

[10] *Id.*

[11] FTC Closing Statement, *supra* note 2, at 1–2.

[12] *Id.*; Howard Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing*, 41 Rev. Indus. Org. 303 (2012) (stating that "the combined firm accounted for more than 40% of prescription dollars" and that the merger cleared "despite a significant increase in market concentration").

[13] Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks at Georgetown Law Global Antitrust Symposium 6 (Sept. 19, 2012), *available at* http://www.ftc.gov/speeches/leibowitz/120919jdlgeorgetownspeech.pdf.

In earlier days that alone may have killed a merger because a presumption of adverse competitive effects would be inferred from such structural evidence. But going beyond structural evidence, the FTC's data-intensive analysis supported the conclusion "that the high market shares of the parties do not accurately reflect the current competitive environment and are not an accurate indicator of the likely effects of the merger on competition and consumers."[14] According to a leader of the FTC Bureau of Economics, Express Scripts/Medco "highlights areas of analysis that get greater billing in the revised Guidelines."[15]

Rather than inferring competitive effects from structural evidence, the FTC staff focused on bidding records and win-loss data.[16] The staff found little competitive interaction between the merging firms with respect to large customers, certainly far less than might have been expected from the market share figures cited by opponents to the merger.[17] As the staff looked at smaller customers, they found an ever-growing cadre of PBM competitors.

As part of its competitive effects analysis, the FTC placed weight on changing industry conditions and what that meant for competition tomorrow.

At its most basic level, the case represents a marked change in how the agencies conduct the process of inference compared with what they used to do following prior versions of the Guidelines and what most courts are still doing in applying the Supreme Court's fifty-year-old *Philadelphia National Bank* precedent.[18] *Philadelphia National Bank* supports an inference of anticompetitive effects from proof of high concentration. In contrast, the FTC staff in Express Scripts/Medco attempted to infer market definition from competitive effects evidence or by identifying some group of customers for whom the merging firms were regarded as uniquely close, if not the closest, rivals. Such a group was not to be found. Despite conducting over one hundred customer interviews, the FTC staff heard almost nothing in the way of customer complaints.[19]

As part of its competitive effects analysis, the FTC placed weight on changing industry conditions and what that meant for competition tomorrow. For example, opponents said that health insurers historically had been fledgling, mid-market PBM competitors, unlikely to gain Fortune 500 customers. The FTC found that regulatory changes gave these competitors greater scale and ability to succeed across customer segments.[20]

To reach the conclusion that post-merger there would be nine, not just two, significant competitors the FTC considered more than current position or size.[21] Some competitors, albeit relatively small using conventional market share metrics, had already won significant contracts and

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[14] FTC Closing Statement, *supra* note 2, at 1–2; Shelanski et al., *supra* note 12, at 303–07 ("This analysis also showed that market shares are not an accurate indicator of likely effects of the merger.").

[15] Interview with Alison Oldale, *supra* note 3, at 4.

[16] ABA Antitrust Section, Audiotape, Express Scripts/Medco: The FTC Decision and Analysis (May 30, 2012), http://www.americanbar.org/groups/antitrust_law/resources/committee_program_audio/committee_program_audio_2012_05.html (remarks of FTC's Jim Southworth); Shelanski et al., *supra* note 12, at 4–7 (describing the "bid-data analysis").

[17] Interview with Alison Oldale, *supra* note 3, at 4 ("We looked at what customers of one of the merging firms did if they became dissatisfied and switched to an alternative supplier, and found that they rarely went to the other merging firm. The parties were not particularly close competitors, and notwithstanding the large market shares, unilateral effects were not likely."); Shelanski et al., *supra* note 12, at 6 ("The conditional loss analysis demonstrated that competition from non-merging rivals was substantial, relative to the pre-merger competition between ESI and Medco, and sufficient to prevent a substantial loss of competition from the acquisition.").

[18] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[19] ABA Antitrust Section Audiotape, *supra* note 16 (remarks of the FTC's Jonathan Klarfeld).

[20] FTC Closing Statement, *supra* note 2, at 3.

[21] *Id.* at 2.

were positioned to grow in the future. The FTC characterized these competitors as "significant" instead of dismissing them as niche.[22]

Diversion analysis was also an important part of the FTC's work and played an important role in forming the FTC's closing decision.[23] In its analysis, the FTC found that business shifted between the merging parties at a relatively low rate and that the companies lost significant business to competitors outside the so-called big three. Changing industry conditions were likely to intensify these dynamics, already reflected in the contract awards for large employers going forward. Thus, looking forward the Commission found no reason to believe that competition would be reduced as a result of the merger.

Contrasts with the DOJ's Approach in Oracle/PeopleSoft. One way to see the changing role of structural evidence is to compare the FTC's unconditional clearance of Express Scripts/Medco with the DOJ's unsuccessful challenge of Oracle/PeopleSoft. The 3-to-2 concerns expressed in Express Scripts/Medco resembled the 3-to-2 concerns raised by the DOJ in Oracle/PeopleSoft.

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Express Scripts (2012) v. Oracle (2004)

	Oracle: DOJ Allegations[24]	Express Scripts: Opponent Allegations[25]	Express Scripts: FTC Conclusions[26]
Market share	50%–70%	>80%	>40%
Change in concentration	3-to-2	3-to-2	10-to-9
Product market	High function software for large complex enterprises	Full-service, nationwide PBM services for large private employers	Full-service PBM services
Customers at issue	Fortune 500	Fortune 500	Private employers, government agencies, unions
Outcome	Lawsuit filed; PI denied; deal closed	Lawsuit filed; dismissed in part, portions remain pending	Unconditional clearance; deal closed

Both industries consisted of not only three large established players but other competitors characterized by opponents as "niche," "mid market," "regional," or "limited scale."[27] Government agencies are large buyers in both industries, and selected vendors outside the big three. In Oracle/PeopleSoft, the DOJ went so far as to dismiss a competitor as "mid-market" even though

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[22] *Id.*

[23] ABA Antitrust Section Audiotape, *supra* note 16 (remarks of FTC's Jim Southworth); Shelanski et al., *supra* note 12, at 5–6 (describing "conditional loss analysis" and stating that it is similar to the use of "diversion ratios").

[24] Complaint ¶¶ 23–28, United States v. Oracle Corp., No. C04-0807 (N.D. Cal. Feb. 26, 2004), *available at* http://www.justice.gov/atr/cases/f202500/202587.htm; Findings of Fact, Conclusions of Law and Order Thereon, United States v. Oracle Corp., No. C04-0807 (N.D. Cal. Sept. 9, 2004) (DOJ's expert calculated combined shares as 48% for high function financial management system software and 68% for high function human resource management software), *available at* http://www.justice.gov/atr/cases/f205300/205388.htm.

[25] Complaint, *supra* note 1, ¶¶ 2, 104–114.

[26] FTC Closing Statement, *supra* note 2, at 2–3.

[27] Complaint, *supra* note 1, ¶ 105 ("regional or limited scale"); PI's Trial Br. at 17, United States v. Oracle Corp., No. C04-0807 (N.D. Cal. June 1, 2004) ("mid-market"), *available at* http://www.justice.gov/atr/cases/f203800/203882.htm; *id.* at 24 ("niche").

the DOJ, itself a very large customer, had recently selected this software vendor over the big three.[28] In Express Scripts/Medco the states were shown to be large buyers of PBM services and, like the DOJ in Oracle/PeopleSoft, often selected a supplier outside the big three, but this evidence was accorded more weight.

In describing the decision to challenge Oracle/PeopleSoft, the DOJ leadership emphasized the structural change from 3-to-2.[29] The FTC's decision to clear Express Scripts/Medco over 3-to-2 objections can be interpreted as an important change in direction (although, of course, no two merger investigations yield the same facts or evidence).

FTC and DOJ Closing Statements: Reasons for Clearing Difficult Transactions

The change in direction to de-emphasize structural evidence is corroborated by an analysis of the antitrust agencies' decisions on when to issue closing statements and how to explain the decision to close.

The agencies close most merger investigations without taking any enforcement action. In a small minority of those deals, the agencies make public statements explaining the decision not to challenge. These often arise in context of visible, heavily investigated mergers where the agencies have developed a substantial factual record.

The analysis below summarizes the rationale for the FTC and DOJ merger closing statements issued in the past ten years. Competitive effects analysis is the primary grounds for most of the closing decisions. Structural evidence is the primary grounds less than a quarter of the time and only once in the last five years. In the table below, the "primary ground" is based on an admittedly subjective reading of the closing statement to identify the factor—market structure, competitive effects, entry, efficiencies, or failing firm—that appears to have been most important in the agency's decision.

FTC and DOJ Merger Closing Statements, Primary Grounds for Clearance, 2002–12[30]

Merger	Agency	Year	Primary Ground
Universal/EMI[31]	FTC	2012	Competitive Effects
Express Scripts/Medco[32]	FTC	2012	Competitive Effects
Apple/Nortel and Google/Motorola[33]	DOJ	2012	Competitive Effects

[28] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Lessons Learned from United States v. Oracle Corp. 18, *available at* http://www.ftc.gov/speeches/rosch/120131oraclelessons.pdf.

[29] Jaret Seiberg, *DOJ to Block Oracle-PeopleSoft*, THE DEAL, Feb. 27, 2004 (quoting Ass't Att'y Gen. Pate as saying: "We took this action because it is the right thing to do to protect competition in an important market. Going [from] three to two companies in this market is a competitive problem that needed to be stopped."); *see also* Rosch, *supra* note 28, at 8 (Commissioner Rosch worked as counsel to Oracle on the merger and stated: "When DOJ announced that it was challenging the merger, it had already painted the transaction as a case of three firms (SAP, Oracle, and PeopleSoft) going down to two firms—based on the views of select customers.").

[30] This consists of the agencies' public statements on mergers receiving unconditional clearance. It does not include any merger for which there was an enforcement action or consent order.

[31] Statement of Bureau of Competition Director Richard A. Feinstein, Vivendi, S.A. and EMI Recorded Music at 1 (Sept. 21, 2012), *available at* http://www.ftc.gov/os/closings/comm/120921emifeinsteinstatement.pdf.

[32] FTC Closing Statement, *supra* note 2, at 2–7.

[33] 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. at 3–6 (Feb. 13 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

FTC and DOJ Merger Closing Statements continued

Merger	Agency	Year	Primary Ground
Southwest/AirTran[34]	DOJ	2011	Efficiencies
Google/Admeld[35]	DOJ	2011	Competitive Effects
Perdue/Coleman Natural Foods[36]	DOJ	2011	Market Structure
Google/Admob[37]	FTC	2010	Entry
Cisco/Tandberg[38]	DOJ	2010	Competitive Effects
Delta/Northwest[39]	DOJ	2008	Efficiencies
XM/Sirius[40]	DOJ	2008	Competitive Effects
Chicago Mercantile Exchange/CBOT[41]	DOJ	2007	Market Structure
Smithfield/Premium Standard Farms[42]	DOJ	2007	Competitive Effects
Google/DoubleClick[43]	FTC	2007	Competitive Effects
AT&T/BellSouth[44]	DOJ	2006	Competitive Effects
MediaNews/Contra Costa Times[45]	DOJ	2006	Competitive Effects
Whirlpool/Maytag[46]	DOJ	2006	Competitive Effects

[34] Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of Airtran at 1 (Apr. 26, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-at-523.html.

[35] Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. at 1–2 (Dec. 2, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/277935.htm.

[36] Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Perdue's Acquisition of Coleman Natural Foods at 1–2 (May 2, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/270591.htm.

[37] Statement of the Commission Concerning Google/AdMob at 1–2 (May 21, 2010), *available at* http://ftc.gov/os/closings/100521google-admobstmt.pdf.

[38] Justice Department Will Not Challenge Cisco's Acquisition of Tandberg, at 1–2 (Mar. 29, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

[39] Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corp. at 1–2 (Oct. 29, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/238849.htm.

[40] Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. at 2–3 (Mar. 24, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/231467.htm.

[41] Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Chicago Mercantile Exchange Holdings Inc.'s Acquisition of CBOT Holdings Inc. at 1–2 (June 11, 2007), *available at* http://www.justice.gov/atr/public/press_releases/2007/223853.htm.

[42] Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Smithfield Inc.'s Acquisition of Premium Standard Farms Inc. at 2 (May 4, 2007), *available at* http://www.justice.gov/atr/public/press_releases/2007/223077.htm.

[43] Statement of Federal Trade Commission Concerning Google/DoubleClick at 6–8 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[44] Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of Bellsouth at 2–3 (Oct. 11, 2006), *available at* http://www.justice.gov/opa/pr/2006/October/06_at_692.html.

[45] Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of MediaNews Group Inc.'s Acquisition of Contra Costa Times and San Jose Mercury News at 1–2 (July 31, 2006), *available at* http://www.justice.gov/atr/public/press_releases/2006/217465.htm.

[46] Statement of the Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag at 1–2 (Mar. 29, 2006), *available at* http://www.justice.gov/atr/public/press_releases/2006/215326.htm.

FTC and DOJ Merger Closing Statements continued

Merger	Agency	Year	Primary Ground
US Air/America West[47]	DOJ	2005	Market Structure
Federated/May[48]	FTC	2005	Market Structure
Sprint/Nextel[49]	DOJ	2005	Competitive Effects
Onmicare/NeighborCare[50]	FTC	2005	Competitive Effects
RJ Reynolds/Brown & Williamson[51]	FTC	2004	Competitive Effects
Anthem/WellPoint[52]	DOJ	2004	Market Structure
UnitedHealth/Oxford[53]	DOJ	2004	Market Structure
Caremark/Advance PCS[54]	FTC	2004	Market Structure
Genzyme/Novazyme[55]	FTC	2004	Competitive Effects
Arch Wireless/Metrocall[56]	DOJ	2004	Competitive Effects
Sunoco/Coastal Eagle Point[57]	FTC	2003	Entry
HP/Compaq[58]	FTC	2002	Efficiencies
Carnival/Princess[59]	FTC	2002	Competitive Effects

[47] Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the America West/US Airways Investigation at 1 (June 23, 2005), *available at* http://www.justice.gov/atr/public/press_releases/2005/209709.htm.

[48] Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company at 3 (Aug. 30, 2005), *available at* http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf.

[49] Statement of the Department of Justice Antitrust Division on the Closing of the Investigation of Sprint Corp.'s Acquisition of Nextel Communications Inc. at 2–3 (Aug. 3, 2005), *available at* http://www.justice.gov/atr/public/press_releases/2005/210412.htm.

[50] Statement of the Commission, Omnicare, Inc./NeighborCare, Inc. at 1–2 (June 16, 2005), *available at* http://www.ftc.gov/os/caselist/0410146/050616stmtcomm0410146.pdf.

[51] Statement of the Federal Trade Commission, RJ Reynolds Tobacco Holdings, Inc./British American Tobacco p.l.c. at 5–7 (June 22, 2004), *available at* http://www.ftc.gov/os/2004/06/040622batrjrstmt.pdf.

[52] Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Anthem, Inc.'s Acquisition of WellPoint Health Networks, Inc. at 2–3 (Mar. 9, 2004), *available at* http://www.justice.gov/atr/public/press_releases/2004/202738.htm#attach.

[53] Background to Closing of Investigation of UnitedHealth Group's Acquisition of Oxford Health Plans at 2 (July 20, 2004), *available at* http://www.justice.gov/atr/public/press_releases/2004/204676.htm.

[54] Statement of the Federal Trade Commission, Caremark Rx, Inc./AdvancePCS at 2 (Feb. 11, 2004), *available at* http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf.

[55] Statement of Chairman Timothy J. Muris, Genzyme Corp./Novazyme Pharmaceuticals, Inc. at 2–5 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf.

[56] Department of Justice Antitrust Division Issues Statement on the Closing of Its Investigation of Arch Wireless' Acquisition of Metrocall Holdings at 2–3 (Nov. 16, 2004), *available at* http://www.justice.gov/atr/public/press_releases/2004/206339.htm.

[57] Statement of the Commission, Sunoco Inc./Coastal Eagle Point Oil Co. at 2 (Dec. 29, 2003), *available at* http://www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf.

[58] Statement of Commissioner Mozelle W. Thompson, Hewlett-Packard Co./Compaq Computer Corp. at 1 (Mar. 6, 2002), *available at* http://www.ftc.gov/os/2002/03/hpthompson.htm.

[59] Statement of the Federal Trade Commission, Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corp./P&O Princess Cruises plc at 3–7 (Oct. 4, 2002), *available at* http://www.ftc.gov/os/2002/10/cruisestatement.htm.

It is difficult to draw definitive conclusions from this analysis, as the incidence of agency closing statements depends on the volume of merger activity in the economy, the volume of strategic mergers, the approach of agency leadership to the use of public closing statements, and other variables. Nonetheless, according to this analysis, market structure appeared with some frequency in closing statements eight to ten years ago but almost disappeared from recent closing statements.

Merger Guidelines: The Rise of Competitive Effects Analysis

Over time, the merger guidelines have also deemphasized the importance of historical market shares and increased the emphasis on competitive effects analysis. One possible way to show this evolution is to look at the percentage of total words in the guidelines devoted to market structure issues relative to the percentage of words devoted to competitive effects. The assumption underlying this "test" is that the agencies will spill more ink on issues that are important to them. This analysis shows a marked, measurable shift away from market structure analysis.

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Merger Guidelines and Commentary, 1968–2010, Word Count Comparison[60]

	Market Structure	Competitive Effects	Ratio of Market Structure to Competitive Effects
DOJ Merger Guidelines, 1968[61]	53%	8%	6.6
DOJ Merger Guidelines, 1982[62]	58%	24%	2.4
DOJ Merger Guidelines, 1984[63]	65%	18%	3.6
DOJ & FTC Horizontal Merger Guidelines, 1992[64]	45%	25%	1.8
DOJ & FTC Horizontal Merger Guidelines, 1992 (rev. 1997)[65]	42%	24%	1.8
DOJ & FTC Horizontal Merger Guidelines, 2010[66]	39%	42%	0.9
DOJ & FTC Commentary, 2006[67]	20%	36%	0.6

[60] Assigning words in the guidelines to market structure or competitive effects is relatively straightforward, as the guidelines separate these in the analysis.

[61] U.S. Dep't of Justice, Merger Guidelines (1968), *available at* http://www.justice.gov/atr/hmerger/11247.pdf.

[62] U.S. Dep't of Justice, Merger Guidelines (1982), *available at* http://www.justice.gov/atr/hmerger/11248.pdf. We excluded from this chart the 1982 FTC Statement Concerning Horizontal Mergers given the lack of reliance and use by the FTC. To its credit, the FTC in this Statement placed relatively significant weight at the time to "Non-Market Share Considerations." FTC Statement Concerning Horizontal Mergers, at III (1982), 4 Trade Reg. Rep. (CCH) ¶ 13,200, *available at* http://www.appliedantitrust.com/07_mergersI_guidelines/merger_guidelines/ftc_statement1982.pdf.

[63] U.S. Dep't of Justice, Merger Guidelines (1984) [hereinafter 1984 Guidelines], *available at* http://www.justice.gov/atr/hmerger/11249.pdf.

[64] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992).

[65] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992 rev. 1997) [hereinafter 1992 Revised Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

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

[67] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) [hereinafter 2006 Commentary], *available at* http://www.justice.gov/atr/public/guidelines/215247.htm.

As shown above, the very first U.S. merger guidelines, the 1968 DOJ Merger Guidelines, devoted nearly seven times as much attention to market structure as to competitive effects. Antitrust thinking at the time was still dominated by the structure-conduct-performance paradigm, and the legal or economic literature paid little attention to the mechanism by which mergers might have an adverse effect on competition.[68]

As legal and economic thinking progressed, the focus shifted dramatically. With the 1982 DOJ Merger Guidelines, the ratio of words devoted to market structure relative to competitive effects fell to 2.4 as the DOJ devoted relatively more attention to competitive effects and relatively less attention to market structure. This change reflected the growing understanding in legal and economic circles of George Stigler's pathbreaking article, *The Theory of Oligopoly* (which predated the 1968 Guidelines), as popularized and extended by Harold Demsetz, Richard Posner, and others.[69]

With the 2006 Commentary on the Horizontal Merger Guidelines, a comprehensive report on completed merger investigations, the agencies went out of their way to de-emphasize structural factors . . .

Two years later in 1984, the ratio of words devoted to market structure relative to competitive effects rose slightly as the DOJ made greater efforts to explain the hypothetical monopolist paradigm used for market definition.[70] But the 1984 revisions clarified that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger."[71]

By 1992, with the issuance of the first joint DOJ and FTC Horizontal Merger Guidelines, the ratio of words devoted to market structure relative to competitive effects evidence fell again as the agencies for the first time articulated a dedicated "Competitive Effects" framework.[72] The agencies no longer cited concentration as the factor that made them "likely to challenge" a transaction. Instead, analysis of market structure became just one of five steps, each necessary and, together, sufficient to determine the likely effect of a merger. The agencies added safe harbors and a series of concentration thresholds. But even at the highest range of concentration the agencies recognized that the merging parties could overcome the presumption in the remaining steps of the analysis.[73]

With the 2006 Commentary on the Horizontal Merger Guidelines, a comprehensive report on completed merger investigations, the agencies went out of their way to de-emphasize structural factors and highlight the importance of empirical tests used to measure proximity or closeness of head-to-head competition.[74] For example, the Commentary reports that competitive effects analysis played a critical role in the agencies' enforcement actions to challenge Nestle/Dreyer's (ice cream) and Interstate Bakeries/Continental Baking (bread), and in their decisions to clear R.J. Reynolds/Brown & Williamson (cigarettes) and Fortune Brands/Allied Domecq (bourbon).[75]

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[68] Joseph Bain, Industrial Organization 297–98 (1959); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 238–39 (1960).

[69] George Stigler, *Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964); Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* Industrial Concentration: The New Learning (Harvey J. Goldschmid et al. eds., 1974); Richard Posner, Antitrust Law, An Economic Perspective (1976).

[70] 1984 Guidelines, *supra* note 63.

[71] *Id.* sec. 3.11.

[72] 1992 Revised Guidelines, *supra* note 65, sec. 2.

[73] *Id.* sec. 1.51.

[74] Paul Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, Antitrust, Summer 2006, at 51, 53.

[75] 2006 Commentary, *supra* note 67, at 19–30.

The release of the joint 2010 Horizontal Merger Guidelines continued the trend of the earlier guidelines, and the relative emphasis on competitive effects suggested by the Commentary.[76] The agencies added new sections, all focused on competitive effects, and the ratio of words devoted to market structure relative to competitive effects evidence fell from 1.8 in the 1992 Guidelines to 0.9. Taking the central role of competitive effects analysis as a given, the 2010 Guidelines focused on the methods or techniques for conducting competitive effects analysis.[77] Public statements of FTC and DOJ leadership reinforce this shift.[78]

The recent FTC closing statement in Express Scripts/Medco continues on this path. Only three of the forty-nine paragraphs even mention market definition, market structure, or concentration.[79]

Agency Merger Litigation: Market Structure Evidence Still Has a Starring Role

In contrast, a different picture emerges when looking at how the agencies litigate merger challenges. A review of agency preliminary injunction briefs filed in U.S. district courts shows relatively heavy reliance on structural evidence. Of course, the agencies must tailor their case presentation for the judicial audience. Courts may expect the government to present a structural case and may be more familiar with the narrative that market delineation supports.[80] Market delineation may help organize and focus the case for advocacy purposes.[81]

In litigation, the agencies wield *Brown Shoe*[82] to define markets based on qualitative evidence. Then they use *Philadelphia National Bank*[83] to establish a presumption of anticompetitive effects from the market structure evidence which, under *Brown Shoe*, may be purely qualitative (such as evidence of industry perception). This puts data-intensive competitive effects analysis, of the type we see in the 2010 Guidelines and in agency merger investigations like Express Scripts/Medco, on the sidelines.

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[76] Deborah Garza, *Market Definition, the New Horizontal Merger Guidelines, and the Long March Away from Structural Presumptions*, Antitrust Source, Oct. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_FullSource.authcheckdam.pdf.

[77] *Id.* at 4 ("They abandon the analytical framework of prior guidelines in favor of describing principal analytical techniques and types of evidence used to assess a merger and make plain that the agencies' analysis need not start with nor even necessarily use market definition.").

[78] *See, e.g.*, interview with Julie Brill, Comm'r, Fed. Trade Comm'n, Antitrust Source, Feb. 2012, at 5 ("What the 2010 Guidelines did was to take a step away from the use of market definition, market structure, and market shares as gating issues. The 2010 Guidelines consider competitive effects first, and I think we got that right."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb12_brill_intrvw_2_27f.authcheckdam.pdf; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector, Remarks Before the ABA Antitrust Section Fall Forum 3 (Nov. 18, 2010) ("[M]arket definition is not a 'gating' or threshold issue in the sense that the agencies have to prove a relevant market before it can look at a merger's competitive effects."), *available at* http://www.ftc.gov/speeches/rosch/101118fallforum.pdf.

[79] FTC Closing Statement, supra note 2.

[80] Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives 4 (June 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/234537.htm ("[S]ome have suggested that one solution to the challenge . . . is to abandon market definition and proceed directly to a competitive effects analysis. I want to sound a note of caution about such an approach. As an initial matter, most judges are likely to expect the agencies to present and support a relevant market definition, and a failure to meet that expectation could cause the agency to lose credibility with the court. Further, the market definition exercise places a practical discipline on the analysis."); Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 Antitrust L.J. No. 3 (forthcoming 2013) (draft of Feb. 14, 2002, at 2, 14), *available at* http://ssrn.com/abstract=2004655 ("Because a relevant market denotes the competitive process at issue, alleging a relevant market brings clarity and power to the narrative. . . . Decades of experience suggests that market delineation often adds clarity and power to the narrative.").

[81] *Id.*

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

[83] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

In its recent challenge to H&R Block/TaxACT, the DOJ dwelled on company documents to show closeness of competition.[84] Yet the DOJ cited *Brown Shoe* five times, highlighted *Brown Shoe*'s qualitative factors for defining markets, and presented evidence supporting each factor.[85] The DOJ quoted *Brown Shoe* for the notion that the court could assess competitive effects by examining the "structure, history, and probable future of the market in question."[86] Relying on *Philadelphia National Bank*, the DOJ then asked the court to find that "the challenged acquisition is presumptively unlawful because it will substantially increase concentration."[87]

The recent FTC brief in OSF/Rockford Health takes a similar approach in challenging a hospital merger as an illegal 3-to-2 merger.[88] What stands out is the absence from the brief of any showing that customers (the health plans) obtained price concessions because of rivalry between the merging hospitals or that customers switched or threatened to switch in order to keep pricing competitive. The FTC brief is heavy on concentration and light on competitive effects analysis. Citing *Philadelphia National Bank*, the FTC concludes that "the extraordinary increase in market concentration triggers a strong presumption . . . that the Acquisition is anticompetitive and unlawful."[89] Moreover, "The strong structural case here—and the resulting presumption of illegality—creates an insurmountable burden for Defendants . . . and the Court may order relief on this basis alone."[90]

While the decision in Express Scripts/Medco is a clear sign that the 2010 Guidelines approach is embedded in agency investigational practice, we can expect slower, more incremental change before the courts.

These recent preliminary injunction briefs mirror ones from ten to fifteen years ago. We do not see the shift in focus like we do with the guidelines and in agency practice. For example, the FTC brief in the 1990s drug wholesalers case cited *Brown Shoe* five times and dwelled on qualitative evidence bearing on market definition.[91] Likewise, in the chewing tobacco merger, the FTC's brief cited *Brown Shoe* seven times and invoked *Philadelphia National Bank* in emphasizing that the merger "is so inherently likely to lessen competition."[92]

Over time, the courts can be expected to absorb developments in agency guidelines and investigative practice and lead the parties to take a different approach in litigating merger challenges. There are already some initial signs of change in how the agencies litigate merger cases. The FTC's complaint last year in Graco/ITW led with direct effects evidence.[93] As the Deputy Director of the FTC's Bureau of Economics explained, the Graco/ITW complaint "avoid[ed] a detailed identification of the narrowest markets—as the revised Guidelines emphasized we might

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[84] Wayland, *supra* note 3, at 12–23 (discussing use of company documents to show head-to-head competition and anticompetitive effects in litigating H&R Block/TaxAct).

[85] Pl.'s Mem. P. & A. in Supp. of Mot. for Prelim. Inj. at 23–36, United States v. H&R Block, No. 11-00948 (Aug. 5, 2011), *available at* http://www.justice.gov/atr/cases/f273600/273683.pdf.

[86] *Id.* at 31. The district court granted the motion for a preliminary injunction. Mem. Op., United States v. H&R Block, No. 11-00948 (Nov. 10, 2011), *available at* http://www.justice.gov/atr/cases/f277200/277287.pdf.

[87] Pl's. Mem. P. & A. in Supp. of Mot. for Prelim. Inj., *supra* note 85.

[88] Mem. in Supp. of Pl.'s Mot. for TRO and Prelim. Inj. at 2, 8, FTC v. OSF Healthcare Sys., No. 11-50344 (Nov. 18, 2011), *available at* http://www.ftc.gov/os/caselist/1110102/111118rockfordtro.pdf.

[89] *Id.* at 2.

[90] *Id.* at 8.

[91] Mem. in Supp. of Pl's Mot. for Prelim. Inj. at 9–21, FTC v. Cardinal Health, Inc., No. 98-595 (Mar. 9, 1998), *available at* http://www.ftc.gov/os/1998/03/pipublic.pdf.

[92] Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 7–8, 10, 27–28, FTC v. Swedish Match North America, Inc., No. 1:00CV01501 (June 23, 2000), *available at* http://www.ftc.gov/os/2000/06/swedishmatchbrief.pdf.

[93] Complaint ¶¶ 13–24, FTC v. Graco Inc., No. 9350 (Dec. 15, 2011), *available at* http://www.ftc.gov/os/adjpro/d9350/111215gracoadmincmpt.pdf.

sometimes do."[94] The FTC reversed the standard approach: "Instead of using market definition and shares as the starting point for our analysis we focused more directly on effects . . . . You can see this emphasis in the way the complaint is written, with the analysis of effects first and of market definition second."[95] The competitive effects story that is the focus of the FTC's complaint is based on data looking "directly at the switching behavior of customers between the two merging parties."[96]

The FTC's approach in Graco/ITW suggests that the agencies' investigative practice is starting to be exported to litigation. While the decision in Express Scripts/Medco is a clear sign that the 2010 Guidelines approach is embedded in agency investigational practice, we can expect slower, more incremental change before the courts. ●

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[94] Interview with Alison Oldale, *supra* note 3, at 5.

[95] *Id.*

[96] *Id.*