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INTRODUCTION

Antitrust litigation often confronts situations where predicted effects point in both directions. If every important effect pointed the same way, the court could either dismiss the complaint or else apply the rule of per se illegality. In most serious cases, however, some factors indicate competitive harm, while others suggest benefit. One often misunderstood issue in addressing such practices is the role of balancing, which courts often purport to do in cases under antitrust's rule of reason.[1]

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1. *See, e.g.*, Gorlick Distrib. Centers, LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1024 (9th Cir. 2013); Hairston v. Pac. 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996) (requiring fact finder to consider whether anticompetitive effects outweigh competitive effects); Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (similar). Other decisions speak of "net" effects, suggesting balancing although not doing it. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771, 782 (1999); Atl. Richfield Co. v. USA Petroleum Co. 495 U.S. 328, 342 (1990) (per se and rule of reason analysis are ways of

This paper argues that "balancing" is not a good description of what courts actually do in rule of reason cases under the Sherman Act, although it more accurately describes merger analysis under the 2010 Merger Guidelines (Guidelines). "Balancing" requires values that can be cardinally measured and weighed against each other. The factors that are supposedly balanced in Sherman Act cases almost never fit this description. Even if the things requiring balancing did come in cardinal units, most times the courts would not have the tools necessary to make and apply the measurements. Instead, balancing approaches are usually binary rather than cardinal. They are more like off and on switches that go in one direction or the other.

By contrast, merger analysis under the Guidelines concentrates on price effects, considering whether the downward pricing pressure resulting from merger-induced efficiencies is sufficient to offset the upward pricing pressure induced by the merger itself.[2] This is the only area where antitrust involves meaningful balancing.

As a matter of statutory law and precedent, Sherman Act rule of reason cases and merger cases seem very different from one another, but they have important points in common. First is a claim of competitive harm that requires the court to assess the power and the severity of a threat to competition. Second are offsetting justifications offered to show that the conduct is competitively harmless to consumers or even perhaps beneficial.

I.
SHERMAN ACT BALANCING AND THE *O'BANNON* CASE

Aside from naked price fixing, market division, and a few boycotts, most agreements among competitors are addressed under the rule of reason, which requires the challenger to show that the defendants collectively have market power and that the agreement reduces or threatens to reduce competi-

determining "whether . . . anticompetitive effects outweigh . . . procompetitive effects," although not doing any balancing in this case). Additional decisions are discussed *infra*, text at notes 5–9.

2. *See* discussion *infra*, text at notes 38–40.

tion.[3] Today, the courts pursue rule of reason analysis through a verbal sequence something like this: first, the plaintiff has the burden to show a prima facie anticompetitive restraint, which requires proof of power and a threat of anticompetitive effects. The burden then shifts to the defendant to show some justification for the restraint. If the defendant succeeds, the burden shifts back to the plaintiff, who can then show that the proffered justification was either a pretense or else that a substantially equivalent benefit could be achieved by a less restrictive alternative. If a less restrictive alternative is available, the court condemns the restraint because the same effects could have been achieved in a less anticompetitive manner. If no such alternative is offered or available, the court must balance the anticompetitive effects of the restraint against the non-pretextual defense.[4]

In its *Apple e-Books* decision, the Second Circuit believed that the need to balance is what justifies application of antitrust's rule of reason, reflecting language in Supreme Court decisions.[5] The court then decided the case under the per se rule, however, without doing any balancing because it involved a naked restraint on price. Speaking of both Sections 1 and 2 of the Sherman Act in *Microsoft,* the D.C. Circuit stated, "courts routinely apply a . . . balancing approach" under which "the plaintiff must demonstrate that the anticompetitive harm . . . outweighs the procompetitive benefit."[6] But then it decided that case with almost no balancing, giving only some general statements such as the need to "balance cost savings against

3. On multifirm exercises of market power, see 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1574 (4th ed. 2014).

4. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1504–1507 (3d ed. 2010).

5. United States v. Apple, Inc., 791 F.3d 290, 321 (2d Cir. 2015), *cert. denied,* 2016 WL 854227 (Mar. 7, 2016). *See also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring) (balancing involved in deciding whether to apply per se rule); Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 486–87 (1992) (Scalia, J. dissenting) (difference between per se rule and rule of reason is that latter requires balancing); Northwest Wholesale Stations, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) (per se rule appropriate when "any offsetting efficiency gains" are unlikely). *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law,* 116 COLUM. L. REV. (forthcoming 2015), (discussing these cases and others).

6. United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

reduction in consumer choice," but not offering any metric for doing so.[7] If the defendant offered a nonpretextual defense, the court simply accepted it, and it condemned behaviors for which no defense was offered. Even when courts describe this activity as balancing, they rarely discuss the impact of the restraint on prices. Many never mention prices at all.[8]

While the Supreme Court has both accepted and rejected defenses in rule of reason cases, it has only rarely described this analysis as "balancing,"[9] and it has never actually conducted any balancing. In *Oklahoma Board of Regents*, the Court considered an NCAA-imposed restraint on live broadcasting of television games, together with a defense that the policy promoted "athletically balanced competition." Without balancing the factors, it agreed with the lower court's conclusion that even if such a defense were legitimate, it could be achieved by a less restrictive alternative.[10] The more recent *Actavis* decision described earlier patent/antitrust cases as seeking to balance patent rights and antitrust concerns for competition, but it provided no metric for turning those interests into units capa-

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7. *Id.* at 88. The court also used balancing language in upholding a Microsoft restriction on alterations to the computer boot sequence to the extent that its original equipment manufacturer (OEM) changes would have made Microsoft's own interface completely invisible. The only actual balancing was the contrast between the "drastic alteration" of Microsoft's intellectual property on the one hand, against the "marginal anticompetitive effect" of prohibiting computer makers from substituting a different interface. *See id.* at 63:

> We agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process. We therefore hold that this particular restriction is not an exclusionary practice that violates § 2 of the Sherman Act.

8. *See, e.g.*, Hairston v. Pac. 10 Conf., 101 F.3d 1315 (9th Cir. 1996); Tanaka v. Univ. of S. Ca., 252 F.3d 1059 (9th Cir. 2001).

9. One instance is a footnote in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n. 27 (1977), which defended the legitimacy of "balancing intrabrand and interbrand competitive effects of vertical restrictions," but suggested no calculus for doing this and did not even reference the impact on prices or output. The Ninth Circuit accepted a balancing test in the *California Dental* decision on remand. California Dental Ass'n v. FTC, 224 F.3d 942 (9th Cir. 2000). However, the Supreme Court never embraced such balancing. *See* California Dental Assn. v. FTC, 526 U.S. 756 (1999).

10. NCAA v. Bd. of Regents, 468 U.S. 85, 97 (1984).

ble of being balanced.[11] Those earlier cases included such admonitions as a court's obligation to "balance the privileges of [the patentee] . . . with the prohibitions of the Sherman Act."[12] The methodology that the *Actavis* Court actually developed, which involved looking for payments that were very large in relation to anticipated litigation costs and the justifications for such payment, did not require balancing. The *Leegin* case, which applied the rule of reason to resale price maintenance (RPM) did not suggest balancing, although it did cite one economic text indicating that the overall cost-benefit consequences of RPM are "probably close."[13] Other recent Supreme Court decisions overturned lower courts and insisted on the rule of reason, but without discussing balancing.[14] At most, "balancing" for the Supreme Court refers to a few situations where the opposing harms and benefits are so grossly disproportionate that the court regards the position of one side or the other as almost frivolous.[15]

In fact, "balancing" is a very poor label for what courts actually do. Balancing requires that two offsetting effects can each be measured by some common cardinal unit, such as dollars or tons or centimeters, and then weighed against each other. The factors that courts consider under the rule of reason rarely lend themselves to such treatment. For example, the decisions referenced above that discuss the need to balance "patent rights" against the "prohibitions of the Sherman Act" provide nothing in the way of a calculus for weighing either of

11. FTC v. Actavis, Inc., 133 S. Ct. 2223, 2231 (2013) (discussing United States v. U.S. Gypsum Co., 333 U.S. 364, 390–91 (1948) and United States v. Line Materials Co., 333 U.S. 287, 308 (1948)). *See also* New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 659–60 (2d Cir. 2015) (product-hopping case tracking *Actavis* on this point).

12. United States v. U.S. Gypsum Co., 333 U.S. 364, 390–91 (1948).

13. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–90 (2007) (discussing FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 558 (3d ed. 1990).

14. Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010); Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

15. *E.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("Application of the Rule of Reason to these facts is not a matter of any great difficulty") (asserting that the need to protect patient care did not justify a dentist group's collective decision to withhold patient X-rays from an insurer in order to enable it to verify claims without discussing balancing). *See also supra* text accompanying note 7.

these interests. At best, "balancing" in such cases depends on a complex mixture of soft economic and even ideological judgments about the effectiveness and appropriate domain of the patent system against concerns about promoting competition. A Ninth Circuit case considering a liquor price posting provision declared that the court must balance the state's interest in promoting temperance with the federal interest in promoting competition.[16] It is a little like balancing pride and prejudice, or harmony and ecstasy.

The Ninth Circuit's 2015 decision in *O'Bannon v. NCAA* involved a player challenge to NCAA member agreements governing compensation for college football players.[17] One of these was an NCAA rule that prohibited member colleges from giving student athletes scholarship support up to the full cost of college attendance, including room, board, and collateral expenses.[18] Rather, the agreement capped compensation at a lower amount. The other was a rule that forbade athletes from being compensated by would-be endorsers or licensees for their names, images, or likenesses.[19]

The district court found an anticompetitive restraint, but accepted on principle the NCAA's defense that the rules were consistent with its efforts to protect 'amateurism' in collegiate athletics. It found two substantially less restrictive alternatives, however. On compensation, it found that NCAA member schools should be permitted to give students scholarships and grants that would cover the full cost of college attendance. Second, it held that member schools should be permitted individually to set aside deferred cash compensation for use of the students' names, images, and likenesses, so it struck down the agreement forbidding such compensation.[20]

The Ninth Circuit agreed with the district court that both sets of restrictions were prima facie anticompetitive but were at least partially justified by concerns about amateurism, which according to the Supreme Court must be given ample lati-

16. Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 902 (9th Cir. 2008).

17. O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Mar. 14, 2016) (No. 15-1167).

18. *Id.* at 1074.

19. *Id.*

20. *Id.* at 1052.

tude.[21] As a result it was necessary to determine whether these same goals could be furthered by less restrictive alternatives. Under Ninth Circuit law, proffered less restrictive alternatives must be "virtually as effective" in serving the NCAA's concerns about amateurism and "without significantly increased cost."[22]

The Ninth Circuit also agreed that permitting student athlete compensation to rise to the full cost of attendance, but not more, could preserve amateurism. Here, "[b]y the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." Thus,

> In holding that setting the grant-in-aid cap at student-athletes' full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmance of this aspect of the district court's decision should be taken to establish only that where, as here, a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.[23]

The Ninth Circuit concluded, however, that permitting students to receive deferred compensation for their names, images, and likenesses did not meet its test for an appropriate less restrictive alternative. Allowing the students to receive such compensation would "vitiate"[24] their amateur status to the extent that it would increase their remuneration beyond the cost of college attendance. The court thus drew a hard line at an unweighted concept of amateurism that permitted the NCAA to limit students to full college costs. It also rejected the district court's conclusion that that these sums would be mod-

21. *Id.* at 1074 (discussing NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) and Law v. NCAA, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.").

22. *Id.* at 1074 (quoting County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).

23. *Id.* at 1075.

24. *Id.* at 1077.

est, indicating that it is not an antitrust function to regulate the size of a restraint, but only its existence. As the court observed:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.[25] In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA "ample latitude" to superintend college athletics, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.[26]

To summarize, the court concluded that (1) the agreements limiting student compensation were prima facie a restraint on trade under Section 1 of the Sherman Act; but (2) concerns about preserving amateurism justified the NCAA's rules prohibiting compensation in excess of the full cost of college attendance by eligible athletes; but (3) these concerns did *not* justify rules setting compensation rates lower than that amount.

The district court's "less restrictive alternative," which permitted students to receive deferred compensation in a trust fund of up to $5000 per student per year of eligibility, was really nothing more than disguised price administration. For example, if members of a joint venture are found to be unlaw-

25. *Id.* at 1079 (citing NCAA v. Bd. of Regents, 468 U.S. 85, 101–02, 120.

26. *Id.* One panel member dissented on this point, concluding that there was ample support in the record for the district court's conclusion that permitting small amounts of deferred compensation for students' names, images, and likenesses was a satisfactory less restrictive alternative. *Id.* at 1079–82.

fully fixing prices at ten dollars, lowering the price to eight dollars is not the type of less restrictive alternative contemplated by antitrust law. In this case the line between 'amateur' and 'professional' athletics was a well-established benchmark that courts had repeatedly approved.[27] In its own *NCAA* decision, the Supreme Court had emphasized the historic role of the NCAA in promoting amateurism in intercollegiate athletics.[28] 'Metering' small deviations is not an appropriate antitrust function any more than is the defense that a price fix is lawful if the fixed price is 'reasonable.' The court did not balance, but rather applied a purely binary distinction between amateur and professional play.

Consider the options available to an antitrust court in this case. It could have struck down all horizontal agreements capping compensation or limiting the players' ability to market their own names, images, and likenesses. In larger schools this would very likely have ended amateur collegiate athletics in

27. *See* Agnew v. NCAA, 683 F.3d 328, 345 (7th Cir. 2012); Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008) (upholding restrictions on recruitment of student athletes); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (upholding compensation restrictions); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584, 587 (E.D. Pa. 2004) (NCAA eligibility rules are noncommercial); Adidas Am., Inc., v. NCAA, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (NCAA restriction on size and type of manufacturing company logo that NCAA players could wear on their uniform was intended to preserve amateurism); Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other (Title IX) grounds*, 55 U.S. 459 (1999) (NCAA's enforcement of bylaw preventing post-baccalaureate student from participating in athletics at school different from the one in which she did her undergraduate work was not a commercial act and thus not within Sherman Act's coverage); Gaines v. NCAA, 746 F. Supp. 738, 747 (M.D. Tenn. 1990) (upholding no-draft and no-agent rules); Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (upholding compensation rules); Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975) (upholding eligibility standards and rule restricting athletic scholarships). *Cf.* Bd. of Regents, 468 U.S. at 123 (White, J., dissenting, noting unchallenged NCAA rules limiting compensation for student athletes). *See also id.* at 124 (noting "NCAA's fundamental policy of preserving amateurism and integrating athletics and education"), Several of these decisions also held that amateur collegiate athletics is not "commercial" activity, at least when it does not pertain to explicitly commercial contracts. *See* IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 262 (4th ed. 2013). For a different perspective, see Michael A. Carrier, *How Not to Apply the Rule of Reason Case,* 114 MICH. L. REV. FIRST IMPRESSIONS 73 (2015).

28. *See* Bd. of Regents, 468 U.S. at 88, 96, 101, 119.

high revenue sports, transforming the more successful players into professional athletes. If they were to unionize, any agreement they made with the universities respecting their own compensation would be assessed under the nonstatutory labor exemption to the antitrust laws, provided it was made in the context of collective bargaining. This describes the relationship between player compensation and professional athletes.[29]

The *O'Bannon* court could also have done what the district court did, which was to require that payments for names and likenesses of at least $5000 per year of eligibility be placed into a trust account for players until after they graduated. The district court reached this conclusion by holding that the concerns about amateurism were legitimate, but that the trust account was a less restrictive alternative.[30] However, that approach is nothing more than price regulation, equivalent to adjusting a cartel's price thought to be either too high or too low. In this case, the NCAA is a cartel of buyers, agreeing to suppress the price that they pay for student athletes.[31] The point of the less restrictive alternative test is not to turn the antitrust court into a price regulator, but rather to find *competitive* alternatives to a challenged restraint.

Third, the court could simply define what it means to be an "amateur" athlete, relying on a line of cases stretching back to the Supreme Court's 1984 decision in the *Oklahoma Board of Regents* case.[32] That status operated as an important binary switch, identifying a dividing line that had frequently been cited by both the courts and the NCAA's own standards. Under this view, "uncompensated" play meant just that: NCAA members could not collectively suppress compensation below the cost of education, nor could they agree to more. "Balancing" was not necessary, or else it meant nothing more than accepting the NCAA's concerns about amateurism as legitimate and identifying the singular spot that best satisfies them.

To be sure, there are other problems at work here. For example, some colleges and universities earn millions of dol-

29. *E.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (multi-team collective bargaining in NFL). *See* AREEDA & HOVENKAMP, *supra* note 3, at ¶ 256.

30. *See* O'Bannon F.3d 955, 982–83 (N.D. Cal. 2014).

31. On price fixing by buyers, see 12 HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 2010–2015 (3th ed. 2012).

32. *See* Bd. of Regents, 468 U.S. at 97.

lars from their high profile football and basketball programs, essentially taking a free ride on the backs of their student athletes. Further, paying them more may be a way of preventing collegiate superstars from quitting school early in order to play professionally. This is just another way of saying that antitrust cannot correct every market irregularity. Any fix that addresses all of these problems will probably have to come from Congress, and there is ample precedent for it to do so.[33]

II.
MERGERS, PRIMA FACIE ILLEGALITY, AND EFFICIENCIES

Prior to revised Guidelines issued during the Reagan administration, the antitrust law of mergers was much like rule of reason analysis in Sherman Act Section 1 cases. The courts spoke in broad terms about "injury to competition" or "protecting" competition rather than competitors,[34] but the references were vague and never accompanied by a useable unit of measurement. However, over a series of increasingly pointed revisions, the Guidelines have re-defined the goal as proscribing mergers that realistically threaten higher consumer prices. Mergers may also produce offsetting efficiencies, but these efficiencies will be credited only if they are sufficient to offset any price increase that the merger threatens.[35]

The Guidelines provide merger policy with something that the Sherman Act rule of reason lacks—namely, an approach that makes balancing at least theoretically possible. Mergers are subjected to a structural or behavioral test under either a coordinated effects theory or a unilateral effects theory, whose models predict the likely post-merger price in-

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33. *Cf.* Jung v. Assn. of Am. Medical Colleges, 184 Fed. Appx. 9 (D.C. Cir. 2006) (describing Congressionally created exemption to Sherman Act after district court condemned medical college residency matching program under antitrust laws; dismissing complaint).

34. *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 277–82 (1966) (concern to "protect competition against ever increasing concentration through mergers"); United States v. Phila. Nat. Bank, 374 U.S. 321, 362 (1963) (Clayton Act requires "appraisal of the immediate impact of the merger upon competition," but not discussing price); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (goal is to protect competition, not competitors, but not associating competition with lower prices).

35. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) [hereinafter 2010 GUIDELINES], https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

crease after providing a generalized "credit" for efficiencies.[36] In litigation, that test represents the government's prima facie challenge to the merger on the theory that prices are likely to rise. If the test is met, then the burden shifts to the defendant to show efficiencies that outweigh the credit. These efficiencies must be both merger-specific, which means that they would not likely occur absent the merger, and also of sufficient magnitude to reduce the predicted price to no higher than premerger levels.[37]

Although the Guidelines give the enforcement agencies wiggle room, their stated test for competitive harm approximates a "consumer welfare" standard. In antitrust parlance, "consumer welfare" measures the impact of a practice on consumers, principally consumer prices, after accounting for offsetting producer gains. A merger is acceptable only if efficiencies are sufficient to ensure that prices after the merger are no higher than they were prior to the merger. By contrast, a "general welfare" test nets consumer losses and producer gains against each other, proclaiming a practice to be efficient if producer gains exceed consumer losses, even if consumer losses are real. While the Guidelines never speak expressly of "consumer welfare," they do make post-merger price increases the central standard for assessing merger illegality. A merger is lawful only if, after efficiencies are considered, consumers are unharmed.

The government's approach under the Guidelines has provoked the criticism that the government's burden in making out a prima facie case is relatively simple, relying mainly on structural evidence and predictions extrapolated from observed responses to price changes, while the defendants must provide concrete evidence of offsetting efficiencies.[38]

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36. *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E.J. THEORETICAL ECON. 1, 9–10 (2010); Dennis Carlton, *Revising the Horizontal Merger Guidelines*, 6 J. COMPETITION L. & ECON. 619, 641–44 (2011); Gregory J. Werden & Luke Froeb, *Choosing Among Tools for Assessing Unilateral Merger Effect*, 7 EUR. COMPETITION J. 155 (2011).

37. 2010 GUIDELINES, *supra* note 35.

38. *E.g.*, In re Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, FTC File No. 131-0087 (F.T.C. Apr. 11, 2014) (Wright, Comm'r, dissenting) (protesting that "the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity with that faced by the parties with respect to efficiencies").

However, this criticism is not well founded. Firstly, when the government makes a prima facie case, it already takes into account what might be considered 'ordinary' or typical efficiency gains that mergers are likely to produce. Particularly for unilateral effects mergers, it uses a presumptive formulation, assuming efficiency gains of as much as ten percent.[39] The efficiencies defense is thus relevant only for substantial efficiencies that exceed those already accounted for in the government's evaluation.

Secondly, efficiencies relate to the production and distribution processes of the merging firms themselves, so this information is uniquely in their possession. Further, firms are responsible to their shareholders and the failure rate for mergers is quite high. A large percentage of acquiring firms lose money both in the short and middle term after a merger.[40] As a result, one must presume that firms research very carefully before making an acquisition. At least the acquiring firm should have pretty good information about the source of any increased profits from a merger. The burdens that the law assigns are consistent with the types and quality of information that the parties control.

One additional and rather sobering fact is the record of post-merger pricing. In 2007, the Antitrust Modernization Commission suggested that empirical studies be done concerning post-merger price and output performance.[41] Several of these studies have now been conducted, but more are

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39. Herbert Hovenkamp, *Antitrust and Efficient Mergers*, __ GEO. MASON L. REV. __ (2017), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664266.

40. BARBARA S. PETITT & KENNETH R. FERRIS, VALUATION FOR MERGERS AND ACQUISITIONS 8–9 (2d ed. 2013) (value of acquired firms go up in short term, while value of acquirer declines in both short and medium term); G.A. Jarrell, James A. Brickley, & Jeffry M Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980,* 2 J. ECON. PERSP. 49, 53 (1988) (successful bidders in tender offers showed statistically significant gains in market value in the 1960's and 1970's, but statistically insignificant losses in the 1980's).

41. ANTITRUST MODERNIZATION COMM'N REPORT AND RECOMMENDATIONS 61 (2007) (urging under Recommendation 10b that the agencies to do more retrospective research on effects of merger enforcement decisions). *See also* Orley C. Ashenfelter, Daniel Hosken, & Matthew Weinberg, *Generating Evidence to Guide Merger Enforcement* (Nat'l Bureau of Econ. Research, Working Paper No. 14798, 2009), http://www.nber.org/papers/w14798.pdf (describing the necessity of retrospective analysis of past mergers in building an empirical basis for antitrust enforcement).

needed before we can draw strong conclusions.[42] Many of the studies examine "marginally legal" mergers—that is, mergers that were close to the threshold for illegality under the Guidelines' standards at the time they were examined but were nevertheless allowed to proceed, in some cases after partial divestitures or other relief. The majority of these studies reveal post-merger price increases, some of which are substantial. The methodologies of some of these studies have been criticized, however, and clearly more work needs to be done.[43]

In any event, assuming that a significant portion of these studies are correct, several alternative explanations could be considered. The most obvious one is that the standards for prima facie illegality articulated in the Guidelines are too lenient, at least as the agencies apply them. As a result, too many anticompetitive mergers are permitted. Another is that the government's blanket presumptions about merger efficiencies are too generous. It is unlikely, however, that post-merger price increases occur because the government has accepted efficiency defenses too readily. In fact very few merging parties have succeeded in proving efficiencies sufficient to undermine a prima facie case against a merger.

The Merger Guidelines as currently formulated are an instance of balancing done right. First, stating consumer price increases as the principal concern creates a unit of measure that makes balancing at least conceptually possible. Second, whatever the relative advantages or disadvantages of a consumer welfare test, the fact is that the consumer price test articulated in the Guidelines is easier to administer than a general welfare test. In order to estimate general welfare effects, one must be able to quantify consumer harm, which includes not only higher prices but also deadweight loss. This requires information about the shape of the demand curve. In addition, offsetting efficiencies must be assessed and netted out. This requires a court to look not only at per unit cost savings, but also at the output over which those costs will be spread. If

42. For a catalog, see Hovenkamp, *Efficient Mergers*, *supra* note 39; JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014). *See also* Orley Ashenfelter, Daniel Hosken, & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67 (2014).

43. Gregory J. Werden, *Inconvenient Truths on Merger Retrospective Studies*, 3 J. ANTITRUST ENFORCEMENT 287 (2015).

the merger actually raises prices, then any achievable efficiencies will have to occur at lower output levels than prior to the merger. While that is hardly impossible, the range of efficiencies available at a reduced output is significantly less than the range that results from an output increase.[44]

By contrast, the consumer price approach taken in the Guidelines requires purely "vertical" queries about how much the merger tends to push prices up, and what the downward price adjustment resulting from the efficiencies would be. In most cases, both of those numbers are much easier to determine.

CONCLUSION

Whether the Guidelines approach to balancing can be migrated to general antitrust litigation under the rule of reason depends on the challenged practice. Joint ventures that have efficiency potential but threaten higher prices from collusion are a likely candidate. Practices that threaten exclusion are more difficult to evaluate. Practices whose consequences show up in the longer run will be particularly difficult, as will practices for which the defense has little to do with measurable prices. In any event, if the court cannot articulate a cardinal unit of measurement such as dollars for assessing competitive harm and offsetting efficiencies, then what it ends up doing is not "balancing."

In the vast majority of rule of reason cases, even complex ones such as, *O'Bannon,* real balancing is not necessary. The series of steps—first prima facie case, then defense, and occasionally inquiry into less restrictive alternatives—will be sufficient. Care must be taken to ensure that the defense is one that is really specific to the challenged practice—that is, that the efficiencies could not be earned otherwise than by the challenged venture. In addition, the tribunal must be sure that the proffered less restrictive alternatives ameliorate any competitive concerns and are realistically available. Close cases should be relatively rare, and when they arise, courts should lean toward dismissal when markets are poorly defined or shares are on the lower edge of illegality. In the rare event that balancing is necessary, courts should be aware that unless they

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44. *See* Hovenkamp, *supra* note 39.

have specific, quantifiable amounts to attach to competitive threats and offsetting gains, they are in hazardous territory. For that reason the courts should get out of the business of "balancing" abstractions, such as the impact on competition against the rights conferred by the patent system.[45] Values such as these are impossible to balance, except when they are so lopsided that little more than a casual observation is needed to determine that one is more significant than the other.

Finally, it is important not to forget that historically the equitable power of courts has been greater in Section 1 cases than in merger cases, and can be asserted over a wider range. As a result, remedies can be much more modest or more finely calibrated. For example, the remedies in the *Board of Regents* and *O'Bannon* cases were not to dissolve the NCAA or force divestitures, but rather to enjoin enforcement of the specific rules limiting the number of televised games in the first case, or the agreements limiting compensation in the second. This *cy pres* power of judges should not be overlooked. Just as contractual arrangements come in infinite varieties, they can also be fixed in infinite ways.

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45. *See* discussion *supra*, text at notes 10–12.