Roundtable: Current Substantive and Procedural Issues Facing Merger Practitioners

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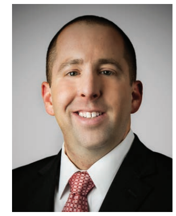

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Editor's Note: *On August 25, 2016, several merger practitioners sat down with Mandy Reeves, Editorial Co-Chair of* The Antitrust Source*, and Joseph Krauss, Editor of* The Antitrust Source*, to discuss current substantive and procedural issues facing merger practitioners today. The panelists included Deborah Feinstein, current Director of the Bureau of Competition at the Federal Trade Commission; David Gelfand, a partner at Cleary Gottlieb and a former Deputy Attorney General at the Antitrust Division of the United States Department of Justice, Carl Shapiro, the Transamerica Professor of Business Strategy in the Haas School of Business at the University of California at Berkeley and former Deputy Assistant Attorney General for Economics at the Antitrust Division; and Jeffrey Perry, a partner at Weil Gotshal and former Assistant Director in the Bureau of Competition at the FTC.*

JOE KRAUSS: Thank you for your willingness to sit down with us today. The first thing I wanted to start with is the Horizontal Merger Guidelines. The 2010 revisions are now six years old. We have six years of experience and practice with those Guidelines on the private side, on the government side, and in federal court. I was wondering if you could give your perspectives on whether they are working, whether there are areas that you think need to be revised, or improved, or updated.

DEBBIE FEINSTEIN: Carl should chime in, but I think the 2010 Guidelines were really meant to reflect what the Agencies were already doing. In terms of helping guide the staff in how to think about whether to bring a case, I think they're working quite well. Even though we have all been doing this for years, I'm amazed at how often we turn to the Guidelines as we are considering different issues.

The Guidelines are particularly helpful in spelling out theories that don't arise every day. The Commission's challenge to the Superior/Canexus transaction is a good example. The FTC challenged a combination of sodium chlorate producers. The FTC argued that the primary harm would come through coordination on output and output reduction, which is one of the theories laid out in the Guidelines at Section 6.3.

The Guidelines set forth a structure for us to consider what we would need to believe such an anticompetitive effect was likely and for the parties to argue why the conditions for the theory were not set forth. The Guidelines set forth a framework that allowed us to have a clear conversation with the parties about what evidence was relevant and what it showed—even if we did not ultimately agree.

In terms of litigation, the courts generally consider the Merger Guidelines even though they are not binding.

CARL SHAPIRO: Let me pick up on that. As someone who played a leading role at the Antitrust Division in the development of the 2010 Horizontal Merger Guidelines, I think transparency was certainly a big part of what we were doing. And, look, it's not surprising—basically we were working with the 1992 Guidelines and there had been a significant shift in practice. So we were writing down that shift but at the same time we were changing emphasis in some ways.

The courts are certainly very interested in market definition, and this remains true even though the Guidelines probably do deemphasize market definition.

—Carl Shapiro

From my perspective as someone who has worked with the Agencies and with private parties on mergers in the past four years since I came back to Berkeley from D.C., I think practitioners understand what the 2010 Guidelines say—it comports with their experiences. Plus, they are workable in terms of telling clients what needs to be done in front of the Agencies to most effectively address Agency concerns. So in that sense I think the 2010 Guidelines are working fine.

The litigation issues are distinct and only apply to those very few mergers that are litigated. The courts are certainly very interested in market definition, and this remains true even though the Guidelines probably do deemphasize market definition because that's the way the Agency investigations actually proceed. When you get to court, market definition is going to play a significant role, and that is going to remain the case unless and until the case law changes.

JOE KRAUSS: Dave and Jeff, you both have had experience in presenting these Guidelines in court. What are your perspectives on how the Guidelines are playing in the courts?

DAVID GELFAND: Before I get to how they're playing out in the courts let me just echo a little bit of what both Debbie and Carl said in the following sense. This is a very important, substantive, and useful document. I actually view it as a bit more than Guidelines because there's a lot of substance in here about how you think about competition problems.

It's not just a set of principles about when the Agencies will act and when they won't act. And in that sense I think they're extremely helpful. It's one of the only things I had on my desk my entire three years at DOJ. I actually had a pocket Guidelines, kind of like a pocket Constitution—the pages were worn at the edges because I was looking at them a lot.

No matter how much you think you know about antitrust, you're a better lawyer if when confronted with a problem that is covered by the Guidelines you go back and just read it again. And just look at it, stare at it, and ask yourself, am I adhering to some of these basic principles?

In terms of how they play in the courts, I think that remains to be seen how influential they will ultimately be in cases that are decided. They're obviously relied on for certain principles and taken as a substantive statement of law or at least legal and economic principles. But they're also just one side's version, and judges I think understand that. So whether courts will adhere to all of the sections we're dealing with, all of the defenses or ways to think about market definition, etc., I think that remains to be seen.

JEFF PERRY: There have been a significant number of litigated merger cases recently, brought by both the FTC and DOJ, and the Guidelines have been relied upon and cited extensively. In terms of whether the Guidelines are working, I generally agree with what's been said so far, but I might come at this in a slightly different way.

At the very beginning of the Guidelines, there's a comment to the effect that the Guidelines are intended to be instructive both for practitioners and for the business community. As for the first group, yes, the Guidelines are excellent and very helpful for practitioners. I think they are exactly what antitrust lawyers and antitrust economists need; they help us think about competition problems and issues and they really do reflect "how the sausage is made" at the Agencies.

Frankly, I'm less optimistic that the Guidelines are as digestible for the second group—clients and the courts. That's not intended to be a criticism of the Guidelines or of these audiences. It's just that the Guidelines are extremely specialized and are written in such a way and in a language that they are more easily understood by people who spend their entire careers practicing antitrust law. They're better suited to that audience than a generalist judge or a business person who isn't dealing with these issues on a daily basis.

And I think one point I would offer as evidence of that is what Debbie and Dave have already said, which I agree with completely, and that is that even experienced practitioners need to read the Guidelines frequently. The Guidelines are that dense and that technical, even for experienced practitioners.

And because of this, the Guidelines leave somewhat of a gap if the intention is to speak to the business community and to speak to generalist judges. So I think there's tremendous value when the Agencies supplement the Guidelines with case-specific closing statements, with the frequently asked questions publications, and with merger statistics. This is critical, because, as helpful as the Guidelines are, if you take those other pieces out or if they're not continually refreshed, I don't think the Guidelines standing alone give us everything that we need.

MANDY REEVES: Can you comment about what role the Guidelines play in your case development and strategy as you prepare for litigation?

JEFF PERRY: I have the Guidelines in mind throughout the life of a merger investigation and litigation, but I would say the Guidelines are more of a focus during the Agency engagement, rather than during litigation. There's a feeling that when you're going in to meet with Commissioners, or with Debbie or Dave when he was at Justice, that everybody knows that the Guidelines are the "Bible." Not everybody agrees with everything that's in the Guidelines but you know they are going to be the touchstone that people look to. So this is the language you speak and this is the framework you use to present your arguments.

The Guidelines are helpful in front of a generalist judge too, but for somewhat different reasons. The Guidelines help to validate the arguments you make in litigation. So if you or your expert are going to offer a UPP (upward pricing pressure) analysis, for example, or talk about diversion ratios, or make some other point that may not be particularly intuitive, it's extremely helpful to be able to point to the Guidelines and have the judge understand that even if he or she isn't familiar with every word in the Guidelines, it's clear that your arguments or analysis aren't being made up for litigation, but instead are part of the principles of merger analysis put out by the Agencies themselves.

DEBBIE FEINSTEIN: Yes, and we certainly have seen that the way the Guidelines get discussed in the context of a litigation is through the experts. A good expert will explain how the Guidelines apply in a simple way to the industry in issue and how these economic principles translate into real-world behavior. Of course, the other side's expert will try to do the same. Usually, the parties' economist will accept the framework of the Guidelines but disagree on how they should apply in a particular case.

CARL SHAPIRO: Let me pick up on the expert witness side of that because I agree with what Debbie just said.

I've tracked cases and in every case that I know of, the economic expert for the merging companies says, "Oh yes, I'm following the Guidelines too." Now, this is significant, because then I imagine the judge is thinking, "OK, so both sides' economic experts are following the Guidelines, so at least when hearing their testimony I can evaluate their testimony using that framework. And especially on the government side, I can ask whether the Agency is being faithful to its own Guidelines or have they left something out?" So the Guidelines have a substantial impact on litigation at least in this way.

Now, this is quite different from the investigation phase where, as Jeff said, everyone knows the Guidelines are like the Bible. But the impact on litigation remains significant. At the very least, the Guidelines are an interesting reference and authority to the judge. Plus, given that the defense expert says that he or she is following the Guidelines, this leads to certain logical questions, either from the judge or in cross-examination. "Did you apply the hypothetical monopolist test?" or "What is your basis for concluding that entry would be sufficient? So the Guidelines play an important role in framing the analysis and the issues in a way that is very much present in court.

JOE KRAUSS: I understand Judge Diane Wood in the *Advocate* argument last week did make a comment that maybe the district judge did get the hypothetical monopolist test wrong. Is this suggesting that perhaps some aspects of the Guidelines might be too complicated and "too economic" for generalist judges? If that is a fair criticism?

DEBBIE FEINSTEIN: I think there's a difference between the hypothetical monopolist test conceptually and the hypothetical monopolist test in its application when there are various facts and data that are at issue. Generalist judges can—and do—understand the concept. In my view, the hypothetical monopolist test is conceptually driven from the Supreme Court's *Brown Shoe* practical alternatives tests—what are the practical alternatives to which a buyer can turn?

Where it gets complicated is when one economist says "I use this particular model" and another economist criticizes this model or offers an alternative model. That kind of battle of the experts is obviously going to be an issue. Judge Amit Mehta talked at an ABA Fall Forum presentation about his inability to determine the precise equation that should be used for the hypothetical monopolist test when two economic papers suggested different equations. Obviously it will be difficult for a judge to make that kind of determination.

Then it comes down to whether our economist's view of the hypothetical monopolist test is consistent with other evidence in the case. Judges do not typically have difficulty with that aspect of deciding product market.

CARL SHAPIRO: One of the things we did in working on the 2010 Guidelines was to go back and look at previous Guidelines and, indeed, how they were greeted when they were released. The hypothetical monopolist test dates back to the 1982 Guidelines when Bill Baxter was Assistant Attorney General for Antitrust. They were greeted with quite a bit of—how should I put it—skepticism. Many practicing attorneys were wondering what the hell this "hypothetical monopolist test" was all about and what it meant for their practice. The test was criticized as being incredibly complicated, and many practitioners were wondering how to actually apply it.

Well, 35 years later, the hypothetical monopolist test has become routine at the Agencies, well established in case law, and widely adopted around the world. So I think the litigation issue now is not so much whether we use the test in court but, rather, how to perform the test in a manner that is understandable and credible to judges, what do judges make of conflicting expert testimony regarding the test, and how do judges balance the results of the test with other evidence regarding the relevant market.

DAVE GELFAND: Joe, coming back to your question of whether the Guidelines should be simplified or made more accessible to generalist judges. First of all, let me say that in my experience, people in our profession spend a lot of time agonizing about how you can explain things to judges that are very complicated concepts that we talk about among ourselves as antitrust lawyers and economists. And one thing that has struck me over the years is, every time an opinion comes out it is remarkable how much a judge who has never been exposed to a merger case before absorbs not just the Guidelines but the case law, how much they absorb from the witnesses, the business documents, and the economists.

They get what this whole exercise is about and ultimately, it's about deciding whether a merger is going to hurt consumers and be anticompetitive; and there are steps along the way to try to get to that decision. So I think it would be a mistake for us to think that we have to oversimplify all of these concepts. But at the same time, we do have to have conversations among ourselves as antitrust lawyers and economists. We have to have conversations with the Agencies that are at a level that you'll never think about putting into evidence at trial because it's too extensive, it's too esoteric, it's too complicated, there's too much "what if," too many alternative runs with the model.

At the end of the day, you've got to decide what it is you're going to distill it down to. And one of the big challenges we have as antitrust lawyers involved in a litigation is picking and choosing. You can't put it all into the record, you've got to decide what your theme is, what your case is, what your key points are. And that's an art that you're never going to be able to capture in a single document.

JEFF PERRY: I agree with Dave. I think it's a mistake to think that judges aren't sophisticated enough to get it, they are. As I mentioned earlier, the issue is that the Guidelines are just written in a different language than most judges are used to speaking, and frankly in a different language than most of us spoke 20 years ago practicing antitrust law; it's just changed. So that's one point.

Second point, the cases that end up in litigation are almost always the types of cases where both sides are able to point to the Guidelines and say, "aha, they support our arguments." There's so much in the Guidelines that can be used by both sides in a litigation, particularly given the fact that the close cases are the ones that tend to litigate. So however these cases are decided, you're always going to have one of the litigants who thinks the judge interpreted the Guidelines correctly and the other party that says the judge didn't understand the Guidelines or misapplied them. And I think that speaks as much to the nature of the case as it does to the sophistication of the judges.

The other point that is important to keep in mind—and this isn't a criticism of the document—but the Guidelines are not a formulaic, step-by-step document where you plug in market share and margins, and the time it takes to enter, for example, and then the Guidelines give you the answer. In other words, the Guidelines do a great job at highlighting the factors that weigh for or against a merger, but they're not easily or objectively implemented. Certainly, when I was at the FTC I was surrounded by a ton of lawyers and economists who understand the Guidelines, and still we had lots of good, vibrant debate about how to apply the Guidelines to a particular set of facts. So even apart from litigation arguments or advocacy, you can have serious differences of opinion among people as to a particular merger, even though they will all believe they are following the merger Guidelines precisely.

So I think the big challenge with generalist judges is just translating the language, it's not a matter of simplifying things.

JOE KRAUSS: We could talk forever about various aspects of the Guidelines, but let's move on to a couple of specific things. We've seen cluster markets used successfully by the FTC in the *Staples* case and alleged in some of the hospital merger cases. What does this recent use imply for market definition going forward?

[I]t's appropriate to group products together for purposes of analysis, so long as you can do so in a way that doesn't distort the analysis. If you ask 10 lawyers and 10 economists, you'll get 20 people who all agree with that.

—Jeff Perry

JEFF PERRY: For better or worse, I've been on both the winning and losing ends of these cluster market cases. I had the good fortune to work on a number of hospital cases while I was at the FTC, and since then I have worked on some of the more recent cases. I don't think there's much controversial or new in the concept of a cluster market. For example, you won't hear people clamoring in a shoe merger to define a relevant market for the sale of size nine and a half blue shoes.

So I think it's well settled that, for analytical convenience, it's appropriate to group products together for purposes of analysis, so long as you can do so in a way that doesn't distort the analysis. If you ask 10 lawyers and 10 economists, you'll get 20 people who all agree with that. The challenge, however, is the balance in how much evidence should be required to support the conclusion that competitive conditions are similar enough for that kind of grouping. Because on the one hand there has to be some meat on the bone; you can't just group products together in a cluster without demonstrating that it's appropriate and not misleading to do so. But, on the other hand, if you do a full-blown analysis to justify the clustering, at some point you've destroyed the whole benefit of cluster markets in the first place.

So the concept itself is pretty straight forward, but the implementation can be difficult. The way I tend to think about it is if you're on the plaintiff side, you should need to demonstrate that the competitors are the same across products, that market shares are roughly the same, and that on the supply side entry and repositioning conditions are roughly the same. If you can show those things in a reasonably substantial way, then it's fair to cluster products together and it's a tried and true method to apply, but the debate is always going to center around the application.

CARL SHAPIRO: Let me pick up on that. The term I always heard and used in decades past was not "cluster markets" but "aggregation for convenience" which is the same concept. And Jeff even used the word "convenience" just now.

I agree with what Jeff just said: conceptually, the notion of a cluster market is not that complicated, it's all about what is practical given the available data. But I do not see how the standard that Jeff described can work in practice. If you can measure the market shares for each individual product market that's going to be in the potential cluster, then you've pretty much done the work. At that point, why cluster rather than define dozens or hundreds of individual markets?

In practice, the issue of cluster markets arises when you do not have the data to measure market shares in each individual product market or doing so is just impractical. In that situation, the plaintiff cannot show that the market shares are nearly the same in all of these markets. So the plaintiff has to fall back on something else to say: "Well, here's other evidence that these individual markets look similar enough so that I'm going to use an aggregated market share, for which I do have the data." I think you have to be able to go that route otherwise it's just a mess practically.

DEBBIE FEINSTEIN: Yes, look, this is not a new concept, I agree completely with that. *Brown Shoe* was a cluster market; it didn't use the phrase cluster market but it clearly was a cluster market. The Guidelines don't use the phrase cluster market, they don't use the phrase bundle market. There were moments where we thought, "Darn, I wish someone got those concepts in the Guidelines."

The Guidelines are never going to explain everything and so you go back to the question of: are the Guidelines enough? You're never going to be able to explain every concept that comes into a merger analysis in the Guidelines; that's not what it's meant for. But the litigated decisions give a lot of guidance. I don't think anybody can honestly say that we haven't given guidance on how we think about a cluster market in light of the hospital cases and *Staples*, between our briefs and our expert reports and the ultimate opinions.

I think the world now pretty well understands what a cluster market is, not that I thought that there was any doubt beforehand. And now the question really is about "OK, what does it mean to prove a cluster market?" And that's really no different than what does it mean to prove any market in terms of the various types of information that we look at.

If we end up obsessing about market definition simply so that parties can say, "Well, something has been proven or not," it can undermine the objective of antitrust . . .

—Dave Gelfand

DAVE GELFAND: I think one of the things you have to think about in these cases is, why are we defining markets in the first place? What is the purpose of that? The purpose is to try to find a line of commerce where competition is really going to be harmed by a merger or harmed by a particular conduct at issue.

If we end up obsessing about market definition simply so that parties can say, "Well, something has been proven or not," it can undermine the objective of antitrust, which is to get to the bottom of competitive effects. For me the question is, what is the end effect on competition?

I don't know why the debate really exists. It seems natural to me that you would group products like others have said, it's something that's been done forever. Unless you're just trying to say, well, that's not an appropriate thing to do, therefore you can't prove your market, therefore you lose the case. But does it really serve the end purpose of figuring out the impact on competition to be obsessed with whether there's something called a cluster market or a bundled market?

MANDY REEVES: Another topic on which there's been recent litigation is potential competition. We have the *Steris* decision, which gives us one judicial perspective on that. I'd be interested to hear the group's thoughts on *Steris* and how that shapes what you think the legal standard is for assessing potential competition.

DEBBIE FEINSTEIN: It was interesting. The judge basically said, "I'll accept the government's view of what the standard is for potential competition," and it was basically a likelihood standard. And the debate came down to what is likely. And on the facts, I think we just came out in different places; we viewed entry as likely because of all the steps that they were taking. Of course they had not actually done everything necessary to enter or they would have been in the market. And so the question is how far you have to go in proving that they would be in the market. We think it's bad for antitrust policy if the standard is you must prove that a company already has entered before we can show that it is likely to have entered.

And I think in any case other than FDA cases, that is going to be a factual challenge. It's easier in the FDA cases where we routinely get consents because you've taken all the steps necessary other than FDA approval and we can show that the FDA approval is likely. I think parties recognize that and so they walk in saying "we understand your concerns and know we need to settle in these areas." I think it's going to be more of a challenge in the other areas.

I don't think anything about the *Steris* opinion will keep us from bringing the next potential competition case. They just don't arise early and often outside the pharmaceuticals area, but we will continue to look for cases that raise concerns.

Interestingly in *Steris*, the court wanted to focus only on the question of whether entry was likely and did not let us put in any of the evidence on what the markets look like, on what the competitive effects would be. And it might be that a court that looked at the broader context might have come to a different view of what was required to show that entry was likely.

I don't think anything about the Steris opinion will keep us from bringing the next potential competition case.

—Debbie Feinstein

DAVE GELFAND: It struck me as a fact-based decision, but I haven't read the opinion in a while.

CARL SHAPIRO: Yes, it's a rather short opinion very much focused on the facts. It doesn't really get into conceptual issues. So I don't think it has very much precedential impact. This decision will not change how I envision working with clients or the Agencies to look at cases because it's so fact based. There is a broader discussion about the evidentiary standards for potential competition and loss of innovation competition that is currently swirling about. But I see this case as very narrow.

JEFF PERRY: The court in *Steris* very specifically said that it assumed the validity of the potential competition doctrine, so I agree that the opinion clearly is fact specific. I think it was a fair standard for the judge to use to say, "FTC, you have to prove to me that Synergy probably would have entered." I don't think the judge expected to see actual entry, just the probability. Obviously, whether the judge's ultimate findings were correct can always be debated, but I think it was a fair standard for the judge to use and a fair way to approach the case.

Also, whether it's *Steris* or any other case, there's always a risk of overreaction to court decisions, whether they are wins or losses. It's important to remember that each case is just one data point—it's one case, with one set of facts in front of one particular judge. It's very easy to read too much into what each case means about the likelihood of winning or losing the next case, and that's particularly true here given how fact-specific this opinion is.

DAVE GELFAND: I think an interesting offshoot of this case and this discussion is, whether there's a different standard for entry as a defense and entry as a Section 7 violation based on potential competition. And I think the government does have to think about whether it wants to be taking the position that certain sets of facts qualify as a potential competition case, if that same government enforcer is unwilling to recognize similar facts as potential entry that could be used as a defense.

MANDY REEVES: Debbie mentioned pharmaceutical cases. How do you think about potential competition in the context of pharmaceutical cases when you know the potential entrants but entry itself may not occur until well into the future? Are there any rules of thumb that you find work in that context?

DEBBIE FEINSTEIN: Typically we do not have concerns where one of the parties is pre-clinical, although there are cases where we have had such concerns depending on the facts of the specific product. When considering likely anticompetitive effects, we consider where the various competitors stack up in terms of when they are likely to obtain FDA approval and enter the market.

Sometimes we hear "Company X is a year behind but they will absolutely be an entrant so you should not worry about the combination of Companies A and B, which are farther along." That doesn't end the inquiry. First, it might still leave the market with only three competitors rather than four. Second, if we believe there is likely to be interim harm because prices will be higher until that additional entrant enters, we are going to have concerns. In the pharmaceutical market we know that the impact of entry doesn't happen until the new entrant has actually entered the market. In other markets, that might not be the case. For instance, starting to build a supermarket might lead an incumbent competitor across the street to begin reducing prices or taking other steps to build customer loyalty. So how to think about the relevant time frame for new entry will depend on the industry.

CARL SHAPIRO: Let me link this to what I see as one of the bigger topics in the antitrust economics discussions these days: industrial consolidation in the American economy.

People are pointing to overall consolidation, let's say nationally. A lot of that has occurred, some of it due to geographic rollups. I think we are going to be hearing a lot about industrial consolidation, at least for the next year or two.

To illustrate my point, consider a case where you've got two companies which are in the same retail or other distribution business but in different parts of the country. Suppose they are both large and they want to merge to have nationwide presence. Maybe there is already one or two nationwide players. Do we say, "Oh this merger is fine, because you're not competitors at all, you're in different regions," or do we say, "No, this merger is a problem, because if you can't merge you'll grow to be national yourself and you'll attack the other guy's region"?

What would it take in terms of business plans showing that one of the merging firms planned to enter the other merging firm's region for this fact pattern to qualify as a serious potential competition case versus a garden variety non-horizontal merger? If anybody can answer that, I'll be impressed.

DEBBIE FEINSTEIN: We figured if you couldn't, nobody could.

JEFF PERRY: I'm not about to try.

JOE KRAUSS: Let's turn to price discrimination, another area that has been dealt with and addressed in some several recent cases, such as *GE/Electrolux*, *Sysco*, and *Staples*.

What's the view in terms of how the Agency should best assess and evaluate price discrimination markets?

DAVE GELFAND: Well, just speaking briefly based on public information about *GE/Electrolux*, obviously we saw the contract market there as a so-called price discrimination market or a targeted customer market.

I need to just come back to the same point I tried to make earlier, but for me the purpose of antitrust is figuring out if there is going to be significant harm from either conduct or a transaction. And if there is a group of customers that depend on competition between the merger parties in an important way and the other factors that weigh into the analysis like entry, repositioning, etc.

don't really protect them, then really what antitrust ought to be seeking to do is get to that answer rather than treating the market definition exercise as if it's just an exercise in its own right.

Price discrimination markets or targeted customers are just a localized form of competition that can be impacted by a merger or by a transaction. We certainly saw that with the contract customers in *GE/Electrolux* who depended on bid competition from just three companies. Two of them were the merger parties and there was a third but it was a three-to-two in bid competition for a very large portion of that contract business, and that competition was going to be lost after the transaction.

If you just pull up to 30,000 feet, many markets are price discrimination markets. That's the whole reason it's a market, because competitors can price based on the competitive set that is in a particular market. Now at the same time, obviously antitrust needs to be sensible. You don't want to take targeted customers to such an extreme that you start worrying about one or two small customers in a big transaction that has a lot of efficiencies which will benefit the customer base as a whole.

I think we were absolutely right in *GE/Electrolux* and I have a fair degree of confidence especially after reading the *Staples* decision that Judge Sullivan would have gone in our favor on that issue.

CARL SHAPIRO: As somebody who teaches MBAs and works with a lot of companies, my view is that price discrimination is simply the business reality in a great many markets. Many companies have sophisticated pricing strategies that target and segment customers. And that's why the concept of "targeted customers" was given central billing in the 2010 Guidelines. We recognized that devoting an early section of the Guidelines to targeted customers—before market definition—was a significant change in the narrative flow of the Guidelines. We did this because our internal reviews at the DOJ and the FTC showed that an increasing number of cases involved targeted customers. The Agencies commonly look for vulnerable customer groups and structure their investigations around those customers. We felt it was important for the Guidelines to make that clear.

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—Carl Shapiro

I think the big issue that remains unresolved, which Dave alluded to, is how to handle situations where a deal looks likely to harm certain targeted customers, but these customers are pretty small compared with all of the customers served by the merging firms. What should we do in these situations? This was certainly the case in *Staples/Office Depot* because the large customers were a relatively small share of the overall revenues of the two companies, even in office supplies. This is where cognizable efficiencies come into play. How does one balance harm to targeted customers with possible benefits to other customers?

JEFF PERRY: One point I'd like to add, which is reflected in the Guidelines, is that to prove up a case based on price discrimination, it's not enough just to show that there is a group of customers who appear to consider the merging companies as their top two choices and believe that other competitors or alternatives are less attractive. There has to be an identifiable group that can actually be targeted with an exercise of market power post-merger.

In other words, it's not just how large or small that customer group is and how we're going to balance harm against efficiencies, but instead the question of whether the allegedly vulnerable customers are identifiable and can be targeted? And that's really where the rubber meets the road in these price discrimination cases because if you don't focus on that issue you end up with a situation where, in any merger of two companies you can find a few customers who will say, "the merging companies are my two best choices."

So when you're analyzing whether a truly identifiable group of customers exist, the question is, are there a bunch of other customers who look just like the so-called vulnerable customers but believe they have plenty of other competitive options? And if that's true, then the similarly positioned customers who believe they are vulnerable should actually be protected. So I think that's a really important part of the analysis and if you lose focus on that you run the risk of the price discrimination theory really over-predicting harm.

DEBBIE FEINSTEIN: That may or may not be right depending on the facts. The Guidelines make clear that you do not have to have clear categories of customers who have the same preferences. If it's an individualized negotiation I may learn things from prior negotiations or what you requested in an RFP that allows me to determine the extent to which you have good alternatives. As a result, having this information about the extent to which you have alternatives can impact the negotiation even if I am not 100 percent certain of your options.

CARL SHAPIRO: For the analysis to properly focus on a group of targeted customers and the merger's effects on them, the merged company must be able to say, "Here are the characteristics of the customers to whom we are raising price." However, this absolutely does not mean that the merged entity has to be perfectly accurate in terms of who will then pay the price increase rather than go somewhere else.

The *Ticketmaster/LiveNation* case we handled when I was at DOJ provides a good example. In that case, there were a whole bunch of different types of venues. It turns out that for very large sports stadiums, a lot of the ticketing was done in the form of season tickets, and these venues were not necessarily vulnerable to a post-merger price increase by the merged entity. The situation was quite different for major concert venues. These venues were the targeted customers identified in the DOJ complaint. We did not include in the set of targeted customers the large sports stadiums or a very large number of smaller venues. This reflected the reality of the ticketing business.

So, the key question there was whether the merged entity could profitably impose a targeted price increase on major concert venues. Such a price increase could well be profitable even if some of these venues would shift to other firms for primary ticketing services. The key question is whether an identifiable set of targeted customers is, on the whole, significantly less likely to switch than are other customers.

JEFF PERRY: Yes, I generally agree with Carl. I'm not suggesting that for a price discrimination theory to hold water, the suppliers need to have perfect information about customer preferences or that there are no similarly situated customers who serve as counter examples. But if you find enough counter examples—customers who look the same, who seem to fit in the category of allegedly vulnerable customers, but are expressing different preferences—then I think you have to ask the question, would it in fact be profitable to try to target these customers with a price increase?

I agree that if price discrimination would be profitable, then it can support a viable theory of harm, even if the price discrimination couldn't be implemented perfectly. But if you look at a marketplace and you see that very similar customers are buying from many different suppliers—then I think at some point you have to conclude that trying to price discriminate against a certain group of customers might not be viable or profitable, not just that it wouldn't be perfect.

CARL SHAPIRO: I agree with that. I would also bring in supply side substitution: if there are suppliers who are serving other types of customers, you have to ask whether they easily could and would serve the targeted customers in the event of a price increase directed at those customers.

DAVE GELFAND: So far we've been talking about this as a market definition exercise but again, we should come back to the point that the ultimate purpose here is to try and figure out what the effects are. A lot of the arguments about that go into this market definition exercise related to whether customers turn to alternatives. Will they turn to alternatives? Those issues feed into the parties' arguments about competitive effects as well.

So you define a market and you get some shares and maybe the shares are high and maybe the court views it as presumptively a violation of Section 7. But parties are still free to come in and bring all that same evidence to bear on the issue of whether there's a competitive effect, whether the presumption is rebutted in the particular case. If it's a close call on these questions of whether these can identify a discrimination market or whether you can identify a cluster market, a lot of the same factors that make that a close call can rebut the presumption even if you have high shares, and can be used to persuade the court that those customers are not going to suffer anticompetitive harm as a result of the transaction. They have alternatives to turn to, the suppliers are not going to have an incentive to raise price, there are potential entrants, potential repositioners, etc.

DEBBIE FEINSTEIN: If you go back to the Guidelines, the targeted customers and price discrimination section comes before the market definition section; it is not part of market definition. Courts may discuss it as part of market definition, but I think over time, courts will understand we are talking about the impact of a transaction on a particular group of customers and not need to include the customers as part of the market definition.

MANDY REEVES: Following up on David's comments about entry, I'd be interested to hear the group's thoughts on how you think about entry from the standpoint of analyzing the likelihood that a transaction will have competitive effects. In the case of *Staples/Office Depot*, for example, you had the parties arguing that Amazon was a growing competitive constraint, which the court dismissed. In Google/AdMob, the FTC declined to block the deal because of Apple's entry. What's the right way to think about the standard for assessing whether a relatively new and disruptive entrant is or will become a sufficient competitive constraint?

JEFF PERRY: In many ways, this is a highly case-specific and fact-specific question. But one overarching point I want to make is that, when you're analyzing competitors with different business models, there needs to be symmetry in the analysis so that a disruptive market participant is given similar competitive weight, whether it's one of the merging parties or a third party. The danger, I think, is that if the Guidelines aren't applied correctly, or aren't applied faithfully, you end up looking at the merging companies when they have very similar business models and saying, "Aha, we're looking at narrow product markets, so these similar competitors must be the first and second choices for customers, and this third-party entrant with a different business model must be a more distant and less important competitor, so we're not going to give them much weight."

And the point I want to make is that, if that's your view, you should stay faithful to that view, so if instead the maverick or disruptor happens to be one of the merging parties, you shouldn't then change course and say, "Aha, these mavericks with different business models are the ones that really drive competition, so we're going to more heavily scrutinize an acquisition of a company like this." The role of a maverick, or disruptive entrant, shouldn't change depending on whether they are one of the merging parties versus a third party.

To your direct point about Amazon's role in the *Staples* case, this was a case where the FTC argued that Amazon's business model was more distant and that Amazon wasn't going to be significant enough to maintain competition. The parties obviously felt differently, and believed a point that comes up in a number of industries, which is that sometimes the real threat to a business and what really constrains their pricing and competitive behavior is not the company that looks most similar to them; it's the company that threatens to do something in a way that may be different and better. We argued that this view was reflected in Staples' and Office Depot's documents and in the companies' ordinary course thinking—and that was a factual question in that case, but one that comes up in many cases.

DEBBIE FEINSTEIN: I do not think it has to be symmetrical because we are looking at different issues. In one case, we are asking whether competition is going to be harmed because of a transaction. Considering whether the elimination of a new entrant might harm competition is not the same as asking whether new entry will be timely, likely, and sufficient to mitigate competitive harm.

[T]he question of whether a disruptive innovator will mitigate competitive harm cannot be answered simply by examining the parties' documents.

—Debbie Feinstein

But putting that issue aside, the question of whether a disruptive innovator will mitigate competitive harm cannot be answered simply by examining the parties' documents. For instance, if customers say—as they did in *Staples*—that the "disruptive innovator" is a sufficiently distant competitor, certainly in a bid situation, that competitor will not mitigate the harm, even if the merging companies tell you that is what keeps them up at night. I note that the fact that we look at it case by case is shown by the fact that in *Staples/Office Depot*, we brought a challenge based on harm in the contract market, but not in the retail market. And we made clear in *Office Depot/OfficeMax* that we were crediting online suppliers such as Amazon and competitors such as Wal-Mart in the retail market because that's where the facts took us.

JEFF PERRY: Yes, the point I'm trying to make is not that the company's documents should trump customer testimony or some other source. The point I was really trying to drive home is, if you believe in a given market that a certain company with a different business model is a significant competitive threat, the analysis shouldn't change depending on whether they are one of the two merging companies or whether they're a third party. It's either a constraint on competition or isn't.

I agree that customer views can be critically important and if customers on the whole don't consider a potential new entrant that has a disruptive new business model to be attractive or a good substitute, then that's important and should be given significant weight.

DAVE GELFAND: I'd like to make a couple of points in response to both Debbie and Jeff.

First, I agree that you can't rely on company documents exclusively. I think all categories of evidence have the potential to be dispositive and they also have the potential to be absolutely irrelevant. You can't categorically say without knowing the circumstances of a case how much weight to put on documents versus testimony versus economic analysis, etc. But that's just a general point.

To Jeff's point about disruptive competition, leapfrogging the existing competitors can still leave a very serious competitive issue. The example I would give is probably the most disruptive competition or among the most disruptive sources of competition we've seen in the last 15 or 20 years, namely online news competing with traditional newspapers. Online sources of news have taken an enormous amount of readership away from traditional newspapers.

But when we brought the case involving newspapers in Orange County, California, the fact is that competition between those two local hard copy newspapers which sat right next to each other on the newsstand still was very meaningful for the 200,000 people who consume their news through newspapers rather than online. So it's not enough to just say, "Well, there's going to be disruptive competition that's going to leapfrog." The question is, how important is the remaining competition? They might lose 80 percent of their market to an outside alternative, but they still compete for what's left.

And the third point I want to make and I think this is really important and it often gets confused, is the distinction between entry as it is thought about in the Guidelines or as we sometimes talk about it, and entry that's going to happen in any event. I think if you have an entrant that's coming in no matter what, then the analysis is whether that's going to leave the market so competitive that the loss of competition between the two merger parties just isn't going to make much difference. The entry that is technically talked about in the Guidelines is entry in response to a price increase or threat of entry that discourages price increases.

So it's not enough to just say, "Well, there's going to be disruptive competition that's going to leapfrog."

—Dave Gelfand

Often you'll hear somebody say, well, we have three competitors going to two, but there's an entrant about to enter so it's really a three-to-three transaction. That's not correct, it's a four-to-three transaction. There was going to be that third competitor no matter what, so that's how you have to analyze it. And that really gets mixed up a lot when people are talking about deals and even when evidence is going in at trial.

CARL SHAPIRO: I would just second that, Dave. In fact, in the *Staples/Office Depot* trial, Amazon obviously was a big factor in terms of their entering. They were entering the market with or without the merger, so the question was whether that entry would be so powerful as to negate concerns about the merger of Staples and Office Depot.

I actually tried in my testimony to make precisely the distinction that you just made, Dave. I even tried to show projected market shares given Amazon's own plans, which is a good way to handle entry that is not conditional on the merger. To be honest, I think the distinction between unconditional and conditional entry got lost in the larger battle about the significance of Amazon's entry.

JEFF PERRY: Yes, I generally agree with the distinction. At the same time, however, if you have a case where entry is not prompted by or enhanced by the merger, but instead is happening one way or another, I still would say—as I think Dave said—that if the entry is sufficient to deter or counteract any harm from the merger, then it "counts," and the merger shouldn't be a problem. The extreme example would be a situation where ten competitors are entering next Tuesday, and they're entering whether the merger happens or not. If that entry is sufficient to maintain competition, then the merger should not be a problem.

DEBBIE FEINSTEIN: I think it is quite clear that we always ask who else is entering. In the pharmaceutical cases, we ask about the other companies in the pipeline. In *Google/AdMob*, the Commission statement said that the Commission initially had concerns, but then saw new entry during the course of the investigation that alleviated its concerns.

We take new entrants into account whether or not they are entering as a reaction to a transaction. It is just a question of how we think about them—as committed entrants pursuant to Section 5.1 of the Guidelines or as new entrants pursuant to Section 9.

JOE KRAUSS: And doesn't the credit that you give to it really get back to what is the evidence that that entry is likely to occur?

DEBBIE FEINSTEIN: Right. Sometimes I think people think that as long as you can show entry it ends the inquiry. You have to ask what the entrant's market share and market impact is likely to be. In *Staples*, Carl actually calculated what Amazon's share would be in 2017. It was trivial.

So we agreed Amazon was coming; "yes, they're good." I mean Carl said on the stand numerous times, they're—I don't know what the adjective was, excellent, amazing, outstanding company but in . . .

CARL SHAPIRO: "Awesome" I believe is the correct word.

DEBBIE FEINSTEIN: Sometimes people think that as long as they can point to another company that is entering, our concerns will be eliminated. But that ignores the sufficiency prong of entry.

Sometimes people think that as long as they can point to another company that is entering, our concerns will be eliminated. But that ignores the sufficiency prong of entry.

—Debbie Feinstein

CARL SHAPIRO: Let me pick up on that. I think this is where the rubber hits the road. Suppose you've got a company that's coming to the market in the next six months let's say and everybody agrees about that. What share are we going to attribute to that company? Ideally, we'd like to project market shares including that company's presence and then use those shares for any sort of structural, Herfindahl type of analysis.

If the government does this, and the entering firm's share is low, the merging firms are going to say: "Come on, these guys are just entering. They may still be pretty small in 6 months or 12 months, but that share understates their competitive significance. They are growing rapidly and shaking things up." In practice, it can be very hard to tell whether that's true or whether this entrant is just coming in as a small player with limited competitive impact. I think that's where the real issue gets joined.

JEFF PERRY: Yes. Much of what Debbie and Carl said in concept I agree with. We should be conducting a forward looking analysis and trying to estimate what an entrant's market share will be over the near and medium term, and hopefully doing more than just projecting market share, but also thinking more broadly about what their competitive significance will be going forward. I think we agree that's the right way to think about it. This is one where, on the facts of particular cases, obviously we come out very differently in terms of what each side thinks the right answers are but I think for the most part we agree on the question.

I also want to echo something Dave said about disruptive innovators. When you're thinking about this disruptive competitor with a new business model coming in you've really got to look at the particular facts and circumstances to determine how competition will be affected. In some cases that disruptive competitor comes in and steals customers away and essentially shrinks the size of the existing market and creates a new and distinct market. In that case, which I think is the newspaper example Dave gave before, competition within the old market remains important.

But again, every case is different. There are some industries where a company faces a disruptive new competitor and they start bleeding customers, but instead of two distinct markets being created the incumbent has to continue competing against this disruptive entrant to try to keep customers and win new ones. In other words, the customers don't really separate into distinct, identifiable groups, and so the new entrant will continue to compete against and constrain the existing competitors for all customers. So I really just want to stress that this is a fact intensive inquiry, and you could see both flavors of this.

DAVE GELFAND: I agree. And even if they have an identifiable set of customers, they might still choose to compete to retain a broader set of customers. So it is highly fact specific.

JOE KRAUSS: We've been talking about innovation markets and it gets back to the 2010 Merger Guidelines, does it adequately address innovation markets? And is this a place where the next administration might consider revisiting and seeing if there are any places where the Guidelines can be improved with dealing with these types of markets?

DAVE GELFAND: I'll take a quick run at that. I don't know whether the next administration can improve on it or not. It's actually just to me an undeveloped area of the law. People don't quite know how to think about innovation markets in the context of a Section 7 case, you can't really measure it. If you're talking about a pure innovation market where the question is whether there are going to be fewer inventions, I can't really point to which products it's going to be in. I just know these are the two companies that are doing a lot of research in a general field and if you lose competition between them there are going to be fewer inventions.

I don't know, it's kind of hard to find a case on that, it's kind of hard to find a way to model that. There's certainly disagreement in the literature about whether even going from two to one, much less three to two, or four to three, whether any of that increases or decreases the incentive to innovate. There are situations where combining R&D programs can lead to more innovation.

So how you capture that in a set of Guidelines when there haven't been any cases litigated that have really zeroed in on that issue, when there isn't a well-developed body of economic consensus around how to think about it—I think that's a big, big challenge.

DEBBIE FEINSTEIN: The phrase innovation market gets used to describe a vast amount of things that are not actually what I think of as a classic innovation market as Dave has explained. The Guidelines are certainly able to take into account R&D concerns in addition to product concerns; that was the case in the DOJ's *Tokyo/Electron* challenge. *GM/Toyota* also raised innovation concerns. The FTC's investigation of *Genzyme/Novazyme* (which it ultimately closed) is often referred to as an innovation market case. It was about future competition in a very identifiable product. So not everyone would call that an innovation market.

In contrast, innovation markets are often more generalized innovation concerns, but for products that are not yet identified. There can be a concern that merged firms might compete in a to-be-determined product because they both have a history of innovation. This is an issue the Commission considered in its investigation of Teva/Allergan, e.g., were Teva and Allergan uniquely able to innovate? As the Commission statement makes clear, it did not find such a concern.

So I think it is important to distinguish between the precise innovation concerns at issue in a given matter.

DAVE GELFAND: I agree.

CARL SHAPIRO: Most of the time when people talk about an innovation market, they're really talking about competition in some product market in the foreseeable future

This was certainly true in the Genzyme/Novazyme case, and I would say other pharmaceutical cases as well. Personally, I prefer this framing: "Okay, here is the product, here are the customers, we can see the competition coming, and we believe these companies are likely to bump directly up against each other in the foreseeable future for certain identifiable products."

A broader type of case arises if the merging firms have the best capabilities in some area but we cannot reliably identify specific products that they will likely be selling in direct competition in the foreseeable future. This type of case would really fit more with the notion of an "innovation market" rather than a future product market. One could also call this a "capabilities overlap" that could affect a variety of future product markets. The key to such a case would be to identify the technical area where the firms have overlapping capabilities possessed by few if any other firms. Logically, such a case would present horizontal concerns. However, the anticompetitive effects are uncertain and could be very hard for the government to prove since it cannot identify with confidence even the products and customers for which competition may be diminished.

JEFF PERRY: When you get into potential competition and innovation cases, I think these are areas where extra caution is really needed. In a typical merger case, where you're assessing how a merger will affect competition in an existing market, even that analysis is necessarily predictive because it's forward looking. And when you get into potential competition cases or pure innovation cases, you get into areas where you're really pushing the bounds of prediction.

So I agree that these are important and hot topics, but I think we have to be realistic about how far forward the Agencies and courts can reasonably predict marketplace dynamics, particularly if we're talking about a true innovation case with affected markets that don't even exist yet. And one potential risk here is that you may condemn a proposed merger and sacrifice near-term and relatively certain efficiencies based on a much longer-term concern about amorphous harm.

I would also echo a point that Dave made, which is that there's very little case law in this area to fall back on. It's one of the things that was disappointing about the *Steris* case that it failed to offer much discussion or critique of the potential competition doctrine. And as a result, we're left in a place where, when it comes to potential competition or innovation cases, we're all citing these non-litigated merger investigations like Genzyme/Novazyme and Applied Materials/Tokyo Electron, where you never had a judge even weigh in on the theory of harm, let alone provide guidance on how the theories should be applied to the facts.

CARL SHAPIRO: Well, there is a line that I've seen in the press lately suggesting that antitrust is missing something because big tech companies are purchasing smaller upstarts which could threaten them down the line although they're not threatening them yet. I don't know what to make of that, but it's out there.

JEFF PERRY: Yes, it's out there, but this is potentially a dangerous area for false-positives in antitrust enforcement.

In many of these potential competition type cases, you have transactions that can be tremendously procompetitive—think about the pharmaceutical area, where you have a whole industry of small innovative companies that are really great idea factories but may be poorly capitalized, or without the resources to really complete R&D, or get to scale production, or actually get a product distributed efficiently to customers. And as Dave and others have mentioned, there can be huge efficiencies—and not just financial efficiencies—but real benefits to patients that come from these transactions.

So when you're thinking about possible competitive harm from these types of transactions, there's often so much on the other side of the ledger that I think we've got to be really cautious about enforcement here.

DAVE GELFAND: Yes, and if you're referring to the same sort of commentary that I'm thinking about, Carl, there are several things missing from that. And I view it as a relatively superficial view point to have been articulated.

First of all, you've got to be able to predict something about future competition. You can't just say well, large established companies shouldn't buy startups or innovators. You've got to predict something about the competition that's going to be lost and it's very speculative when you have a startup company.

Second, the analysis needs to incorporate how the large company is going to improve what the startup or the smaller company brings to the market. They're going to invest, they're going to combine it with their platform, and they're going to probably bring a lot of great benefits to what that smaller company has to offer.

Third, you can't forget about the incentive that smaller companies have to invest in the first place, which is usually to be bought by the highest bidder. And if you start interfering with that dynamic, you really run the risk of discouraging investment in biotechs and tech startups and that's a very dangerous path to start going down based on a speculative competition theory.

And one other problem is you can't win that case as a government enforcer because you've got serious litigation risk trying to find a line of commerce in which competition would be harmed.

JOE KRAUSS: Let's finish with efficiencies. Debbie, this best starts with you because I was intrigued by your blog in March, and it really hit home with me in discussing efficiency arguments with clients because every time you try to point to some government action evaluating efficiencies, it's a litigation where the government is trashing the efficiencies claims for the most part. This makes it difficult to talk to clients about how important efficiencies are when they see that and say, well why do I go through the effort to try to do that?

What can the Agencies do and what can we as private practitioners do to better articulate the true standard in terms of how the Agencies are evaluating efficiencies in mergers and not be tilted by that skewed perspective if you only look at the litigated cases?

DEBBIE FEINSTEIN: I think the disconnect is that business efficiencies are not Merger Guidelines efficiencies. Often we keep hearing for months about the business efficiencies before the parties focus on what we might consider efficiencies under the Guidelines. It's great that you think you're going to get $2 billion in cost savings, but come to me with a number that reflects an honest assessment of what meets the Guidelines test.

I often hear about nebulous best practices that one party can bring to another. But these are not best practices arising from one party being able to share a particular technology with the other. Rather, parties claim that one firm has smart people who have developed great practices that they can apply to the other firm. But this is clearly not a merger specific benefit.

Similarly, we often hear about cost reductions from rationalizing suppliers. Sometimes those can be credited, but often, the companies are already beginning that effort and they include in their efficiencies everything they will achieve unilaterally and everything that they would do together. Focusing only on the merger-specific and cognizable efficiencies to give us a reasonable assessment of efficiencies from the outset will save a huge amount of time.

In *Sysco*, we recognized there would be some efficiencies. But even their own economic experts didn't agree on the numbers. And what their experts said in court was much lower than what they had argued to us throughout the investigation. It would have been more useful for them to come in with those lower numbers from the outset. Instead, we did the work to come up with a reasonable assessment.

The second point is that parties often fail to consider the extent to which the efficiencies would be passed through. For instance, in bid markets, the economics make clear that not all efficiencies get passed through. Yet, parties often don't take on this issue.

In the early stages, come in with a reasonable number that reflects the Guidelines approach and some consideration of pass-through so we can start from a reasonable point and go from there. Then we're in a position to say "Great, if you are right on that number, that would address our concerns so now let's all dig a little bit deeper to see if those numbers hold up." But we often start so far apart that there's no way to have that reasonable conversation.

CARL SHAPIRO: I think the situation regarding efficiencies is unfortunate and could be improved upon. I say this having seen from both sides how efficiencies are viewed. The Agencies are very skeptical of efficiencies and have a high bar before they are credited. In part because of this, merging companies often seem to say: "Well, let's not seriously develop and present an efficiency claim early on because we doubt it will get us very far." The net result is that the merging companies do not develop an efficiency claim that meets the Agencies' standards, particularly as regards merger specificity. Or they present an efficiency claim later, which may be less credible.

I think progress could be made, at least in some cases, if merging companies went in earlier with a credible efficiency claim and if the Agencies were more willing to engage with the merging parties on such claims. I realize that it can be very difficult to develop a detailed, credible efficiency analysis, as this often requires combining confidential information from the two companies. The DOJ and the FTC could reward such efforts by taking them seriously and indicating which parts are convincing and which are not, giving the merging parties a chance to refine and strengthen their efficiencies claims.

More generally, if the merging firms can tell a credible goodness story with their merger at an early stage of the investigation, it affects the Agency's thinking about the deal, even if the Agency sees some problems.

I think progress could be made, at least in some cases, if merging companies went in earlier with a credible efficiency claim and if the Agencies were more willing to engage with the merging parties on such claims.

—Carl Shapiro

DAVE GELFAND: I was simply going to say that one of the things I was struck by during my three years at DOJ was—and I'm not speaking about any particular case now because there were some cases in which a stronger showing was made on this topic—but I was struck by how superficial the efficiencies arguments often were. They weren't even arguments half the time, they were just statements to the effect that millions of dollars in overhead would be saved by firing a lot of people.

As Debbie said, parties really need to do something that ties in to merger specificity and the benefit that the market will receive from it.

CARL SHAPIRO: The biggest opening here, in my view, is for companies that can show efficiencies they have actually achieved in other deals that are comparable to the deal on the table. I thought this was a big opportunity for Staples, given the Office Depot/Office Max deal that had happened just a few years earlier. And it's a pity they never put on a defense so their efficiency claims were never properly presented in court and subjected to cross-examination. Those claims were disputed by the FTC, but Judge Sullivan never had the opportunity to ask questions of the efficiency witnesses on either side.

JEFF PERRY: I don't agree with that, but I also don't want to re-litigate the *Staples* case, so let me just briefly say this. The expert reports, documents, and efficiency arguments in the *Staples* case were all in evidence. The fact witnesses and expert witnesses were all deposed at least once; so the efficiencies evidence was in the record, but obviously the claims were not ultimately credited by the judge. As Carl points out, there was a recent (Office Depot/OfficeMax) transaction that looked very similar and led to hundreds of millions of dollars in annual savings that I don't think anyone debated. And Staples' own files in the current transaction supported the point that the current acquisition was motivated by, and the valuation was driven by, significant efficiencies of more than a billion dollars per year. And yet in response, the FTC's efficiency expert said there would be zero dollars in cognizable efficiencies, literally zero dollars. So you can draw from that what you will, but you can see how the private bar or the business community might see that as extraordinarily skeptical.

On the private bar side, there's room to get in and engage early and more effectively. And respectfully, on the Agency side, there's room to give a little more credit to efficiencies.

—Jeff Perry

To your earlier point, I do think that litigation cases provide a skewed sample set—I agree completely. First, because the Agencies are in litigation mode and at that point they've made a decision to challenge a transaction, and they do what they should do—they go in guns blazing to try to win that case. But second, and I think this is reflected in the Guidelines, efficiencies really matter the most in marginal cases. So if you bring me a five-to-four merger with combined market shares in the high 20s, I would say get your efficiencies arguments in order, let's engage early, let's do everything that Carl, Debbie, and Dave said.

But, if there's a transaction that the Agencies believe is not a close call, and they believe will lead to significant harm, it's hard to advise a client that efficiencies are going to be given significant weight. There's also the question of whether the level of proof required to demonstrate efficiencies in that subset of deals may exceed the level of proof or certainty required when analyzing competitive effects. And, there's a real risk in these transactions that if you make a strong efficiencies argument, it can be flipped against you where the Agencies may say, "Aha, clearly these smaller competitors don't have the scale to compete and you've made that clear by arguing that this transaction will lead to efficiencies."

So I agree with Carl on the fact that we're in somewhat of a bad cycle and there's room for improvement on both sides, frankly. On the private bar side, there's room to get in and engage early and more effectively. And respectfully, on the Agency side, there's room to give a little more credit to efficiencies and to more fully appreciate the challenge in quantifying forward-looking efficiencies to the ledger level of detail.

DEBBIE FEINSTEIN: Where the intuitive story of efficiencies makes sense and is consistent with other facts we are hearing, we do not necessarily need to have mathematical precision on the efficiencies. But often we hear these contradictory stories. On the one hand, we will get scale economies and need those to compete, but the small competitors will constrain any post-merger exercise of market power. That may be right because you have built up an inefficient system but we need an explanation of the seeming inconsistency.

MANDY REEVES: I think that's a great place to end. Thanks everyone for a terrific discussion. ●