SAME RULE, DIFFERENT RESULT: HOW THE NARROWING OF PRODUCT MARKETS HAS ALTERED SUBSTANTIVE ANTITRUST RULES

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It has long been recognized in antitrust cases that market definition is typically malleable and frequently outcome-determinative. In *United States v. Grinnell*, a Section 2 case, Justice Abe Fortas dissented from the definition of a market so narrow he called it a "strange red-haired, bearded, one-eyed man-with-a-limp classification."[1] In more recent years, commentators have argued both that the Court in *Grinnell* defined "excessively narrow submarkets"[2] and that those submarkets were "consistent with the evidence as to demand substitution."[3] In other words, the market could be both implausibly narrow and correct, particularly if judged by today's standards, when product markets often require multiple adjectives.

The breadth of the relevant market mattered in *Grinnell*, as it does in merger challenges brought under Section 7 of the Clayton Act, because—as the Supreme Court recognized many years ago—"market definition generally determines the result of the case."[4] Former U.S. Federal Trade Commission

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explicitly or implicitly, upon it. For merger matters brought under Section 7 of the Clayton Act, how the decision-maker defines the ambit of the market determines both whether the merging firms are deemed competitors in the first place[9] and whether their merger would substantially diminish competition.[10] Since at least 1963, when the Supreme Court decided United States v. Philadelphia National Bank,[11] courts reviewing Section 7 claims have assessed the competitive effects of a transaction within, rather than across, markets.[12]

Despite the importance of market definition, the rules that govern it are flexible enough to support a range of permissible choices. As the U.S. Department of Justice Antitrust Division (together with the FTC, the Agencies) observed in a brief filed in 2015, "[f]requently, the government alleges narrow markets, the defendants describe broad markets, and the court must choose between the competing approaches."[13] The choice is often outcome-determinative, leading many to charge that market definition is "an essentially ex post choice"[14] designed "to achieve the desired results in calculating market

dence/110330aba-directeffects.pdf (arguing that an assessment of whether the Clayton Act is violated "may turn on market definition, but it doesn't have to . . . ."; "direct evidence can shed light directly" on the ultimate question).

[9] See, e.g., United States v. Sabre Corp., 452 F. Supp. 3d 97, 136 (D. Del. 2020) (holding that a one-sided firm could not compete in a two-sided market as a matter of law), vacated, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (per curiam); FTC v. Lundbeck, Inc., No. CIV. 08-6379 JNE/JJG, 2010 WL 3810015, at *22 (D. Minn. Aug. 31, 2010), aff'd, 650 F.3d 1236 (8th Cir. 2011) (concluding that the FTC failed to show that acquired products were in the same market).

[10] See, e.g., United States v. E.I. du Pont de NemMC /j /T16 (, 650 FnC v. Lundbeck, Inc., No. . (, Althe/fiDel. 2020) (holdin

shares.[15] This gripe is long-standing; in the 1960s, commentators charged that “the Government has not been averse to shifting its market theories from case to case, seemingly with little justification other than making the relevant percentages more favorable to its cause.”[16]

Given this broad discretion, market definition can vary not just from one case or judge to the next, but also over time, as new tools and theories gain purchase. These changes, in turn, may affect the way substantive antitrust rules are applied, even if those rules have not themselves changed. In the 1980s, for example, Robert Pitofsky objected to the Merger Guidelines of that era because they—at least in his estimation—“have tended to expand relevant markets and thus diminish apparent market power.”[17] Other commentators took the opposite view of the same Guidelines, predicting narrower markets.[18] More recently, Jan Rybnicek and Josh Wright argued the 2010 Horizontal Merger Guidelines would lead to narrower markets and fewer cognizable efficiencies than was the case under the preceding Guidelines.[19]

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[15] G.E. Hale & Rosemary D. Hale, A Line of Commerce: Market Definition in Anti-Merger Cases, 52 IOWA L. REV. 406, 426 (1966); see also GEORGE E. HALE & ROSEMARY D. HALE, MARKET POWER: SIZE AND

Whatever the cause, when a court defines product markets more narrowly today than in yesteryear, it necessarily applies substantive legal rules in a

as in recent years product markets have continued to narrow even as thresholds have remained unchanged.[33] This conclusion is underscored by the case studies described in Part IV, which demonstrate that, *ceteris paribus*, bank merger enforcement is more stringent when markets are drawn narrowly. Second, and relatedly, proposals to return to 1960s-era antitrust rules—which, to be clear, we do not endorse—should do so wholesale, reverting to both lower thresholds and broader markets.[34] Or, to borrow a phrase from Justice William Rehnquist, these proposals should avoid cherry-picking, instead taking "the bitter with the sweet."[35]

I. NARROWING MARKETS

Despite its importance, the rules that govern market definition have always been flexible enough to support a range of permissible choices. In the 1950s, the Supreme Court held both that product markets should be "drawn narrowly"[36] and that it was "improper" to define them so narrowly that only "fungible" products remained in the market.[37] The decision in *United States v. Brown Shoe Co.* confused matters further by creating a list of factors capable of supporting a definition as broad or as narrow as the fact finder desired.[38] Given this flexibility in defining a relevant market, commentators have long

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mittee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf; *see also* Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), hbr.org/2017/12/the-rise-fall-and-rebirth_1 1 Tf 18.14 0 Td (The Rise,)Tj1Tr

charged that market definition is “an essentially ex post choice”[39] designed “to achieve desired results in calculating market shares.”[40]

How courts exercise this discretion has varied substantially over time. During the first 25 years after the Celler-Kefauver Act of 1950,[41] the Supreme Court defined a mix of broad product markets, such as “retail grocery”[42] sales and “children’s shoes,”[43] and narrow ones like “accredited central station [alarm] service[s]”[44] and “automotive finishes and fabrics.”[45] Lower courts also defined a mix of broad and narrow product markets.[46] Beginning in the 1980s, perhaps in response to the issuance of the 1982 Merger Guidelines, narrow markets became the rule. For example, the product market in grocery store mergers changed from “retail grocery” sales in the 1960s to “supermarkets” in the late 1980s and “premium natural and organic supermarkets” in the 2000s.[47] Today, agencies and courts routinely define product markets so narrowly that they require multiple adjectives, such as “the sale of superpremium ice cream products to the retail channel,”[48] “broadline foodservice distribution to national customers,”[49] “[b]randed seasoned salt products . . . (not including private or store label) sold at retail,”[50] and branded canola oil sold to retail-

production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors”).

[39] Kaplow, *supra* note 14, at 124.

[40] Hale & Hale, *supra* note 15, at 426.

[41] Pub. L. No. 81-899, 64 Stat. 1125 (1950).

[42] United States v. Von’s Grocery Co., 384 U.S. 270, 272 (1966).

[43] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) (defining three markets in all: “men’s, women’s, and children’s shoes”).

[44] United States v. Grinnell Corp., 384 U.S. 563, 571–74 (1966) (defining a product market for “the accredited central station service business”).

[45] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 594–95 (1957).

[46] *See, e.g.*, United States v. Gen. Dynamics Corp., 341 F. Supp. 534, 555 (N.D. Ill. 1972) (“[T]he energy market is the appropriate line of commerce for testing the competitive effect of the United Electric–Freeman combination.”). *But see* Pitofsky, *supra* note 2, at 1808 n.9 (criticizing the “ludicrously” narrow product market for “florist foil” defined in Reynolds Metals Co. v. FTC, 309 F.2d 223, 227 (D.C. Cir. 1962)).

[47] *Compare* Von’s Grocery, 384 U.S. at 272 (retail grocery), *and* Van de Kamp ex rel. Cal. v. Am. Stores Co., 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (accepting the state’s proposed product market of “‘supermarkets,’ full line grocery stores with more than 10,000 square feet’”), *aff’d in part*, 495 U.S. 271, 283 (1990) (assuming the correctness of the district court’s antitrust analysis), *with* FTC v. Whole Foods Mkt., 548 F.3d 1028, 1032–33 (D.C. Cir. 2008) (finding clearly erroneous the district court’s definition of a market encompassing all supermarkets and cataloguing evidence suggesting that a market for “premium, natural, and organic supermarkets (‘PNOS’)” was plausible); *id.* at 1043–49 (Tatel, J., concurring) (finding that the evidence strongly suggests a PNOS market).

[48] Complaint ¶ 11, Nestlé Holdings, Inc., FTC Docket No. C-4082 (filed June 25, 2003).

[49] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining overlapping product markets for “broadline foodservice distribution” and “broadline foodservice distribution to national customers”).

[50] Complaint ¶ 8, McCormick & Co., FTC Docket No. C-4225 (filed July 29, 2008).

ers.[51] As explained below in Part I.B, comparing the product markets used by the Supreme Court during the relatively "broad market" era to their modern equivalents suggests many product markets are narrower today.

A. LAW

The basic legal rules for market definition were put in place decades ago. In 1950, Congress revised Section 7 to prohibit any acquisition—including stock or assets—"the effect of [which] may be substantially to lessen competition, or tend to create a monopoly" in "any line of commerce . . . in any section of the country."[52] This description is somewhat different from the Sherman Act, which instead addresses "trade or commerce among the several States,"[53] although in practice courts use the same market definition rules for both statutes.[54]

The Court spent the next 15 years interpreting the new Clayton Act language and developing a body of associated legal rules. As a threshold matter, the Court recognized that the facts on the ground do not always lend themselves to a single, obvious result. In *Times-Picayune Publishing Co. v. United States*,[55] a Sherman Act case, the Court recognized that defining markets is an inexact science: "The 'market,' as most concepts in law or economics, cannot be measured by metes and bounds."[56] Similarly, in the *Cellophane* case, it noted that "[i]ndustrial activities cannot be confined to trim categories."[57]

Acknowledging these real-world nuances, the Court set out two principles that vest fact finders with substantial discretion. First, the Court explained that "a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn."[58] This concept is known today as the "narrowest market" principle,

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[51] *See* Complaint ¶¶ 25–35, J.M. Smucker Co., FTC Docket No. 9381 (filed Mar. 5, 2018) (defining a market for "the sale of canola and vegetable oils . . . to retailers" but then explaining that canola and vegetable oils are separate markets clustered for convenience and that the relevant product market excludes avocado, coconut, corn, olive, peanut, and other oils, as well as private-label products).

[52] 15 U.S.C. § 18.

[53] 15 U.S.C. §§ 1, 2.

[54] *See, e.g.*, Note by the Delegation of the United States to the OECD Directorate for Financial and Enterprise Affairs, Competition Comm., Roundtable on Market Definition, DAF/COMP/WD(2012)27 (June 7, 2012), www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf (discussing market definition without distinguishing between Clayton Act and Sherman Act cases).

[55] 345 U.S. 594 (1953).

[56] *Id.* at 611.

[57] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (*Cellophane*).

[58] *Times-Picayune*, 345 U.S. at 612 n.31.

which both the courts and the Agencies routinely use.[59] Second, the Court cautioned against drawing the circle too narrowly, explaining that it is also improper “to require that products be fungible to be considered in the relevant market.”[60] This tension—that markets should be “narrow” but not too narrow—has haunted market definition exercises ever since. Indeed, both commandments appear, almost side by side, in the current Horizontal Merger Guidelines.[61]

From the late 1950s to the mid-1970s, the Court applied these market definition principles to several Clayton Act cases. As described in more detail in Part I.B, the Court’s emphasis varied somewhat from one case to the next, producing a patchwork of markets that were generally, but not always, broad.

B. PRACTICE

Although the basic legal rules for defining relevant product markets have not changed since the mid-1960s, the product market in the average Clayton Act case has narrowed. Today, the Agencies typically allege—and courts routinely find—markets that are substantially narrower than their historical counterparts.

1. The Broad Market Era (1950–1975)

Between approximately 1950 and 1975, the Supreme Court defined a mix of broad and narrow relevant product markets. In Brown Shoe, for example, the Supreme Court defined separate relevant product markets for all men’s shoes, all women’s shoes, and all children’s shoes.[62] In doing so, the Court explicitly rejected the defendant’s attempt to narrow the markets by alleging separate markets for different price tiers, concluding that “the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists” and that “further division of product

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[59] See, e.g., FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 885 (E.D. Mo. 2020) (“Crucial to the Court’s conclusion is the ‘narrowest market principle.’”); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 26 (2015) (quoting and applying the Times-Picayune rule).

[60] DuPont, 351 U.S. at 394.

[61] 2010 Horizontal Merger Guidelines, supra note 8, § 4.1.1 (“Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”); id. § 4 (“However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test . . . is designed to ensure that candidate markets are not overly narrow in this respect.”).

[62] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) (“Applying these considerations to the present case, we conclude that the record supports the District Court’s finding that

lines based on 'price/quality' differences would be 'unrealistic.'"[63] The Court also rejected attempts to distinguish among different kinds of children's shoes as "impractical and unwarranted."[64]

The Supreme Court also endorsed a fairly broad product market in *United States v. Philadelphia National Bank*.[65] There the district court rejected both litigants' proffered (and narrower) markets as attempts to "subdivide a commercial bank into certain selected services and functions," which if "carried to the logical extreme, would result in many additional so-called lines of commerce" but serve "no useful purpose."[66] The Supreme Court took the same view, holding that the relevant product market was "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'"[67] Although the Court acknowledged that the competitive dynamics varied among the products and services included in this broad market, it nonetheless concluded that "it is clear that commercial banking is a market sufficiently inclusive to be meaningful in terms of trade realities."[68] The Supreme Court applied the same "commercial banking" product market to six other bank mergers in the following 12 years,[69] in the process rejecting both broader and narrower candidate markets.[70]

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[63] *Id.*

[64] *Id.* at 328.

[65] 374 U.S. 321 (1963).

[66] United States v. Phila. Nat'l Bank, 201 F. Supp. 348, 363 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963).

[67] United States v. Phila. Nat'l Bank, 374 U.S. at 356.

[68] *Id.* at 357 (internal quotations and citations omitted).

[69] *See* United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 667 (1964); United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 181–82 n.15 (1968) (affirming "commercial banking" product market); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360–61 (1970) (holding that the district court erred when it defined narrower product markets with a broader range of participants because "the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved"); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618–19 (1974) (noting that the district court's definition of a "commercial banking" product market was not appealed but "in any event it is in full accord with our precedents"); United States v. Conn. Nat'l Bank, 418 U.S. 656, 666 (1974) (reversing a district court finding that the relevant market included both savings banks and commercial banks, although acknowledging that the market may eventually broaden to include both types of banks, and remanding the case with instructions that "the District Court should treat commercial banking as the relevant product market"); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120–21 (1975) (affirming "commercial banking" product market). The Court did not reach the question in a seventh case. United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 369 n.1 (1967).

[70] *See Connecticut National Bank*, 418 U.S. at 666 (rejecting a broader market that encompassed both commercial and savings banks); *Phillipsburg National Bank & Trust Co.*, 399 U.S. at 360–61 (rejecting a narrower market that did not include the full "cluster" of services traditionally included in the term "commercial banking").

Yet the Court did not always define broad markets. In the Du Pont (GM) case, for example, the Court chose to define narrow product markets for "automotive finishes and fabrics,"

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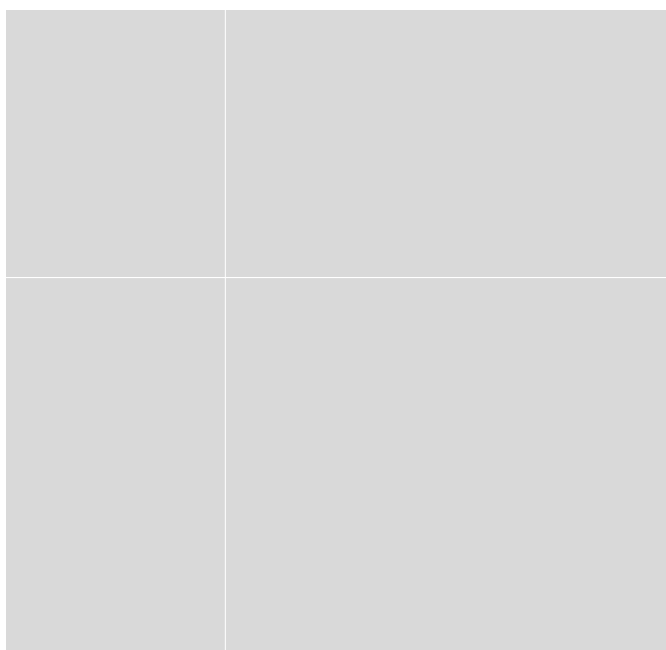
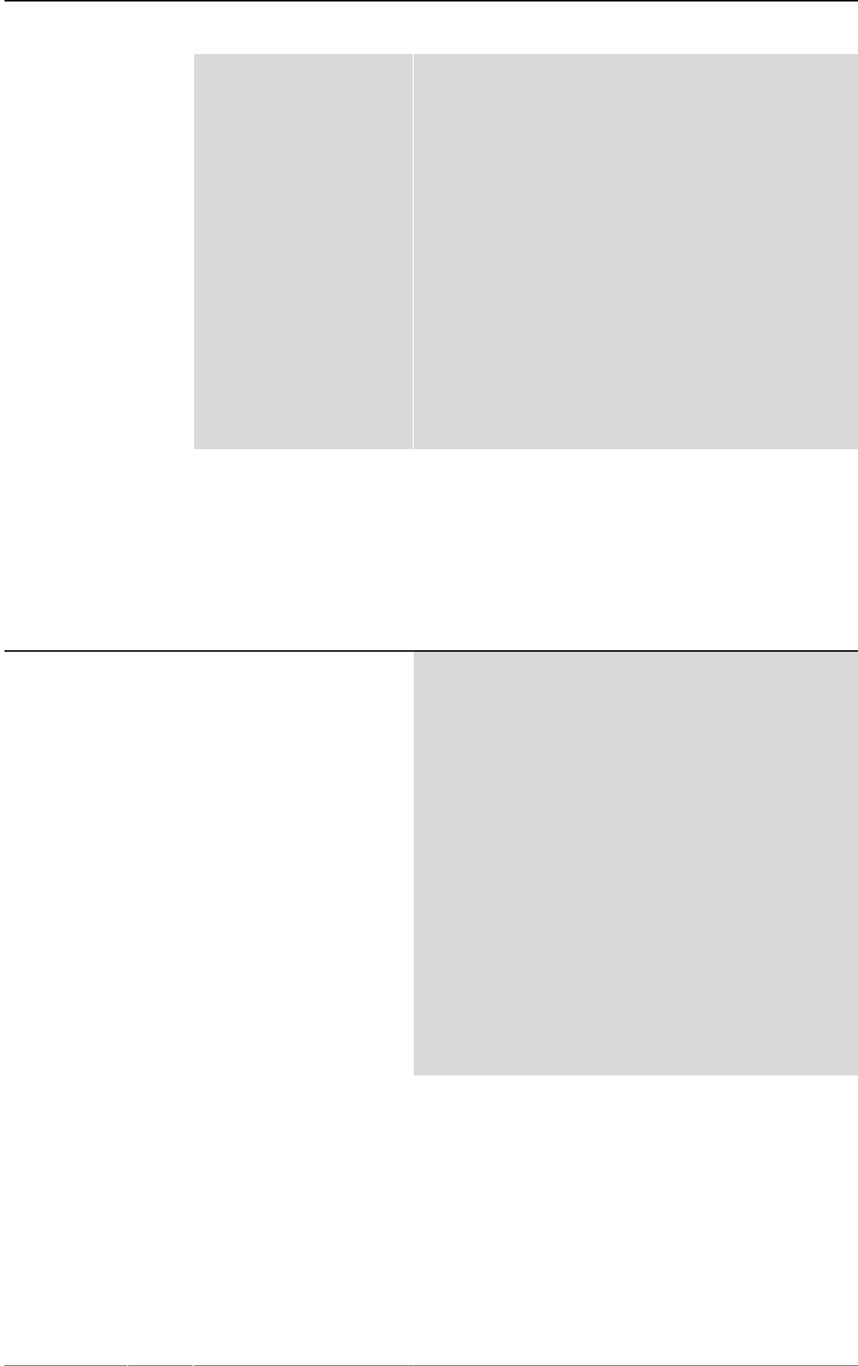
the early 2000s, the FTC alleged that “the sale of superpremium ice cream products to the retail channel” was a relevant product market, and that “refrigerated pickles” and “shelf-stable pickles” were in different product markets.[86]





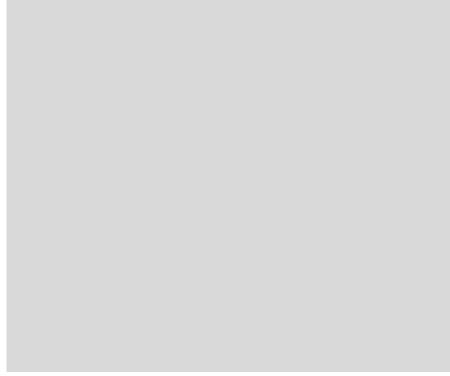


TABLE 2: SUMMARY STATISTICS

Product Market	Count by		Industries
	Cases	Industries	
Narrowed	12	6	Banking; Beverage Containers; Coal; Grocery Stores; Shoes; Seasoning
Constant	7	6	Automotive Finishes; Beer; Electrical Conductors; Natural Gas; Sodium Chlorate; Spark Plugs
Broadened	0	0	
Total	19	12	

for the "operation of premium natural and organic supermarkets."[98] Beverage container product markets also exhibit a sequential narrowing trend, moving from (1) a product market for "the combined glass and metal container industries and all end uses for which they compete" in the 1960s,[99] to (2) separate product markets for particular uses of glass containers (for foodservice, brewery, and distillery use) in 2002 and 2013,[100] and (3) specific sizes and shapes of metal containers in 2016.[101]

Other markets narrowed quickly and then stayed narrow, such as coal mining. In the early 1970s case United States v. General Dynamics Corp.,[102] the district court concluded that the relevant market for assessing the competitive effects of a merger of two coal miners was "interfuel" competition among

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[98] Id. at 1037–41 (Brown, J.). There is some evidence the product market has since broadened to include Wal-Mart supercenters and online grocery delivery services. See Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Remarks for "Merger Control in USA" Panel at GCR Interactive: Merger Control 11 (Oct. 21, 2020), www.ftc.gov/system/files/documents/public_statements/1583814/wilson_remarks_at_gcr_merger_control_2020.pdf ("As an example, consider the case of supermarkets. At one time, only grocery stores were included in the product market. Eventually, Wal-Mart and other superstores were added to the list of market participants. Now, as a result of the pandemic, perhaps online ordering and delivery should lead to an expanded list of market participants."); see also Complaint ¶ 9, Wal-Mart Stores, FTC Docket No. C-4066 (filed Nov. 20, 2002) (including "supercenters" and "club stores" in the "supermarket" market in Puerto Rico only); Complaint ¶¶ 11–12, Koninklijke Ahold, N.V., FTC Docket No. C-4588 (filed July 22, 2016) (excluding club stores and other retailers from the "supermarket" market).

[99] United States v. Cont'l Can Co., 378 U.S. 441, 457 (1964).

[100] See FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (parties stipulated the relevant product market was "food service glassware"); Complaint ¶ 30, FTC v. Ardagh Group S.A., No. 1:13-cv-01021-RMC (D.D.C. filed July 17, 2013) (alleging the relevant product markets were "(1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers").

[101] Complaint ¶¶ 5, 9, Ball Corp., FTC Docket No. C-4581 (filed June 28, 2016) (defining one product market for "standard 12-ounce aluminum beverage cans" and a separate cluster market for various kinds of "specialty aluminum beverage cans" that "come in a variety of dimensions" but can be clustered for convenience).

[102] 341 F. Supp. 534 (N.D. Ill. 1972), aff'd, 415 U.S. 486 (1974).

different energy sources—including coal, natural gas, and uranium—used to generate electricity.

A few markets initially stayed constant and then narrowed, such as food products. In FTC v. Consolidated Foods Corp.,[112] the Supreme Court defined separate markets for dehydrated onions and dehydrated garlic.[113] The FTC was still applying these market definitions in 1993, when it resolved allegations that an acquisition by McCormick & Co. would harm competition in the “U.S. dehydrated onions business.”[114] Although market definitions involving onions and garlic have not been assessed since then, the FTC has taken a narrower approach in other food and seasoning transactions, including a 2008 consent order with McCormick that limited the market to branded salt products sold at retail, explicitly excluding chemically identical store-brand and private-label products.[115]

II. POTENTIAL CAUSES

At a high level, much of this narrowing may be attributable to four factors: (1) the growing use of economic tools, particularly as the primary focus of merger analysis shifted from coordinated to unilateral effects, and from homogeneous to differentiated products;[116] (2) a concomitant increase in reliance on demand substitution metrics, culminating in the nearly complete exclusion of supply substitution from market definition; (3) additional limitations intro-

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[112] 380 U.S. 592 (1965).

[113] Id. at 595 (reporting the merging parties’ shares of the market for the “manufacture of dehydrated onion and garlic”).

[114] See Press Release, Fed. Trade Comm’n, Announced Actions for March 1, 1996 (Mar. 1, 1996), www.ftc.gov/news-events/press-releases/1996/03/announced-actions-march-1-1996 (reporting that the agency had granted McCormick’s petition “to modify a 1993 consent order” that resolved allegations that an acquisition “would substantially reduce competition in the U.S. dehydrated onion business”).

[115] Complaint ¶ 8, McCormick & Co., FTC Docket No. C-4225 (filed July 30, 2008) (alleging a relevant product market for “the manufacture and sale of branded seasoned salt products,” which “include any dry branded product or product formulation (not including private or store

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Along with the overarching change in enforcement emphasis, these tools often define markets more narrowly than they had been before. For example, critical loss analysis proponents argue that approach may be used—particularly with additional refinements—"to support a finding of narrower markets" when profit margins are high.[123] Likewise, former FTC Chairman Joseph Simons has argued that the 2010 Merger Guidelines' use of the Lerner Index in the market definition exercise "produces extremely narrow markets."[124]

These tools also still rely—often implicitly—upon how the market is defined. For example, diversion ratios are sometimes assumed from firms' market shares, which in turn depend upon market definition.[125] Perhaps recognizing this weakness, the 2010 Merger Guidelines assert that "[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration."[126] Even if they need not in theory, they often do in practice, including in the model the DOJ offered in AT&T.[127]

Commentators who predicted that the growing use of statistical tools would lead to "narrower product markets than those to which we have become accustomed" have been proven correct.[128] These tools typically suggest narrow markets, particularly for differentiated goods.[129] For example, in the 2010 Merger Guidelines, the Agencies declared that "[d]efining a market broadly . . . can lead to misleading market shares" and "[m]arket shares of different

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[123] Katz & Shapiro, supra note 116, at 50 ("Our central result is that an aggregate diversion ratio greater than the critical loss creates a presumption that the candidate product market is in fact a relevant antitrust market. This implies that, all other things being equal, higher pre-merger margins, which lead to a low critical loss, tend to support a finding of narrower markets."); see also Werden, supra note 20, at 214–15 (describing the possibility that some models may "overestimate" demand elasticities and "result[ ] in overly narrow markets").

[124] Joseph J. Simons, Comments to the Federal Trade Commission and Department of Justice

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products in narrowly defined markets . . . often more accurately reflect competition between close substitutes.[130]" The Agencies therefore argued that

FTC v. RAG-Stiftung,

Oats

may in turn reduce demand substitution for at least some customers.[156] Yet changes in the underlying industries are unlikely to fully explain the rise of multi-adjective product markets. For example, commodities like coal and salt have changed little, if at all, over the years, even as courts have defined those

A. EFFICIENCIES

The move toward narrower relevant product markets has affected the way courts assess efficiency claims in two ways.

1. Out-of-Market Merger Efficiencies

First, as former FTC Commissioner Joshua Wright and his co-authors recognized a few years ago,

those in Philadelphia National Bank and assess the net effect of the proposed transaction within these broader markets.[164] Indeed, the Court's recent decision in American Express suggests the Court may already be moving in this direction, at least in Sherman Act cases.[165]

2. Magnitude of Offsetting Merger Efficiencies

Since FTC v. H.J. Heinz Co.,[166] narrower markets have also changed the magnitude of offsetting merger efficiencies a defendant must prove. Two dimensions of that case are relevant here.

First, the D.C. Circuit adopted a sliding scale for assessing merger efficiency claims that becomes more exacting as markets narrow and market shares increase. In general, the court said defendants must show only that the likely cognizable efficiencies exceed the likely anticompetitive effects and therefore are unlikely to "substantially . . . lessen competition . . . in any line of commerce."[167] But when the market is highly concentrated, the court

harms.[170] Although this rule started in the D.C. Circuit,[171] it is now also binding circuit precedent in the Third and Ninth Circuits[172] and has been followed by trial courts in the Sixth and Seventh Circuits.[173]

Second, merging parties in highly concentrated markets face a heightened evidentiary burden when seeking, almost always in vain,[174] to prove efficiencies. As the court explained in Heinz, "given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[175] Although one hopes that the court conducts a rigorous analysis in every[176] case,

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[170] See id.; see also 1997 Horizontal Merger Guidelines, supra note 136, § 4, at 32 ("The greater the potential adverse competitive effect of a merger . . . the greater must be the cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market."). Notably, the D.C. Circuit managed to dismiss even the very large production efficiencies in Heinz—approximately 22.3% of the acquired firm's variable manufacturing costs—as failing the merger specificity requirement. See Heinz, 246 F.3d at 721–22.

[171] See Heinz, 246 F.3d at 720; United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) ("[W]e hold that the district court did not abuse its discretion in enjoining the merger based on Anthem's failure to show the kind of extraordinary efficiencies necessary to offset the conceded anticompetitive effect of the merger in the fourteen Anthem states: the loss of Cigna, an innovative competitor in a highly concentrated market.").

[172] See FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016) ("In order to rebut the prima facie case, the Hospitals must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger." (citing Heinz, 246 F.3d at 718–25)); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015) ("Because § 7 seeks to avert monopolies, proof of 'extraordinary efficiencies' is required to offset the anticompetitive concerns in highly concentrated markets." (citing, inter alia, Heinz, 246 F.3d at 720–22)).

[173] See FTC v. Advocate Health Care, No. 15 C11473, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017) ("Where the merger would result in high market concentration levels, as in this case, the defendants must provide proof of 'extraordinary efficiencies' based on a 'rigorous analysis' that ensures that the proffered efficiencies represent more than 'mere speculation and promises about post-merger behavior.'" (quoting Heinz, 246 F.3d at 720–21)); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("Moreover, '[h]igh market concentration levels require proof of extraordinary efficiencies . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.'" (quoting United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011))); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011) ("Efficiencies must be 'extraordinary' to overcome high concentration levels." (quoting Heinz, 246 F.3d at 721–22)).

[174] The recent challenge to the T-Mobile/Sprint merger may well be the first case in which efficiencies played a determinative role. See New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 208 (S.D.N.Y. 2020) (concluding that "the efficiencies are sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the prima facie case").

[175] Heinz, 246 F.3d at 721.

[176] Furthermore, some believe the 2010 Merger Guidelines' baseline approach is already unduly stringent. See, e.g., Daniel A. Crane, Rethinking Merger Efficiencies, 110 MICH. L. REV. 347, 356–57 (2011) ("The Guidelines implicitly treat efficiencies and anticompetitive risks

the *Heinz* court appears to have believed that even greater rigor is necessary when markets are narrow and market shares are high.

Combined, these two effects are greater than the sum of their parts. Because markets have narrowed, merging parties that previously could have carried their burden by showing efficiencies must now prove "extraordinary efficiencies" under a particularly "rigorous analysis." In other words, as markets narrow and market shares increase, defendants must produce stronger proof of much larger efficiencies. The obligation, if actually applied this way, likely forecloses an efficiencies defense in many narrow market cases.[177]

B. Competitive Overlaps

The extent to which relevant product markets have narrowed also has implications for other aspects of merger analysis. Consider two that cut in opposite directions.

First, narrower markets can make it more likely that two firms that compete in the same broad market—such as "retail supermarkets" or "coal"—are not viewed as horizontal competitors. For example, one firm may fall out of the market entirely. For this reason, courts have long cautioned against drawing market boundaries too narrowly. For example, in *Philadelphia National Bank*, the Court declined to consider only the banking patterns of "the smallest customers" because this evaluation would draw geographic markets "so narrowly as to place appellees in different markets."[178] It likewise declined to consider only the banking patterns of the largest customers, many of whom used banks based in New York City.[179]

This result may be particularly likely in dynamic markets. In these markets, competitors often seek to "leapfrog" each other by introducing products with new and different features. In the short run, an entrant's product may be differentiated from existing products sold by others. Yet incumbents may—and in such markets often do—quickly "catch up" by introducing similar fea-

asymmetrically by insisting that efficiencies be proven to a very high degree of certainty in order to justify a merger whereas risks need not be proven with great certainty in order to block a merger.").

[177] Of course, demonstrating cognizable efficiencies remains an uphill battle for merging parties. *See, e.g.*, Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies, Remarks to the Bates White Antitrust Webinar (June 24, 2020), www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf.

[178] United States v. Phila. Nat'l Bank, 374 U.S. 321, 361 (1963).

[179] *See id.*

tures to their own products. Therefore, in some cases, narrower markets may result in relatively less aggressive antitrust enforcement, at least in theory.[180]

Second, whereas in some cases narrowing the product market will exclude one of the merging firms, in other cases it will just exclude some of their competitors, thereby pushing up the merging parties' combined market share. Because market shares are an input in many economic models used to measure anticompetitive effects, like diversion ratios, economic models may be more likely to find harm in narrow markets.

C. THE STRUCTURAL PRESUMPTION

Narrow markets may also be more likely to trigger a structural presumption of unlawfulness, which "has been critical for effective horizontal merger enforcement."[181] Embodied in both the case law and the 2010 Merger Guidelines,[182] when the presumption is triggered, it shifts the burden from the plaintiff and requires the defendant to prove that the transaction is lawful.[183] As the Court recognized in Philadelphia National Bank, the very case that established the presumption, the size of the relevant market can affect the market share calculations.[184] When product markets shrink, as it appears many have, then the number of competitors declines, thereby increasing the market share of each firm that remains in the market. Because the structural presumption is triggered whenever certain market share thresholds are met, the presumption is more likely to apply when markets are narrow. Perhaps ironically, the structural presumption is a product of the broad market era

generally,[185] and of a case in which the courts defined a broader market than either party sought.[186]

The district court in the recent *Peabody* case clearly explained the relation-

The Whole Foods case illustrates both of these dynamics. As discussed earlier, the FTC argued for a narrow product market that included only premium, natural, and organic supermarkets (PNOS), and the defendant urged the court to find a broader market that included conventional supermarkets. As both the district court and the court of appeals noted, the "case hinge[d]—almost entirely—on the proper definition of the relevant market."[191] If the market was narrow, then concentration was high, the structural presumption applied, and the transaction was likely unlawful. If the market was broad, then concentration was low, the structural presumption did not apply, and the transaction was likely lawful. Moreover, the FTC rested its entire case on the structural presumption and its corollary,[192] and these were the controlling considerations in the final judgment of the D.C. Circuit.[193]

IV. CASE STUDIES

Two case studies in the banking industry further illustrate how narrowing markets have quietly changed substantive antitrust rules. Under U.S. law, banking mergers are reviewed concurrently by both the sector-specific regulator, the FRB, and the DOJ. Both must give their approval.

The first case, FirstUnion/CoreStates, illustrates how narrower product and geographic markets can exclude otherwise cognizable efficiencies. In 1998, Philadelphia National Bank's corporate successor (CoreStates) was acquired by another large bank (FirstUnion). The FRB and DOJ both reviewed the transaction but defined radically different product and geographic markets. The FRB began with the product market fixed by the Supreme Court in Philadelphia National Bank—commercial banks—and then broadened it to include thrift institutions (at a discounted weighting), which they believed "have become, or have the potential to become, significant competitors of commercial banks."[194] Reflecting what it viewed as significant industry developments, the

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[191] Whole Foods, 548 F.3d at 1043 (Tatel, J., concurring) (internal citations and quotation marks omitted).

[192] Id. at 1037 (Brown, J.) ("Because of the concentration in the supposed PNOS market, the FTC urged the 0e.mTj 0.0313 Tw T* [(transaction waihg1tyrkete61 <</neA10 it B e9 Tw 10.4lroadenu084 Tdluwf 0.1703 /S

FRB also defined a broader geographic market encompassing nine counties near Philadelphia, as compared with the four-county area the Supreme Court had used in 1963.[195] The DOJ, in contrast, broke the "cluster" of commercial banking services into narrower single-product markets—savings accounts, checking accounts, and so forth.[196] The DOJ also narrowed the relevant geographic market, rejecting the FRB's nine-county market and the Supreme Court's earlier four-county market in favor of a narrower two-county area.[197]

Consistent with the theory described in Part III above, these different market definitions meant the DOJ and FRB applied the same substantive legal rules in materially different ways. The FRB found that the transaction, as modified by the divestiture of 23 bank branches (accounting for $866.9 million in deposits[198]), "would not be likely to result in a significantly adverse effect on competition" and would generate "public benefits" such as "increased consumer convenience and gains in efficiency."