CEPR Competition Policy RPN Webinar

The New FTC_DOJ Draft Merger Guidelines: A Discussion with Susan Athey and Aviv Nevo

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With Susan Athey (Professor of Economics, Stanford Graduate School of Business and Chief Economist, US DOJ Antitrust Division) and Aviv Nevo (Professor of Economics, University of Pennsylvania and Director of Bureau of Economics, FTC).

Discussants: Mike Walker (Chief Economic Adviser, UK Competition and Markets Authority and Member, Competition Policy RPN) and Hans Zenger (Head of Unit, DG Competition, European Commission) compared notes and discussed the implications of this new document for enforcement across the globe.

Chair and Introduction by Cristina Caffarra (Competition Policy RPN Co-Founder and Steering Committee Vice-Chair) and Tommaso Valletti (Professor of Economics, Imperial College London, Research Fellow, CEPR and Leader, Competition Policy RPN)

Webinar Transcript *(slightly edited for clarity)*

Aviv Nevo:

[....] Please do submit comments. I'm not just saying that, we really are looking for feedback. And I think an event like this is one of the ways in which we're hoping to generate it. So let me step back a second before going to details to talk about the goals of the revision of these Guidelines. I think the main goal was to update the Guidelines to deal with realities of the modern economy. Now what that actually means from an economic perspective? it means sharpening the existing tools that we have, the methods, as well as adding new ones, and I'll talk more specifically about examples of exactly how we get them. Let me just take a second to lay out the structure of the Guidelines before going into more details. The Guidelines have, several parts, they start with an introduction, which is supposed to be high level, to be read really, by not necessarily to draw specialist messages. Then it goes into the heart of the document, 13 Guidelines, highlighting various potential concerns that the agency might have. The next section is a high level discussion of market definition, talks about some of the general principles. Then there's a section discussing rebuttal arguments, and it's a very important section, I will talk more about it later. And I encourage you, as you read the document to look at that section carefully. And next is a four part appendix that discusses the tools and methods and data that are used to explore the various Guidelines and the rebuttal arguments in more detail. So a lot of the details one would follow in the analysis are in the appendix. But it's important to note that the appendix is an integral part of the Guidelines. One of the comments that we got has been: by being in the appendix, are these less important? And from our point of view, absolutely not. The reason they're in the appendix, and we'll talk more about that later, is for readability. But I'll get to that in a second.

Each of the 13 Guidelines tends to start with a discussion of the relevant law, whether it's case law or the statutes, and then discusses the economic intuition, and tries to provide details for

implementation. So the idea is to really go from here's the law to here's what the agencies do with that law. And what is it they look at, many of the implementation details are provided in the appendix. And as I've already said, this is really done for an ability for readability. And to avoid repetition, because some of the same tools are used over and over again, in different parts.
Now, starting with the law in principle is a good idea. I think it really lays out clearly the path, from law to economics to implementation. In practice, you know, I have to be honest and say it's hard to achieve. And therefore created, I think, somewhat of a distraction. I therefore, urge you, as you read the Guidelines to not get stuck in the legal discussion and look beyond, there's a lot of really good stuff, once you get beyond the legal discussion. And this is especially true for an international crowd. The US case law has no jurisdiction outside the US, but the general principles of economics, the ones that we use to implement the law, you know, if you want to put it bluntly, last time I checked, demand curves are downward sloping on both sides of the Atlantic. And so there's a lot of good stuff. And just to be clear here, the discussion of the law is a good one to have. But putting it in the Guidelines creates a distraction and doesn't let us really dive into a lot of a lot of the good stuff that's there.

So one of the strengths, in my view of these Guidelines is that they clearly lay out the various avenues the agencies should explore when investigating a merger. This really opens the door to bringing in more and new economic ideas, okay, it has a lot of the traditional ways that we look at economics, but it also has a lot of new ways that really are essential if we want to look at many of the industries and situations that we face in the modern economy.

Another strength that I see is the removal of labor of labels, right? So, for example, we no longer talk about vertical and horizontal mergers, per se. And I think this is really important in the modern setting, you're having transactions with elements of horizontal and elements of vertical, so putting a label, is this a horizontal deal or not a horizontal deal I don't think gets us anywhere. What we can do by not having labels is to get quicker to talking about the substance. Okay, to me, substance means economics, right to talk about the harms, or the benefits of the deal. It lets us get there quicker without having to worry about, okay, what is the label that we need to put on?

So now let me turn to a few specific examples to illustrate these points. And I'm sure Susan is going to follow up with a few more examples. Let me start with the first Guidelines. And the first Guidelines is what's called a “structural presumption”. What it does is lays out concentration thresholds. And it basically says that mergers that exceed these thresholds are presumed to lessen competition. What's the idea here? It's, I think, a pretty intuitive line, if I asked pretty much, anyone in the audience to take a poll, what merger would it be more worried about a merger of ten to nine, or a merger of three to two? Not knowing much more, you'd probably say, I'd be more worried about the first. The thresholds are trying to capture that idea, and are really trying to capture both unilateral and coordinated effects. Now, some people are objecting to these types of thresholds, these kinds of structural analysis, they link to so called “structure conduct performance paradigm” - I don't really see that as the link, I think the general idea is supported by standard or kind of standard models. And the example I just gave, you don't need to go to models, right? Just ask which of the two cases before are you more worried about? it's probably the three to two. Now, one can say: Well, if that's all you did, that will be a problem. But that's not all we do, right? We treat this presumption as on thing, concentration measures are one thing we will get, but not the only thing. We look at it, sometimes it's a starting point. And then we look at sort of other arguments or other kind of evidence.
How do you push back against this kind of structural presumption? You do that with economic modeling and evidence, and the evidence can focus on benefits, and looking at rebuttal arguments.

So it's not that there isn't economic evidence, it will still be there, this is just the start of the analysis. In practice, the higher the concentration, or the change in concentration, the more convincing economic evidence needs to do to be to really rebut this presumption. Right? So if we're actually talking about a three to two, or a merger to monopoly, in a well defined market where we actually think entry is very difficult, you're going have to have a very strong economic argument to convince that the deal is not anti competitive. Also in practice, it's very unlikely that US agencies might actually decide on mergers just based on this, it's extremely unlikely that they will use this as a standalone basis unless they very strongly believe in the market definition. Think of the example I just gave of a merger to monopoly in a market that we really strongly believe is really well defined. And entry is very difficult. And there's no really offsetting efficiency, arguments and pushback. In most cases, what will happen is that this Guidelines would you be used together with others.

Based on conversations I had in the past few weeks, the idea of presumptions seems to come as a surprise to some people. But you know, but the use of presumptions is not new, and was very much present in 2010. I mean, if you read the language of 2010, it very clearly states that there is a presumption, the thresholds are a bit different. But the presumption is there. So really, the main change here is the fact that the thresholds are simply set to return to pre 2010 thresholds. But other than that, there's not a major shift from what was done in practice in 2010. Now, you might ask, well, why did we feel the need to mention separately? I think the answer is that part of what we're trying to do here, is to show that there's different channels to challenge a merger. Righ. But you know, there's going be a mirror side of saying, we’re not going to go and worry about structure at all, it’s too much about market definition, to get that structural assumption and go straight to competitive effects. And to have something symmetric, you almost need to have this as potentially a standalone. One of the uses, I can imagine where the structural case is strong, is that we really are going to save resources and can go directly to talk, about the various elements and models and so forth. And just say like, he case is so strong, that we can actually base a challenge based just on that. Okay. And finally, let me just note that in order to use this Guidelines, you need a probably a fairly narrow market definition. And in some cases, that's actually hard to do. That's where a lot of times we actually lose cases.

Those who are well familiar with 2010 will notice that we suddenly changed the language here. There was a use of market power. We now use lessening of competition. We do this for a couple of reasons. It really helps in connecting with the statute, US statute, but it also helps us in discussing evidence that hopefully I'll have time to get and, you know, the appendix discusses the data methods and tools used to measuring a listing of competition. It includes all the tools and models in 2010 and a few additions. One of the changes I personally like is the discussion of how we explore and present evidence. We discuss the gradual presentation of evidence starting from documents and testimony, when there is data to estimate diversion, maybe measure of upward pricing pressure and finally quantitative models, think of it as merger simulation. The idea is, these are all kind of methods we have been used to, we put on them based on their credibility, but we also emphasize that we use them to learn about ways in which competition could be lessened, And sometimes it is just not feasible, we don't have the data, we don't have the modeling ability, we don't have the time or the resources. So you can learn about lessening of competition in a variety of different ways. All of which tells you about the economics. All of these are indicative of lessening of competition, but we don't necessarily have to go all the way and making this point really relies on switching language, talking about lessening of competition.

And briefly, Guideline 3 which is about coordinated effects, has some new stuff in it. I'm not going to talk about details. There's some discussion of algorithmic pricing and aligning of incentives. I urge you to read those and look at them carefully. There are many other places that we build on the modern economic literature. I know Susan is going to be talking about some of those as well. So let me just conclude by acknowledging that these Guidelines are still very much a work in progress, we still have some work to do. I'm not going to talk specifically about where we think there's going to be changes. But having meetings like today, hopefully will help us get to where we need to get. Thank you very much. And let me turn it over to Susan.

Susan Athey:

Thanks very much Aviv for that overview. And again, I also want to reiterate that we are definitely very interested in getting comments, and we are certainly going to incorporate changes to the Guidelines. So thank you so much to everybody who's already submitted. And please do submit, I want to start by picking up on one of the themes that Aviv mentioned about how presumptions are rebuttable. That's maybe one of the most commonly missed things that I've seen in people reading the Guidelines.

The Guidelines are intending to be accessible. And at the very beginning, hopefully, a business person who was considering a merger, could pick up the Guidelines and get the idea of whether they needed an antitrust lawyer, whether they needed to dig in deeper, and it talks about the different ways that competitive concerns could arise, how could a merger possibly lead to a substantial lessening of competition? So the 12 Guidelines discuss what could be wrong with the merger, how the agencies would approach overall evaluating a merger, how competition might be harmed. But also consider whether there are reasons that this merger might be helpful to competition? And the rebuttal framework describes this and one thing I liked about the way that these the Guidelines are now framed is that we can start with how would competition be harmed. But then when we look at rebuttals, those can also be framed in terms of how competition might be helped. And we have tools such as the tools in the appendix, that can be used to assess the nature of competition and to quantify competition. They talk about how to provide evidence about competition, and those same tools can be used to assess whether a merger could even be helpful to competition. The one important sentence talks about how the merging parties might present evidence that no substantial lessening of competition is threatened by the acquisition. And it also talks about how the parties must show that these benefits that they are anticipating will pass through to competition.

So it's not enough that the merging parties benefit. For example, if you had a cost reduction, if you had two weak firms merging, you would need to argue that that merger would indeed make them more competitive as a result. And that applies to horizontal mergers. If there's a certain harm to competition that's identified, the merging parties have the opportunity to explain why they think that that competition won't be lessened. And I think it's very important, especially from the economics perspective, to think about the potential harm to competition in the context of this rebuttal framework. Could you say well, hey, here's a merger, I think this would be really beneficial for competition, it would make tougher competition, that that would lead to lots of benefits for training partners, but it looks like this merger might be prohibited through these Guidelines? And my answer would be no, if that merger improves competition, then the parties would have the opportunity for rebuttal. Now, the rebuttal section also tightens up a lot of loopholes, sometimes you don't need a merger to get those benefits. And certainly, we want to be clear that that the benefits need to be merger specific, they need to be verifiable. And we sort of tightened up the language to make sure that that's not confusing. I don't think the intentions are very different than the past. But it's clearer about what it is that the parties would need to do to meet that burden.

Then moving on to a few of the other parts of the Guidelines beyond horizontal. We have a Guidelines that talks about a merger that involves a product that rivals might use to compete. And people will recognize in the Raising Rivals' Costs theory there and the classic discussions of whether the merging firms would have the incentive and the ability to harm competition with rivals. By framing it though not in strictly vertical terms, we avoid arguing about the geometry of the merger and really cut to what is the core economics, avoiding confusion.

Moving on to something that's more new, we've brought back into our Guidelines a concept of extending or entrenching market power, which didn't receive a lot of attention in the 2010 Guidelines. And so there's a number of reasons to elevate this and discuss it in our merger Guidelines. First of all, starting with an example, what if in the 1990s Microsoft instead of building Internet Explorer, and then engaging in potentially exclusionary conduct, had said, Oh, it would be even easier as if we just bought Netscape. So you could try to analyze a merger like that under a Raising Rivals cost theory. But another way to analyze it that might hit the economics more head on is an entrenchment theory. And so this Guidelines about entrenchment would try to start with the market power of the firm while raising rivals costs is looking at sort of the changes in market power. The entrenchment really starts with the powerful firms sources of market power, and then how the merger might entrench that market power. And I think that hits the economics much more head on and really focuses your attention on the heart of the matter. Of course, if you have a firm with market power, then presumably there are some barriers to entry, and it focuses the inquiry on those barriers to entry and how the merger might interact with those barriers to entry.

Another important point here is that these mergers often do involve related products. And again, the best way to understand the merger might be in terms of increasing switching costs. When you look at the Guidelines, it's also useful to see a few important points, for example there's a sentence that highlights that we're not talking about mergers that are simple improvements to efficiency, but rather those that create artificial competitive advantage. And there's a discussion of the kinds of barriers to entry that might come into play here. Again, if you worry that this Guidelines might say that firms can't by anybody, I would return to the rebuttal framework, and say if a merger is going to be beneficial for competition, that would be the party's burden to provide evidence that in fact, the merger is beneficial to competition rather than entrenching monopoly.

Transitioning from that, we have several Guidelines that are really applications of core concepts from previous Guidelines. And I want to talk about two of those. One is the platform section. The platform section is important for a few reasons. First of all, when we update the Guidelines, we want to look out and see what's been happening in the economy. What kinds of mergers have we been seeing that weren't directly addressed, or fully enough addressed by previous Guidelines? platforms come immediately to mind. And over the last 15 to 20 years, we have seen several things: first, a lot more mergers involving platforms. Second, we've been able to assess from lived experience, barriers to entry seem to be important. And whether platforms are indeed frequently getting displaced, or whether some of them are maintaining dominance over a long period of time. And we can start to understand the sources of that, that sustained power. And then, of course, when we see this happening in the economy, the agencies learn from that experience. And the economic researchers build both theoretical models, as well as conduct empirical work to better understand these. And it's not that it's brand new, core economic concepts. But it's rather that there's details and we see certain patterns that are worthy of in depth detailed study. And so we, we better elaborate how those economics come to play. Now, in the specific case of platforms, there may be multiple theories implicated in a single merger, you might have something that relates to raising rivals' costs, buying a product that helps your competitors compete. But you might also have entrenchment going on at the same time. And there's also reinforcing effects. So one thing that Guidelines intends to do is to lay out these economics, which aren't impossible to understand, but involve multiple steps. And it can be difficult in a specific court case to lay out all of those steps. That puts a lot of burden on the plaintiffs to explain this core economics. So getting us a little bit closer to the economics that would matter then enables the parties in a merger to spend more time discussing the specific facts of the industry rather than having to start from scratch.

There's another Guidelines on labor markets, which also is really an application of core concepts in other parts of the Guidelines. I just want to mention and give credit to previous Guidelines that the idea that antitrust theory applies equally in buyer markets is very clearly laid out in previous merger Guidelines, in the United States and we have been successfully bringing cases in that area under the 2010 Guidelines, including, for example, the merger involving publishers where the main theory involves harm to authors who harm in the market for writing books. And that kind of monopsony case is perfectly consistent with the 2010 Guidelines. But over the last 15 years, we've gotten more experience looking at labor markets. And there's also been an explosion of empirical work documenting market power in labor markets. So we've updated the Guidelines to be more explicit about how all of these theories apply specifically to labor markets. When I think about the economics of this, it's really not hard. Every basic textbook for decades has already laid out the theories of monopsony including how they apply to labor markets. If you think for example of a hospital merger, if you have two hospitals merging in a city, and they're the main employers of nurses, after the merger, they'll recognize that if they expand their employment of nurses, they may have to pay all of their nurses more. So they would, after a merger, have the incentive to hold back a bit on employing nurses. And that change in incentives from the merger would lead to less nurses hired, worse service for consumers. And it also interferes with the whole underlying economic processes. That's how our market economy works. If prices for nurses go up, if wages go up, then people should go to nursing school or nurses might want to enter this market. But if we interfere with that competitive process, then when I'm old and go to the hospital, I'm not going to have enough nurses. And we're all going to be saying, wow, there's this terrible nursing shortage, why what happened? What went wrong? Well, we didn't allow the market to send the signal to nurses that these jobs are valuable, and then we won't get the entry of nurses in the long term. So this is kind of crazy. And it's strange to me that I have to reiterate that, economists would argue this is econ 101. It's not even econ 102. It's not radical. But it's very important. And so I'm proud of us bringing this to the forefront in these Guidelines, and making sure that we protect competition particularly in labor markets. So let me stop there. Thanks very much. And looking forward to the comments.

Tommaso Valletti:

Wonderful. Thank you very much, Susan. So now we turn to Hans Zenger, economist at a former colleague at the European Commission, and a very good friend.

Hans Zenger:

Many thanks Tommaso and Cristina for the invitation. And I start with the same disclaimer. I am of course also speaking in a personal capacity, and not as a representative of the European Commission. So first of all, I think, congratulations are in order to the US team, well done to them to get the Guidelines out. I know it's a tough process to go through a revision of Guidelines. And clearly, these Guidelines are a response to the structural increase in market power that we've seen over the past 40 years. So as we all know, globalization, technological change, had a huge impact on the economies, that is the market power that we see in our economies. At this time, merger control is as important as it ever was. And so in that sense, I think it's very easy to support the US efforts towards more vigorous enforcement of mergers. As Susan and Aviv mentioned, the Guidelines significantly expand the scope beyond horizontal. They include lots of interesting stuff on verticals and conglomerates and potential competition, dynamic competition, and so forth. And that's great and very exciting, that the scope of potential enforcement is increased. The Guidelines also bring to the forefront a number of really important current competition issues that we're seeing across the world, in modern markets, and maybe saw a lot less in the past. And in many instances, I think these theories that are reflected in the Guidelines reflect quite well the type of cases that we are exploring and the theories that we're exploring in Europe at the moment. Things like potential competition, monopoly, entrenchment, platform competition, and so forth.

One thing I want to emphasize in particular, is there is a significant section extending non horizontal cases beyond foreclosure. Traditionally, we as antitrust economists have looked at non horizontal cases simply through the lens of foreclosure because we said: with substitutes we'll look at overlaps and with complements we're looking at foreclosure. And I think in modern dynamic markets, that's sometimes too narrow view. Because in dynamic markets, the boundaries are often much less clear. And what is a complement today may very well be a substitute tomorrow. And so it's important to assess the sort of ecosystem theories and platform theories and entrenchment of dominance. And go beyond foreclosure in specific cases where it's needed. I think it's particularly needed in the circumstances that Susan pointed to where you have a dominant platform that acquires some complement that has scarce capabilities arising at the boundaries of what is currently the ecosystem of the dominant firm. Susan mentioned Microsoft and Netscape. That's a fantastic example, dominant tech companies very often are not so much afraid of direct head to head competition, because in their direct product market as it is right now, they're protected by entry barriers, network effects and scale economies. But what's really dangerous to them potentially, in terms of competition is something complementary arising at the boundaries of the moat. And then developing something into something else in the future, aligning with other people who are out there, and dynamically attacking the dominant platform. I think Google is probably a lot more worried about ChatGPT, and what people might do with it, and how it might be combined with other products, then about very direct competition in search. So I think it's amazing to see that in the draft Guidelines. And I very much think that's the right thing.

There is obviously also some different emphasis compared to European Commission policy, I think it's important to keep in mind in that regard that we have very different legal system, we have different legal mechanisms. So for instance, the US works a lot more with rebuttable presumptions than Europe. We also have different court environments, which shapes the strategy in which you want to bring cases. So there are different institutional dynamics. And I think, in large part, they explain the seeming differences in our approach, but ultimately I think we will be very much aligned. And I have no doubt that even though we may have different institutional starting points we will, in the majority of cases end up in the same place in Europe and in the US.

I will speak a little bit more about implementation, where I have some question marks. And my main comment there really is that the strong increased emphasis on concentration in some of the Guidelines sits a bit uncomfortably with an assessment of competition. That's particularly true with a non horizontal mergers. The way the Guidelines are written seems to endorse the view that concentration analysis is sort of end in itself. In Europe we do see concentration analysis more as a tool, you know, as one way of analyzing competition, but it's just one out of many tools and other tools are very important to identify anticompetitive conduct itself. It's not an objective in itself. It's competition law, not concentration law, so that that huge focus on concentration I do have some question marks with. Aviv was explaining that, you know, nothing really much has changed in that regard, especially with the horizontals, because there were presumptions before and that's obviously true. Yet the Guidelines seem to say for instance that concentration is problematic, even if it arises as a result of competition. So, efficiencies are not recognizable if they will accelerate a trend towards concentration. If you mean it differently, maybe it should be formulated differently.

An example I want to give of the question that I have is this retail concentration that we've experienced across the world, in the last 50 or so years, we had all these mom and pop shops, traditionally who then that merged, there was a huge increase in concentration and a trend towards chain stores and so forth. And, you know, at least in Europe, I would say that this kind of consolidation has, has been quite beneficial for competition, but these are a lot stronger and more competitive retailers now who act as purchasing agents for final consumers and that's been beneficial in particular for poor consumers. So you know, some processes of increasing concentration can be good for competition, and I think focusing too much on concentration, lose that out of sight.

I will mention non horizontals as well, at least sort of the main part of the text has huge emphasis on concentration. And at times, it seems to be vertical integration is something that's really inherently bad. And I know that's not how it is meant, because if you look at the individual examples, and Susan spelled out some of them, that's all good stuff. It's anticompetitive stuff that you want to go against. But I think some of the language in there simply gives the impression that vertical integration is viewed as intrinsically problematic. And I think that's not very helpful.

What I find great is the stuff on the mechanisms of entrenchment. Susan spoke about platform competition, I think that's really exciting and very helpful. The more general view on concentration, and much less sure. So we have all these technological innovations, which, in large part, results out of integration, and may bring substantial value. We know there's hardly anything that can be more competitive as integrated guys competing against each other, that's where really the full force of competition can come about. So I have some question marks with respect to these to these sections. I mean, for instance, when the Guidelines speak about using concentration in much the same way, for verticals and for horizontals. And using analog methods. I don't really understand what that means. It's very different settings, it's substitutes, versus complements. So the effect of concentration can be very, very different as we know. So overall, you know, while I personally find there is too much of an emphasis, probably for my personal taste on concentration as an end in itself, there's lots of great stuff in there. In particular extending the scope to verticals, to potential competition to labor markets and so forth is a great thing that will, will help enforcement not only in the US, but in the world. And you bring many new topics to the forefront of the debate, where as agencies we have to make progress. And I believe that we will be ultimately very much aligned in progressing these very important topics. So, congratulations again. And I'm really looking forward to working continuing to work with us agencies on individual cases. Thank you.

Tommaso Valletti:

Thank you, Hans. I'll pass to Mike. Of course, there are questions that I'm sure Aviv and Susan will want to address, but let's hear from Mike and then and then back to them.

Mike Walker:

Great, thank you. Standard caveat, I speak on my own behalf and not on behalf of the CMA, but I'm not going to say anything controversial, so that's not really an issue. Look I really like these Guidelines. And I really like the approach to the Guidelines. I like the fact that the focus is very much on the underlying economic intuition behind the various theories of harm. And I think that they actually provide real guidance. I mean, lots of Guidelines don't really provide guidance except to the chosen. And so I like the Guidelines, I completely agree with Aviv about the value of getting away from labels. If you're having a discussion and saying this is a horizontal merger, this is a vertical merger, you're in the wrong place, just look at the facts. So I really liked that aspect of it.

Now, I think Aviv and Susan are very careful to try and portray these Guidelines is yet nothing really to see here. Nothing really new, you know, just standard economics. I agree, completely standard economics. But actually, I don't think that's right. And I think there is a substantial break with the past, as Tommaso has said more than 1100 comments have been submitted already. I mean, that in itself says that something is going on here, and I think it's good. I really don't get the arguments that there's no economics in these Guidelines. To me it's pretty simple. It's not rocket science. It's just thinking about incentives in a straight line. And on that basis, these Guidelines do really well, you know, call me nerdy but incentives are mentioned 63 times in the text of not particularly long Guidelines, it's all about incentive and ability. Do they have the ability to cause harm, do they have an incentive to cause harm? It's not rocket science. I think it's really good. So I like that. And I think the howls of protest from much of the competition bar are actually a good sign that the Guidelines are broadly in the right place.

On structural presumption, there's quite a lot on structural presumptions. When we talk about about horizontal issues, there is basically no mainstream economic model beyond perfect contestability or some extreme model that doesn't suggest increasing concentration in concentrated markets is bad news for consumers. And so on that basis, I have absolutely no problem with structural presumptions, assuming your market definition is reasonable and you're confident of that. And obviously, if we're in a case where there's a huge argument of that market definition, then you're not really in the right place. But otherwise, I think these structural presumptions are good. We don't have structural presumption in our merger Guidelines. But we come pretty close to it, so I support structural presumptions, and I don't really understand why people seem to find the concept of a rebuttable presumption so hard, Susan said that people have read this and missed that. And I'm thinking I'm not quite sure how they're managing to do that, because it seems pretty clear to me. And that's the right place to be and it's good economics. And it's also good in terms of enforcement efficiency.
The whole section on talking about extending and entrenching dominance, as Susan said, is very different from 2010. I think that's a really important section. The idea that dominant firms might want to entrench their dominant position and do things to protect it, perhaps by extending an

ecosystem. The incentives to do that are really clear. And so it shouldn't be surprising that competition authorities are concerned about that. I particularly like the point where the Guidelines talk about the importance of thinking about transition points, where there might be a technological transition, for instance, and I think Susan mentioned something about ChatGPT. With respect to some issues around tech platforms, AI might be such a transition point. And so it's super important that we are alive to these issues around existing dominant platforms trying to entrench that position. So I really think it is good that the Guidelines do that.

Now labor market concerns. It's good that this issue is raised in these Guidelines, we've been thinking about it within the UK. From my point of view, whether some of these concerns are significant to the UK is largely an empirical matter, I've always taken the view that monopsony power tends to be associated with downstream market power that's captured anyway. My intuition is that's more likely to be an issue in the US than in the UK, a smaller more compact country. That said, we are doing work in this area. So we absolutely should be doing some micro economic research in the labor market, concentration, relationships with wages, because this is a really important area that we haven't done a lot of work on. One thing I absolutely agree with here is it's been a terrible blind spot generally in competition policy to think that monopsony power leads to lower prices upstream. So that must be good, because they will get passed through downstream, which is obviously just really bad economics. Monopsony power restricts what you buy upstream. So it's going to restrict your output downstream. And that is not going to lead to lower prices, it might have no effect on prices if you have no market power, but it might increase prices. And so maybe wage rates might go down with monopsony power, but actually the marginal cost that the firm faces goes up. That's why they will purchase the labor. Most costs go up. That's bad news downstream. I think that's a really important intuition to make sure that decision makers understand and we get away from this idea that input market power is really not something we should be concerned about.

Okay. So now just a couple of places where I think the Guidelines are a bit lighter than I would maybe hope. I think it'd be nice if that is a bit more on the importance of innovation and how concerned we are about harm to innovation, how that relates a lot of these theories, because of course it does. And I think that harm to innovation is more important than direct harm to prices. It's lovely to get closer to marginal cost pricing. But actually what we really want is a dynamic economy where we get new products. So I think I'd be happy with a bit more on innovation. I'd be happy with a bit more on resilience. One of the things we learned from the pandemic is that we completely ignored resilience concerns and competition policy. And that might be a mistake. The CMA wrote a paper on this a couple of years ago, the jury's little bit out as to how it should handle resilience concerns. There is a reference to in the appendix, more could be done that. And then the final comment I will make is, we made a lot in our set of Guidelines of the importance of decision makers being willing to make decisions under uncertainty. And when things were uncertain, we should not just default to Oh, it's all been too difficult and uncertain, okay, you can do your merger. Maybe it doesn't need saying in the US. But it would be good for to ensure that point is understood that where we have some of these forward, looking things you are going to be uncertain. And we shouldn't be embarrassed by that. And I will stop at that point.

Cristina Caffarra:

Thank you. I'm sure Aviv and Susan will want to react to some of what they heard. But it wouldn't be me if I wasn't also throwing in some comment or provocation on my side, because everyone has been incredibly well behaved here. I appreciate Hans and Mike trying to be a little controversial. I want to just put this point: both of you Aviv and Susan are being incredibly conciliatory, you're being incredibly reasonable. You're saying there's nothing here, let's not scare the horses, there's nothing to worry about, really, this is continuity. And look, this is looking pretty much like what we did before. But this is kind of dissonant to me, given the big reaction to these Guidelines. These Guidelines have been perceived as a major break with the past. And there's been an outcry. One part of it, yes, has to do with the use of precedent, the fact that there is reference to cases that go back to the 70s, Brown Shoe, Philadelphia National Bank and all that. Leave that to one side. But what has driven this revision is surely a fundamental change in the political economy, we need to rethink some of what we're doing, because we've been fairly lax in the past, I think that's a consensus. So I imagine you're trying to be reassuring to the market and to the economists and saying, no, no, we haven't gone crazy, it is all continuity, it's all there. But it isn't really, I don't read these Guidelines as being continuity, as you say. The point on concentration is fundamental. We've been blind to the fact that markets are concentrating serially. And concentration matters. We've been preaching for years that market power matters, not concentration. But in the end concentration tells you a lot about market power, though there will be exceptions. So I would give less of a continuity message. This is not the message that comes across to me from the heads of agency, there isn't a continuity, there's a break. And you're going a little bit out of your way to be conciliatory. I'm with Mike on this. Embrace it. This is change. And it's good. I'll stop there.

Susan Athey:

I can try to take it there. I appreciate your responses. And one way to think about it is that economics has been evolving to meet reality, but antitrust economics has moved more slowly. I think when people say "economics", when they talk about "economics", they mean a modern research economist who works on imperfect competition. What people are talking about when they say "economics" is almost unrecognizable from what we do. So I think these like rules of thumb that have been used historically, we just had really big blind spots for the kinds of conduct which led to both a lot of concentration and a lot of market power. And so, one of the things that we're doing is saying, hey, this modern economics does fit into the antitrust law. And that's scary, because there's, there's been a lot of market power acquired, driving through those blind spots.

But at the same time, it's not radical economics. And it does fit into the antitrust law and the antitrust economics, and it's been a bit of pulling the wool in front of your eyes, or whatever the best expression is to say that, those blind spots are definitely blind spots. And I also liked the point about the labor market competition that was put even more succinctly than I did. And the and the reason that the monopsonist buys less is because they perceive a higher marginal cost. And that also would be reflected in output markets. Again, that's in every textbook. It's so simple. You don't even need modern economics. But somehow people have pulled the wool over everybody's eyes to say, oh, gosh, market power in input markets would be good for consumers. So of course, there are some scenarios that are fact specific, you can construct edge cases, but the core basic economics is there you do not need more exotic theory to get that result that monopsony is bad for bad up and down the market.
So I would say it's sort of radical to say that good economics would block a lot of mergers that historically went through.

Aviv Nevo:

If I can just jump in, quickly, we don't have to think enough time for a full response. All the comments, I just want to thank Hans, Mike and Cristina, for the great comments. I wish we had a lot more time to fully flesh them all out, but let me just reiterate my agreement with Susan. I think what we're doing here is simultaneously continuing what was done in the past and producing stuff that's very new. So on some dimensions, I think we are continuing stuff that's in the past, as I said, in horizontal mergers the structural presumptions were there, we changed the threshold a bit, but not by much, they were there. That's not a radical change. If I can give it an analogy, it's not a perfect analogy, but if I could give an analogy, what we're doing here with the Guidelines, you can think of it as we are building a car, we've actually built a very nice car, the car that has a lot more horsepower, also has stronger brakes, maybe has an extra seat, add more passengers in it, and so forth. That's what we've done here in the Guidelines, we've extended in various different dimensions. How will these Guidelines be used, how were past Guidelines used? That's kind of a separate issue. And one has to realize that there's a lot of cases that one could have brought on based on 2010, that maybe were not brought, so let's separate things in terms of what the Guidelines are doing. They are continuing trends that we've seen in economics and also extending them in all the various ways that we've done. And my hope is they will be used responsibly. But just like a car, you can drive a car, and you can have a perfectly good car, and it can be driven irresponsibly. What I'm hoping here is that this will be driven responsibly. And I will leave it to you to decide what responsibly means, right? You could be driving too slow or driving too fast. Right? That's gonna be a matter of policy decision.

Tommaso Valletti:

Thank you, Aviv. Thank you, Susan. I will try to wrap up. What I heard is that, Susan and Aviv are saying that this is not a big change. It's an evolution. And from an economics point of view, this is perhaps true. It is based on the fact that the world has changed. We are in a different place now compared to where we were 20 years ago. But my guess is also from a practitioner' point of view for the kind of economics which is done in cases, not in academia, this is actually a revolution. This is my sense. This is what I feel. I may be wrong, but that's the way I've interpreted things. I want to remind everybody that there's time until September 18 to submit comments. I I'm sure that they are welcome, especially iF they're supportive to the changes that the DOJ and FTC are putting forward. So please do that. And once again, I think CPR I thank everybody for being on this event.

Cristina Caffarra:

If I may jump in to advertise our next event for a second. Hans and everyone on this panel have emphasized the importance of the extension in the direction of ecosystems, entrenchment, acquisition of market power, not through leveraging, but through other mechanisms. Tommaso and I are having another CEPR event with Hans and Mike are also participating in a couple of weeks, a workshop in which we're going to talk precisely about "ecosystem theories" beyond leveraging. So do join if you can.
Remember September 14. So, thank you, everybody. Bye bye.