THE DILEMMAS OF THE 2023 MERGER GUIDELINES

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INTRODUCTION

Through their new Merger Guidelines adopted in December 2023 (MG)[1], the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (jointly, "the Agencies") aim to solidify the New-Brandeisian structuralist approach to markets[2] to embrace the "big is bad" mantra.[3] The adventuresome 2023 Merger Guidelines[4] rest on the idealist proposition that atomized markets reduce economic inequality, increase consumer protection, and protect economic democracy.[5] With the 2023 MG, the Agencies openly depart from principles that have characterized modern antitrust enforcement. For, the 2023

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1. U.S. DEP'T. OF JUST. & F.T.C., MERGER GUIDELINES (2023) [hereinafter 2023 MG], https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/K6CM-KJMZ].

2. To justify the withdrawal of the 2020 Vertical Merger Guidelines, Chair Khan explained that "[m]arket structure screens have been used for decades by agencies when assessing whether horizontal mergers merit a presumption of anticompetitive effects. Since the 1980s, however, vertical mergers have not been subject to similar screens that use readily observable market features. This distinct analytical approach to horizontal and vertical mergers is not justified." *See* F.T.C. COMMISSION FILE NO. P810034, STATEMENT OF CHAIR LINA M. KHAN, COMMISSIONER ROHIT CHOPRA, AND COMMISSIONER REBECCA KELLY SLAUGHTER ON THE WITHDRAWAL OF THE VERTICAL MERGER GUIDELINES (2021). *See, e.g.*, Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37 (2014); Lina Khan, *The Ideological Roots of America's Market Power Problem*, YALE L.J. F. 960, 972 (2018) (defining antitrust law as "structured to preserve a set of structural conditions (competition) as a way of promoting a set of outcomes and principles.").

3. On Neo-Brandeisians' fixation on bigness, see TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (Columbia Global Reports 2018); Tim Wu, *Be Afraid of Economic 'Bigness.' Be Very Afraid*, N.Y. TIMES (Nov. 10, 2018), https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html. *See also* Daniel Sokol, *Antitrust's 'Curse of Bigness' Problem*, 118 MICH. L. REV. 1259 (2020); Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087 (2022); Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?,* 64 ANTITRUST BULL. 531 (2019).

4. *See* Herbert Hovenkamp, *The 2023 Merger Guidelines: Law, Fact, and Method*, 65 REV. INDUS. ORG. 39 (2024).

5. *See* Greg Ip, *Antitrust's New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021, 11:07 AM), https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424.

MG treat factual indicators as legal presumptions: Market shares, oligopolistic market structure, and industry trends toward consolidation are no longer perceived as factual elements that form the basis for a full-fledged merger analysis, but rather, these facts become conclusory elements that warrant structural presumptions for the prohibition of mergers. In other words, the 2023 Merger Guidelines are shortcuts that cast a wide net consisting of prohibiting mergers based on legal presumptions rather than a case-by-case merger analysis. The structuralist return that justifies the presumptive prohibition of mergers shares similarities with a precautionary approach to mergers where *ex ante* prohibitions sans fully-fledged merger analysis enable agencies to intervene quickly and timely in blocking mergers.[6]

The 2023 MG replace both the 2010 Horizontal Merger Guidelines (2010 HMG) and the 2020 Vertical Merger Guidelines (VMG) to reflect modern market realities.[7] The 2023 MG abandon the broadly accepted framework of the Agencies' 2010 Horizontal Merger Guidelines (2010 HMG),[8] not only embraced by federal courts, but also the key policy instrument that jurisdictions around the world use to enforce their own merger control regimes.[9] The 2023 MGs' structure radically depart from its predecessors going back to 1968. In contrast, the Guidelines lay out eleven "guidelines" (or "principles"[10]) which are not "mutually exclusive, and a given merger may implicate multiple guidelines."[11]

The 2023 Merger Guidelines differ only marginally from the Draft Merger Guidelines issued earlier in 2023. The Draft Merger Guidelines (DMG) had thirteen guidelines whereas the final 2023 MG have eleven guidelines, but the

6. For structural presumptions together with incipiency doctrines can justify early and timely interventions before the mere likelihood of harm materialize. On the precautionary approach in antitrust, see Aurelien Portuese, *Precautionary Antitrust: The Changing Nature of Competition Law*, 17 J. L., ECON. & POL'Y 548 (2022).

7. *See* Press Release, Federal Trade Commission, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023) ("With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy . . . . These guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books."); *id.* ("As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy.").

8. U.S. DEP'T. OF JUST. & F.T.C., HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 HMG], available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/TK7T-5Q7P].

9. *See, e.g.*, William E. Kovacic, *The Modern Evolution of Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377, 435 ("The Guidelines not only changed the way the U.S. courts and enforcement agencies examine mergers, but they also supplied an influential focal point for foreign competition authorities in the formulation of their own merger control regimes.").

10. *See* Press Release, Federal Trade Commission, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023) ("[T]he guidelines give an overview of thirteen principles that the agencies may use when determining whether a merger is unlawfully anticompetitive under the antitrust laws.").

11. *Id. See also* U.S. DEP'T. OF JUST. & F.T.C., DRAFT. MERGER GUIDELINES [hereinafter DMG], at 2 ("[A] single transaction can have multiple effects or trigger concern in multiple ways.").

two dropped guidelines remain de facto in place in the 2023 MG.[12] The guidelines have a three-tier structure:

The proscriptive guideline—Guidelines 1 to 6: These guidelines start with "Mergers can . . . ."[13] They identify the mergers that are presumed harmful based on their allegedly anticompetitive effects. These guidelines overwhelmingly emphasize the desire of the Agencies to preserve the so-called "competitive market structure" and to block all mergers conducive to increased concentration or vertical integration.

The provisional guidelines—Guidelines 7 to 11: When a merger fits into one or multiple[14] proscriptive Guidelines 1 to 6, the MG identify certain conditions or situations within which the merger takes place, and which constitute an aggravating circumstance for blocking the merger. These guidelines start with "When a Merger . . . ."

The fallback guideline—former Guideline 13 from DMG: The DMG had a Guideline 13 which stated that "*Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly*."[15] This guideline enabled

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12. Guideline 6 which stated that "Vertical mergers should not create market structures that foreclose competition" remains de facto in place. DMG, *supra* note 11, at 3. Indeed, the DMG explained that, for vertical mergers, "If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence." *Id.* at 17. But the 2023 Merger Guidelines state "The Agencies will generally infer, in the absence of countervailing evidence, that the merging firm has or is approaching monopoly power in the related product if it has a share greater than 50% of the related product market. A merger involving a related product with share of less than 50% may still substantially lessen competition, particularly when that related product is important to its trading partners." 2023 MG, *supra* note 1, at 16 n.30 (relating to Guideline 5 which relates to vertical mergers). Therefore, Guideline 6 of the DMG is blended together with Guideline 5. This is exactly what Carl Shapiro suggested when he wrote "Guideline 6 should be dropped or somehow folded in Guideline 5." Carl Shapiro, *Why Dropping Market Power from the Merger Guidelines Matters*, PROMARKET (Aug. 7, 2023), https://www.promarket.org/2023/08/07/carl-shapiro-why-dropping-market-power-from-the-merger-guidelines-matters/ [https://perma.cc/QHM3-ZQT9]. Regarding the permanence of Guideline 13, *see infra* note 17.

13. The DMG wrote "Mergers should not . . . ." DMG, *supra* note 11, *passim*. The final Guidelines' wording ("can") suggests that the final version is slightly more sympathetic to rebuttal evidence. *See* 2023 MG, *supra* note 1, *passim*. This is clear from the greater emphasis on rebuttal evidence in the final version as opposed to the draft version of the Guidelines. Sections 2 and 3 of the 2023 MG address rebuttal evidence whereas rebuttal evidence was relegated to the final section of the DMG.

14. The 2023 MG indeed state that the "Guidelines are not mutually exclusive, as a single transaction can have multiple effects or raise concerns in multiple ways." 2023 MG, *supra* note 1, at 2.

15. DMG, *supra* note 11, at 28 ("Merger Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly."). A strict interpretation of the term "substantially lessen" that is likely to be adopted by the agencies may mean a return to cases such as *United States v. Pabst Brewing Co*. and *Brown Shoe* where the Supreme Court decided, respectively, that a merger of two breweries supplying an aggregated 4.49 percent of the beer market would substantially lessen competition and that the foreclosure of one percent of the acquired firm's market would substantially lessen competition. *See* United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Brown Shoe Co. v. United States, 370 US. 294 (1962).

the Agencies to challenge a merger that does not contravene any of the eight proscriptive guidelines. This guideline repeats the vague language of Section 7 of the Clayton Act. The 2023 MG have retained this guideline somehow since they state that "the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation."[16] In other words, any merger that does not fit into a proscriptive guideline listed from 1 to 6 may be considered as anti-competitive under novel theories of harm that the 2023 MG did not articulate. Hence, Guideline 13 from the DMG remains *de facto* in place.

Consequently, the thirteen Draft Guidelines remain *de facto* effective with the eleven final Merger Guidelines. These guidelines not only depart from judicial evolution but also may paradoxically frustrate congressional intent[17] and Neo-Brandeisian intent.[18] For, the Guidelines create dilemmas which may undermine their persuasiveness in courts and, thus, in practice. These dilemmas of the 2023 MG are the following:

The 2023 MG fail to assist in discerning between mergers that risk harming competition and those that do not.[19] In doing so, the DMG increase legal uncertainty and deter competitive behavior, undermining the achievement of their stated objectives of benefiting buyers and suppliers in the affected markets, fostering economic growth, and lessening inequality. Because companies will err on the side of caution, they will refrain from merging. Therefore, by casting a net so wide that it prohibits pro-competitive mergers, the 2023 MG paradoxically increase the risk of anticompetitive effects and increase capital concentration. In other words, firms may resort to "restraints of trade" to achieve what mergers would have otherwise achieved. This is the

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16. 2023 MG, *supra* note 1, at 4.

17. One of the main reasons for the antitrust agencies to revise the Merger Guidelines was to be "faithful" to the statutory language of the Clayton Act. *See, e.g.*, F.T.C., *supra* note 2, at 2 ("[T]he FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."); *id.* at 3 ("The 2020 VNGs contravene the text of the statute . . . ."). *See also* F.T.C., COMMISSION FILE NO. P234000, STATEMENT OF CHAIR LINA M. KHAN, JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER AND COMMISSIONER ALVARO M. BEDOYA, REGARDING FTC-DOJ PROPOSED MERGER GUIDELINES 1 (2023) ("[W]e wanted to ensure the guidelines faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent."); *see also* F.T.C., STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER JOINED BY CHAIR LINA M. KHAN AND COMMISSIONER ALVARO M. BEDOYA REGARDING FTC-DOJ PROPOSED MERGER GUIDELINES 2 (2023) ("The proposed merger guidelines seek to cure this deficiency and more faithfully effectuate Congress' clear desire to arrest unlawful mergers in their incipiency, whether they threaten to either substantially lessen competition or facilitate the exercise of monopoly power.").

18. Neo-Brandeisian reformers emphasize the need for an assertive merger policy that target "giant mergers (over $6 billion in value)[,]" "return to structural presumptions[,]" and enforce a "per se ban on mergers that reduce the number of major firms to less than four" to protect small businesses. WU, *supra* note 3.

19. *See* Gregory J. Werden, *The Risk Concept in the New Merger Guidelines: Treating a Proposed Merger Like Schrödinger's Cat,* 38 ANTITRUST 30, 34 (2024) ("[The Agencies] treat a proposed merger like Schrödinger's cat—at the same time both substantially lessening competition and not substantially lessening competition.").

"restraint dilemma": the MG incentivize companies to *make*, rather than *buy*, products and services, at the risk of inciting hardly detectable contractual restraints instead of reportable mergers. Consequently, the 2023 MG are likely to result in the primary evil they seek to avert, which is a higher concentration of capital and increased economic inequality.

By prohibiting restraints that do not qualify as mergers, the Agencies may push their constitutional boundaries by going beyond congressional intent. To avoid the "restraint dilemma," the MG create the "constitutional dilemma."

These two dilemmas are hiding in plain sight of the 2023 Merger Guidelines. They will not be resolved; they will not go away. And yet, entrepreneurs and the business community will experience them repeatedly until courts as the final arbiters shed light on how to solve them. In this article, we address these three dilemmas successively.

I. THE RESTRAINT DILEMMA: MAKE OVER BUY, RESTRAINTS OVER ACQUISITIONS

The 2023 MG fail to clearly inform market participants about when to make the decision of acquiring a company for its products and services because such acquisition is legal as opposed to designing these products and services internally because the envisaged acquisition would be illegal. In short, the 2023 MG fail to provide guidance as to whether the business owners should *make* or *buy* the products they need to further compete against its rivals. This failure is (a) based on a misguided preference for organic growth, (b) generates uncertainties, and (c) ironically may incentivize further use of contractual restraints over acquisitions.

A. The Flawed Preference for Organic Growth Over External Growth

The 2023 MG propose to shift enforcement away from price output and quality results and re-focus enforcement on structuralist concerns such as increased concentration and vertical integration. In doing so, they openly portray "organic" growth as competitive and condemn virtually any acquisition in a concentrated or moderately concentrated market as presumptively harmful. The 2023 MG's *ex ante* condemnation of concentrated or vertically integrated market structures originates from the Neo-Brandeisian belief that entrepreneurs should *make* not *buy*. In other words, internal expansion is "superior" to external growth: the simpleness and naturalness of "organic" growth is opposed to the alleged artificiality and modernity of external expansion. Brandeis indeed vilipended "size attained by combination, instead of natural growth"[20] while Neo-Brandeisians clamor "organic growth" over acquisitions.[21] The 2023

20. Louis D. Brandeis, *The Curse of Bigness*, *in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (Harper's Weekly 1914) ("And it is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration.").

21. F.T.C. & U.S. Dep't. of Just., Letter on Ministry's Public Consultation Paper on the Future of Competition Policy in Canada 2 (Mar. 31, 2023),

MG's fixation with organic growth and atomized market is unfounded and departs from recent economic thinking and legal precedent.[22]

The DMG claimed that "[c]ompetition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth."[23] Additionally, the DMG have claimed that "[t]he antitrust laws reflect a preference for internal growth over acquisition."[24] These are very strong statements that claim to decipher congressional intent as well as overall judicial precedent. To back such claims, the Agencies only cite Justice Marshall's concurring opinion in the *Falstaff*[25] case, which itself quotes the dated *Philadelphia National Bank* case of 1963.

But, the *Falstaff* case is the wrong case to rely on possible anticompetitive effects of a merger since the Supreme Court in that case, involving a beer merchant as a potential competitor, refused to decide on the applicability of Section 7 of the Clayton Act which, paradoxically, is the main legal basis for the Merger Guidelines to be issued. In other words, the antitrust agencies cannot rely on a case that does not shed light on the meaning of a statutory provision that is used to issue the Merger Guidelines. For, Justice White, who delivered the opinion of the Court in the *Falstaff* case, made clear that:

> Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence

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https://www.justice.gov/atr/page/file/1578296/dl?inline ("Congress has stated a preference for organic growth over growth through acquisition.").

22. *See, e.g.*, Jonathan B. Baker et al., *Comments of Economists and Lawyers on the Draft Merger Guidelines*, UNIV. PA. INST. L. & ECON. RSCH. (2023). The guidelines "could be read to interfere with their ability to implement our shared objective effectively, by making it more difficult for enforcers to rely on economic analysis to discriminate between mergers that risk harming competition and those that do not." *Id.* at 1. Herbert Hovenkamp, *The 2023 Draft Merger Guidelines: A Review*, UNIV. PA. INST. L. & ECON. RSCH 4–5 (2023) ("These draft Guidelines reflect a strong emphasis on structure, but bury the link between concentrated structure and higher prices, lower output, reduced innovation or similar indicia of market power."). About the final 2023 MG, see Hovenkamp, *supra* note 4 ("A federal judiciary that may be reluctant to embrace more aggressive antitrust generally, might be more receptive to arguments based on sound science. That science also places the focus where it should be: on post-merger prices and output, consistent with the goals of antitrust generally. The Guidelines should acknowledge that economics can be their friend.").

23. DMG, *supra* note 11, at 33. The same language was used in Lina Khan and Jonathan Kanter's Letter on the Ministry's Public Consultation Paper on the Future of Competition Policy in Canada. *See* F.T.C. & U.S. Dep't. of Just., *supra* note 21, at 2 ("Importantly, competition usually spurs firms to pursue efficiencies internally, and Congress has stated a preference for organic growth over growth through acquisition.").

24. DMG, *supra* note 11, at 11.

25. United States v. Falstaff Brewing Corp., 410 U.S. 526, 560–61 (1973) (Marshall, J., concurring).

> in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter de novo or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. There are traces of this view in our cases . . . but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it.[26]

Additionally, Justice Marshall, who the DMG quoted, wrote in his opinion that:

> To be sure, remote possibilities are not sufficient to satisfy the test set forth in § 7. Despite substantial concern with halting a trend toward concentration in its incipiency, Congress did not intend to prohibit all expansion and growth through acquisition and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms.[27]

Also, Justice Marshall clearly stated that "in terms of anticompetitive effects, the dominant firm's acquisition of another firm within the market might be functionally indistinguishable from a de novo entry, which § 7 does not forbid,"[28] hence, not only equating external growth from internal growth from antitrust purposes, but most importantly, conditioning such analysis to a dominant position, what the 2023 MG fail to account for since they overlook the question of market power in favor of structural presumptions.

In other words, the *Falstaff* case does not support the claim the DMG made that Congress expressed a preference of internal growth over external growth. Moreover, Justice Marshall's opinion argues the very opposite of what the DMG claim it argues. The same is true for the *Philadelphia National Bank* cited by Justice Marshall in his opinion. Finally, the *Falstaff* case is not a "controlling" precedent that Neo-Brandeisians often cite to justify reliance on old cases. Indeed, in the *Falstaff* case, the Supreme Court was reluctant to rely on potential competition theory, "very few courts validated the theory . . . case law is rare,"[29] and the FTC itself would disparage the theory as a "rather peculiar theory of competitive injury."[30] In other words, *Falstaff* is not a controlling precedent, and in any way, does not say what the DMG claim it says.

Interestingly, the final 2023 MG do not contain the claim that Congress favored organic growth over external growth. The final MG have replaced the

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26. *Id.* at 537–38 (majority opinion).

27. *Id.* at 555–56 (Marshall, J., concurring).

28. *Id.* at 559 n.13.

29. Shanker A. Singham, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L L. 363, 383 (1998).

30. *B.A.T. Industries*, 104 F.T.C. 852, 919 (1984).

erroneous claim[31] with: "Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger."[32] This is problematic because the antitrust agencies have repeatedly claimed that the new Merger Guidelines "faithfully" represent congressional intent. But how can the 2023 MG convincingly represent congressional intent when the erroneous claim that Congress preferred organic growth over external growth upon that justify the assertiveness of the new Merger Guidelines is withdrawn by the same antitrust agencies after only few months of public consultation? The alleged preference of Congress for organic growth is misguided but the 2023 MG continue to rest on such claim.[33]

For, due to the erroneous nature of the claim made in the DMG, the final MG merely assert that "[i]n general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition."[34] This statement is much more accurate since it narrows down the claim to concentrated markets and it merely acknowledges a presumptive effect on competition rather than making a dubious originalist claim about congressional intent. In conclusion, antitrust agencies know that there is no such thing as congressional preference of organic growth over external growth, and yet, the 2023 MG implicitly convey this misguided claim while alleging to faithfully enforce congressional intent.

B. Blurring Is Deterring: Legal Uncertainty Encourages 'Make' Over 'Buy'

The heightened regulatory risks of merging will push many companies to err on the side of caution—namely, not to merge. The FTC leadership promised to issue clear guidelines so that "law-abiding business can plan accordingly" their merger ambitions.[35] Conversely, the legal uncertainty stemming from the numerous and non-exhaustive scenarios outlined in the 2023 MG, which suggest that a merger may be illegal, leaves businesspeople uncertain about whether to produce or purchase products and services to stay competitive. Amidst uncertainties, businesspeople will be deterred from merging even though some mergers would have been pro-competitive as external growth would have enabled faster competition as opposed to precarious product design internally.[36]

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31. "Competition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth." DMG, *supra* note 11, at 32.

32. 2023 MG, *supra* note 1, at 32.

33. *See, e.g.*, the encouragement of "alternative arrangements" to merger such as "organic growth" when assessing efficiencies. *Id.*

34. *Id.* at 11.

35. F.T.C., COMMISSION FILE NO. P234000, *supra* note 17, at 3.

36. On vertical mergers enabling faster scale and scope economies, *see* Peter Lee, *Innovation and the Firm: A New Synthesis*, 70 STAN. L. REV. 1431 (2018).

Assertiveness of the U.S. merger policy under the Biden Administration may incentivize dealmakers to abandon planned mergers[37], to pause any acquisitions for a foreseeable future[38], or to divest some many assets that the acquisition becomes commercially less appealing. With the antitrust agencies becoming increasingly less interested in divestiture of assets as potential merger remedies compared to blocking mergers they deem illegal, the magnitude of divesting assets required to expect clearance has increased.[39] Importantly, the 2023 MG explicitly avoid the question of divestitures and merger remedies,[40] thereby signaling a broader reluctance from agencies to settle than block mergers,[41] which further contributes to deterring mergers in the first place.

Neo-Brandeisians explicitly refer to deterrence as the primary goal of its merger policy. For example, FTC Chair Khan wrote that "[m]arket participants acknowledge that the FTC's work is deterring unlawful deals . . . . The fact that the FTC's work is driving this type of deterrence is a real mark of success."[42] Because of the uncertainty generated by the 2023 MG, market participants will not merge due to deterrence, therefore making the antitrust agencies successful by Neo-Brandeisians' metrics.

As Nobel Prize Winner Ronald Coase explained in the early twentieth century, firms face a "make or buy"[43] question when it comes to complementarity: should they vertically integrate or should they vertical merge? The answer depends on a wide range of factors, including intellectual property

37. Josh Sisco & Sam Sutton, *Wall Street Gives Administration Earful Over Antitrust Enforcement*, POLITICO (April 27, 2023) ("The volume of M&A activity has fallen sharply over the last year and dealmakers say the effect of President Joe Biden's antitrust crackdown has also been felt in ways that won't show up in the data."); Ed Hammond, *Rate Uncertainty and Antitrust Theory Paralyze M&A*, BLOOMBERG (May 2, 2023).

38. Leah Nylen & Michelle F. Davis, *M&A Deal Pace Slows as Biden Administration Cracks Down on Antitrust*, BLOOMBERG (May 10, 2023, 9:00 AM) ("The US government's aggressive stance on antitrust is chilling merger activity among the country's biggest companies, with some deals never making it past the boardroom as executives fear lengthy and expensive approval processes.").

39. *See e.g.*, Letter from Lina Khan, Chair, F.T.C., to The Honorable Thomas P. Tiffany, Rep. Wis., Nov. 3, 2023, at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/2023.11.3_chair_khan_letter_to_rep._tiffany_re_merger_challenges.pdf [https://perma.cc/48PY-BHG5] (citing ICE and Black Knight merger as approved after "the parties significantly altered their deal and sold off assets to maintain competitive markets in response to Commission litigation.").

40. The 2023 MG states that "[t]he consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope." 2023 MG, *supra* note 1, at 2 n. 8.

41. Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022) (FTC leadership aims to "stop anticompetitive mergers rather than negotiate settlements with companies.").

42. Letter from Lina Kahn, Chair, F.T.C., to The Honorable Thomas P. Tiffany, Rep. Wis., *supra* note 39, at 2.

43. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (distinguishing alternative methods of organization by the price mechanism of markets or by the entrepreneur of the firm).

rights of the upstream firm[44], but will eventually depend on whether the interactions with the strategic assets will be market-based or intra-firm. However, *make* over *buy* as the default option to business growth often proves to be an inferior option. For, time is of the essence for dynamic competition—and undeniably, growth via acquisitions often enables firms deliver products and services faster than by internal design and manufacturing. For, only six percent of companies grow without acquisitions.[45] And yet, between seventy and ninety percent of mergers fail for a variety of reasons.[46] This means that external growth is a natural growth strategy delivering, if successful, faster results.[47] Paradoxically, the 2023 MG deter mergers and encourage restraints of trade which may have, not fewer, but greater anticompetitive effects.

C. Some Unintended Consequences: Encouraging Restraints Over Acquisitions, Hurting Small Companies in the Name of Protecting Them

By unreasonably dismissing external growth for organic growth, the 2023 MG contribute and incentivize other forms of horizontal and vertical collaborations, increasing the likelihood of anticompetitive conduct in the market. Worse, an assertive merger policy may encourage the proliferation of potentially anticompetitive interlocked directorates that Neo-Brandeisians traditionally despise.[48]

Indeed, the 2023 MG encourage restraints of trade in spite of mergers. They write "firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger."[49] Moreover, the antitrust agencies make explicit that they will consider and encourage alternative arrangements to mergers in order to rebut efficiency arguments:

> Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include

44. On how strong intellectual property rights, such as in the case of pharmaceutical companies, encourage vertical disintegration, see JONATHAN BARNETT, INNOVATORS, FIRMS, AND MARKETS: THE ORGANIZATIONAL LOGIC OF INTELLECTUAL PROPERTY (2020).

45. Rita McGrath, *The Misunderstood Role of the Middle Manager in Driving Successful Growth Programs*, *in* THE SEARCH FOR ORGANIC GROWTH 147 (Edward D. Hess & Robert K. Kazanjian eds., 2006).

46. Clayton M. Christensen et al., *The Big Idea: The New M&A Playbook*, HARV. BUS. REV. 2, 2 (2011) ("[S]tudy after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%.").

47. Lee, *supra* note 36, at 1472 ("[T]he strategic objectives of exploiting economies of scale and scope as well as achieving rapid growth also push toward consolidation.").

48. On the alternative between merger or investments, see Ben Mermelstein et al., *Internal versus External Growth in Industries with Scale Economics: A Computational Model of Optimal Merger Policy*, J. POL. ECON. 301, 339 (2019) (concluding that "when entrants (or, more generally, small firms) have higher investment costs than large established incumbents, entry-for-buyout behavior can impose significant welfare losses and make merger approvals much less attractive for an antitrust authority.").

49. 2023 MG, *supra* note 1, at 32.

> organic growth of one of the merger firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.[50]

At minimum, this suggests that the antitrust agencies may be more welcoming of restraints of trade through exclusive dealing, long-term partnership, preferential treatments and prices for the targeted assets, self-preferencing, licensing, rather than a clean and simple merger. At most, an assertive merger policy may encourage interlocking directorates—also known as cross-ownership—which paradoxically was demonized by Justice Brandeis as "the root of many evils."[51] And it is not Guideline 11[52]—which dubiously includes partial ownership into merger analysis—that will deter firms from engaging in partial ownership in order to circumvent the ban of mergers. First, partial ownership will continue to be widely used and widely undetected because it is unreportable.[53] Second, the 2023 MG themselves encourage partial

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50. *Id.*

51. Louis D. Brandeis, *supra* note 20 ("It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters.").

52. Guideline 11: "When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition." 2023 MG, *supra* note 1, at 28.

53. *See* Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 285 (2020) ("Horizontal shareholding poses the greatest anticompetitive threat of our time, mainly because it is the one anticompetitive problem we are doing nothing about. This enforcement passivity is unwarranted."); Einer Elhauge, *Vertical Shareholding*, 133 HARV. L. REV. 665, 666 (2019) ("Vertical shareholding, or when a common set of investors owns significant shares in vertically related corporations, may have anticompetitive effects similar to some vertical mergers."); Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO ST. L. J. 1, 3 (2021) ("When the commonly-held corporations are horizontal competitors in the same product market, this increased interest in the profits of competitors will naturally lessen their incentives to compete with each other."). *See also* OECD, COMMON OWNERSHIP BY INSTITUTIONAL INVESTORS AND ITS IMPACT ON COMPETITION, BACKGROUND NOTE BY THE SECRETARIAT (Nov. 29, 2017), https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf; Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1316 (2016) ("Horizontal shareholdings are omnipresent in our economy given that institutional investors now own 80% of all stock in S&P Soo corporations."); Einer Elhauge, *Tackling Horizontal Shareholding: An Update and Extension to the Sherman Act and EU Competition Law*, OECD (Dec. 6, 2017) ("The very name of the legal field—antitrust law—comes from the fact that the Sherman Act aimed to prohibit certain trusts that were in fact horizontal shareholders in competing firms."); Daniel O'Brien, *The Competitive Effects of Common Ownership: Ten Points on the Current State of Play*, OECD (Dec. 6, 2017) ("The empirical literature to date does not establish that common ownership through minority shareholdings has harmed or is likely to harm competition."); Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 565–67 (2000); Herbert Hovenkamp & Fiona Scott Morton, *Horizontal Shareholding and Antitrust Policy*, YALE. L. J. 2026 (2018); Thomas Lambert, *Mere Common Ownership and the Antitrust Laws*, 61 133 B. C. L. REV. 2913 (2020) (arguing against common ownership as violating antitrust laws); Eric A. Posner et al., *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J 669, 712 (2017) ("that common ownership

mergers. The alternative arrangements that the 2023 MG encourage include contracts, but also "partial merger involving only those assets that give rise to the procompetitive efficiencies."[54] How can partial mergers be considered as mitigating potential anticompetitive effects while simultaneously being the single source (Guideline 11) of anticompetitive effects? For the 2023 MG to be commonsensical and not contrarian, Guideline 11 will de facto be set aside in favor of those alternative arrangements to mergers which include partial mergers as encouraged by the 2023 MG. Consequently, the 2023 MG overwhelmingly encourage what Brandeis, and Neo-Brandeisians[55], consider as the "root of many evils"—namely, interlocking directorates with partial and cross-ownership.

The restraint of trade dilemma of the 2023 MG is the following: either the antitrust agencies deter mergers and encourage contractual restraints while prosecuting the anticompetitive effects of these restraints, hence deterring companies from both merging and contracting at the cost of efficiency and innovation, or, the antitrust agencies deter mergers and encourage contractual restraints while adopting a more accommodating approach to these restraints, hence deterring potentially pro-competitive mergers only to be lenient with potentially anti-competitive restraints.[56] The efficiency and innovation gained from these restraints will not be as large as they would have been in the case of a merger[57], but at least they are present in spite of anticompetitive contractual restraints. The antitrust agencies cannot escape this restraint dilemma because it is "the nature of the firm"[58] that companies need to collaborate[59], need to

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already leads to all the anticompetitive effects of a merger without the procompetitive economies of scale."); Jose Azar et al., *Anticompetitive effects of Common Ownership*, 73 J. FIN., 1513, 1563 (2018) ("when firms have reduced incentives to compete due to common ownership, prices are higher and output is lower."); Albert Banal-Estañol et al., *Diversification, Common Ownership, and Strategic Incentives*, 110 AEA PAPER AND PROCEEDINGS 561, 563 (2020) ("Changes in money flows and resulting common ownership incentives can then be empirically linked to changes in markups . . . .").

54. 2023 MG, *supra* note 1, at 32.

55. *See* WU, *supra* note 3 ("The problem of overlapping ownership of horizontal rivals highlighted by Professor Einer Elhauge should be addressed . . . .").

56. Konstantine Gatsios & Larry Karp, *How Anti-Merger Laws Can Reduce Investment, Help Producers, and Hurt Consumers*, 40 J. INDUS. ECON. 339 (1992); Anthony M. Marino & Ján Zábojník, *Merger, Ease of Entry and Entry Deterrence in a Dynamic Model*, 54 J. INDUS. ECON. 397, 415 (2006) ("[A] merger challenge decision should not be made without considering the incumbents' alternative means of preserving or gaining market power. Merger may well be the most efficient of all these alternatives, and prohibiting it without preventing the firm from channeling its monopolization efforts elsewhere could be counterproductive.").

57. Transaction cost minimization, including elimination of double marginalization, can only take place in the case of mergers. *See* Dennis W. Carlton, *Transaction Costs and Competition Policy*, 73 INT. J. INDUS. ORG. 1, 8 (2020) ("[T]he merged firm will eliminate the inefficiency from double marginalization. Pre-merger, the entire industry bears the efficiency costs of double marginalization.").

58. Coase, *supra* note 43.

59. Lee, *supra* note 36.

grow, and such growth often takes place by exploiting the complementarity of assets owned by different companies.

Organic growth may become more challenging for small and mid-size firms that are more likely to lack the resources to grow and develop as strong players absent a merger. Faced with the increased risk of investigation and litigation, potential acquirers will simply replace acquisitions with horizontal and vertical collaborations and increase the likelihood of interlocking directorates. Most of these collaborations are analyzed under a rule of reason[60] which may be more lenient than the approach adopted by the 2023 MG, thereby generating an opportunity for businesspeople to collaborate (vertically and horizontally) rather than merge and acquire assets.

Naturally, assessing the likely effects of a given merger requires an understanding of the contractual alternatives to integration available to the merging parties. The potential anticompetitive effects of these horizontal and vertical agreements are more likely to fly under the Agencies' radar and are not guaranteed to result in higher benefits to consumers than a structural change. Notably, the fear of litigation is likely to deter mergers of smaller firms that may not bear the costs as compared to larger companies that may factor that risk in as a cost of the merger. In other words, the 2023 MG will not "wish away" firms' needs to integrate and cooperate to gain efficiencies, grow, and enter new markets. They will do so via contractual restraints which may generate greater anticompetitive effects without providing the benefits to smaller firms of viable exit options.

Regulatory uncertainty surrounding mergers under the 2023 MG will lead to effective merger deterrence, which, in turn, will hurt smaller companies and startups. For example, the number of exit options will shrink. With IPOs remaining prohibitively costly and unaffordable for most companies, being acquired remains the primary way of scaling-up quickly and sustainably for high-growth startups in need of capital injection. However, the 2023 MG signal a much tougher stance on mergers, deterring large companies from acquiring companies in need of capital injection via acquisitions. The effect of the 2023 MG's deterrence effects on acquiring companies will be that target companies may find it difficult to scale-up, resulting both in the paradoxical loss of competition with industry incumbents and in the reduction of funding in different entrepreneurial stages, thereby undermining the very entrepreneurial dynamism and entry that Neo-Brandeisians claim to foster with the 2023 MG. Indeed, the adverse consequences of more assertive (vertical) merger enforcement on entrepreneurial dynamism of smaller companies and startups is well documented.

60. *See, e.g.*, California Dental Ass'n v. F.T.C., 119 S. Ct. 1604, 1617 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984) ("[T]he rule of reason can sometimes be applied in the twinkling of an eye . . . ."); F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Bd. Regents Univ. Okla., 468 U.S. 85, 104, 106–10 (1984). *See generally* F.T.C. & DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000).

An assertive merger policy as exemplified by the 2023 MG may hurt smaller companies and startups. For example, many founders create companies and have external funding because of viable exit options. Some companies are exclusively designed for exit—these are called entry-for-buyout strategies.[61] However, an aggressive merger policy renders entry-for-buyout strategies unviable and unattractive, thereby discouraging the very entry (i.e., the founding of the startup).[62] In short, an accommodating merger policy fosters the entry encouragement effect.[63] Indeed, "investment behaviors can be greatly influenced by firms' beliefs about future merger policy. Importantly, when the antitrust authority adopts a less restrictive policy, this may spur entry-for-buyout behavior by firms seeking to be acquired."[64] On the contrary, entry-for-buyout is greater in a scenario with a more lenient merger policy. Additionally, acquisition is considered to be one of the primary ways of capturing a startup's value.[65] Consequently, the 2023 MG may entice founders not to create startups given the expectation that acquisition as exit is not a viable solution, and may entice venture capitalists to reduce funding to startups given the expectation that the scaling-up of the startup will be more uncertain and lengthier absent a viable path for acquisition. These unintended consequences of the assertive merger policy designed by Neo-Brandeisians with the 2023 MG may hit at the heart of their agenda—namely, protecting small businesses.

Almost all venture-backed exits of startups result in mergers and acquisitions.[66] This means that the inability for startups to provide a credible exit route to venture capitalists will discourage the latter to provide the same level of funding to founders as they would absent an aggressive merger policy, thereby resulting in increased difficulty for startup founders to expand and enter the markets. Paradoxically, the Neo-Brandeisian policy may insulate incumbents by making entry more difficult to finance or deterring altogether.

This collateral damage of the Neo-Brandeisian policy encapsulated in the 2023 MG is illustrated by the FTC's challenge of Meta's acquisition of Within. Judge Davila, who delivered the judgment, concluded that Meta funds virtual reality (VR) apps such as the fitness app Within, and had no intention of entering de novo, but only to fund and develop Within. Indeed, Judge Davila concluded that, "In addition to providing funding or engineering support to third-party VR app developers, Meta has also sought to increase the VR app content available on its platform by acquiring third-party app developers and developing its own

61. Eric Rasmusen, *Entry For Buyout*, 36 J. INDUS. ECON. 281 (1988).

62. Marino & Zábojník, *supra* note 56.

63. Robin Mason & Helen Weeds, *Merger Policy, Entry, and Entrepreneurship*, 57 EUR. ECON. REV. 23 (2013) ("With the entry encouragement effect, more lenient merger policy stimulates entry . . . .").

64. Volker Nocke, *MaCCI Letter, Research Highlights in 2020*, 2 (2021).

65. Joshua Gans & Scott Stern, *The Product Market and the Market for 'Ideas': Commercialization Strategies for Technology Entrepreneurs,* 32 RSCH. POL'Y 333 (2003).

66. Devin Reilly et al., *The Importance of Exist via Acquisition to Venture Capital, Entrepreneurship, and Innovation*, 32 MINN. J. INT'L L. 159, 164 (2023) ("92% of all U.S. non-shutdown venture-backed exits from 2004-2020 were mergers and acquisitions.").

apps internally.*"*[67] Judge Davila further concluded that submitted evidence shows that:

> Notably, even though Meta personnel had considered the option to increase third-party funding without entering the market and an option to do nothing as comparison, there was never an option for Meta to build its own VR dedicated fitness app to enter the market de novo.[68]

Here, the dichotomy was not between make or buy, but rather between fund or buy. In order to better compete with its rival, Beat Saber, Within had to finance its expansion. Meta offered such financing. Should the acquisition have been unsuccessful with a different judgement, the Neo-Brandeisian approach would have reinforced the incumbent Beat Saber while deterring entry into the VR market where funding proves difficult to find outside large tech companies. The 2023 MG will continue deterring venture capitalists from funding startups in the absence of clear exit options, and may deter large companies from acquiring small companies given the antitrust risks—both outcomes hurting the creation and expansion of small businesses.

II. THE CONSTITUTIONAL DILEMMA: BLOCKING MERGERS THAT ARE NOT MERGERS

The second dilemma that the 2023 MG generate is the tension between the Neo-Brandeisian ambition of extending the reach of antitrust agencies to review mergers that are not mergers while being faithful to congressional intent. For example, the 2023 MG intend to review acquisitions of assets that do not qualify as mergers despite a questionable constitutional basis to do so.

A. The Problematic Guideline

In their attempt to extend the regulatory reach of merger review, the antitrust agencies have added a problematic provision of the Merger Guideline: Guideline 11. This guideline states that "when an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition."[69] This guideline describes partial ownership and the Brandeisian fixation for the root of many evils—namely, interlocking directorates. Indeed, Guideline 11 is concerned with acquisition of assets providing "investor rights in the target firm, such as rights to appoint board members, observe board meetings, influence the firm's ability to raise capital, impact operational decisions, or access competitively sensitive information."[70] The antitrust agencies want to fold into merger review the problem of cross-ownership (i.e., non-controlling interest in a competitor) and common ownership (i.e. non-controlling interest in competitors held by common investors). To be sure, the

67. F.T.C. v. Meta Platforms Inc., 654 F. Supp. 3d. 892, 904 (N.D. Cal. 2023).

68. *Id.* at 935.

69. 2023 MG*, supra* note 1.

70. *Id.*

competitive concerns raised by both cross-ownership and common ownership are real and should be further explored.[71] Beyond the legitimate concern for the antitrust effects of cross-ownership and common ownership, Guideline 11 is problematic for two reasons.

First, because the 2023 MG broaden the definition of (potential) "competitor," there is a risk that pro-competitive investments and alliances will be retroactively reclassified as minority interests in a competitor, chilling investments from capital-laden companies into capital-needed startups without clear antitrust concerns. Second, Guideline 11 allows antitrust agencies to review acquisitions and investments that are neither mergers nor acquisitions with controlling interests. This potential regulatory overreach may frustrate congressional intent and call the 2023 MG's constitutionality into question, particularly regarding Guideline 11.

In 2024, Microsoft invested more than thirteen billion dollars in Artificial Intelligence (AI), OpenAI's for-profit subsidiary.[72] In exchange, Microsoft gained a forty-nine percent stake in OpenAI's for-profit subsidiary and became the exclusive cloud provider of OpenAI, thereby controlling the computational power of OpenAI's language programming capabilities. To mitigate antitrust risks, OpenAI, who once described Microsoft as "minority owner" in OpenAI, now describes the tech giant as holding a "minority economic interest."[73]

This minority interest is not subject to merger control in Germany[74], but the European Union is preparing for a full-scale probe into this minority interest.[75] In the U.S., emboldened by the 2023 MG and especially Guideline

71. There is vast literature debating the antitrust concerns of cross-ownership and common ownership. *See* sources cited *supra* note 53. However, the U.S. antitrust agencies have recently found insufficient evidence of competitive effects of cross-ownership. *See* OECD, *U.S.' Submission to OECD Hearing on Common Ownership by Institutional Investors and Its Impact on Competition* (Nov. 28, 2017).

72. Tim Bradshaw et al., *How Microsoft's Multibillion-Dollar Alliance with OpenAI Really Works*, FINANCIAL TIMES (Dec. 15, 2023), https://www.ft.com/content/458b162d-c97a-4464-8afc-72d65afb28ed [https://perma.cc/MYT8-PP23].

73. *Id*. ("The distinction may prove crucial as antitrust authorities attempt to shine a light on Silicon Valley's most-watched — yet least understood — partnership.").

74. Press Release, Bundeskartellamt, Cooperation Between Microsoft and OpenAI Currently Not Subject to Merger Control (Nov. 15, 2023) ("We thoroughly examined the possibility of the companies having to notify Microsoft's involvement in OpenAI. However, we have concluded that the previous investments and the cooperation between the two companies are not subject to merger control."). *But see* Tono Gil, *Watch out for AI Cooperation Agreements that Are Really Mergers, Germany's Mundt Warns*, MLEX (Sept. 21, 2023) ("Big Tech partnerships with startup AI developers such as OpenAI should put competition authorities on alert to the idea that cooperation agreements could be mergers in all but the name, Germany's top antitrust enforced said today.").

75. European Commission Press Release IP/24/85, Commission Launches Calls for Contributions on Competition in Virtual Worlds and Generative AI (Jan. 9, 2024) ("The European Commission is checking whether Microsoft's investment in OpenAI might be reviewable under the EU Merger Regulation."). *See also* Samuel Stolton, *Microsoft's OpenAI Ties Under EU Spotlight*, BLOOMBERG (Jan. 10, 2024); Ryan Browne, *Microsoft's Multibillion-Dollar Investment in OpenAI Could Face EU Merger Probe*, CNBC (Jan. 9, 2024).

11, the tide has changed[76]: the FTC has announced launching inquiries into generative AI investments and partnerships.[77] The FTC issued orders to five companies—Alphabet, Amazon, Anthropic, Microsoft, and OpenAI—"requiring them to provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers."[78] Interestingly, the legal basis for issuing these orders is not Section 7 of the Clayton Act (which is the legal basis for Merger Guidelines), but Section 6(b) of the FTC Act, which authorizes the Commission to conduct studies.

The FTC did not investigate these investments with minority interests under Section 7 of the Clayton Act (and incidentally under the 2023 MG) because this legal basis is questionable. Indeed, Section 7 of the Clayton Act does not provide a legitimate legal basis for Guideline 11 of the 2023 MG. Section 7 of the Clayton Act prohibits the acquisition, "directly or indirectly, [of] the whole or any part of the stock" of a company when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[79] True, Section 7 of the Clayton prohibits the acquisitions of stocks or assets[80] in "whole or any part."[81] But, paragraph 3 of the Section 7 of the Clayton Act makes clear that:

> This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from

76. Compare with the situation only recently, *see* Natasha Lomas, *Don't Expect Competition Authorities to Wade Into the Microsoft-OpenAI Power Play—Yet*, TECHCRUNCH (Nov. 20, 2023) ("By the numbers Microsoft remains a minority investor—which has likely helped the tech giant fly under M&A regulators' radars and avoid triggering transaction notifications thresholds that could have led to formal competition reviews.").

77. Press Release, Federal Trade Commission, FTC Launches Inquiry into Generative AI Investments and Partnerships (Jan. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships [https://perma.cc/2N43-GP6L].

78. *Id. See also*, Federal Trade Commission, Order to File a Special Report, P246201, https://www.ftc.gov/system/files/ftc_gov/pdf/P246201_AI_Investments_6%28b%29_Order_and_Resolution.pdf [https://perma.cc/AZD2-UZQE] ("The Commission is seeking information concerning certain investments in or partnerships with Artificial Intelligence developers and the potential impact of such partnerships and investments on competition. The Special Report will assist the Commission in conducting a study of these investments and partnerships.").

79. 15 U.S.C. § 18.

80. Previous versions of the Clayton Act focused on "voting securities," suggesting a link with Section 8 of the Clayton Act which prohibits interlocking directorates.

81. *See generally*, Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, YALE. L. J. 2026, (2018) (explaining that Section 7 of the Clayton Act "*applies to both complete and partial acquisitions*").

> owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.[82]

In other words, investments are exempted from the application of the Clayton Act, according to Section 7(3), whenever these investments do not "substantially lessen competition." With Section 7(3), Congress wanted to exempt passive investments from merger scrutiny.[83] The first sentence of Section 7(3) refers to cross-ownership (i.e., horizontal partial ownership), whereas the second sentence of Section 7(3) refers to common ownership (i.e., vertical partial ownership).

B. Bypassing Congressional Intent

Fiona Scott Morton and Herbert Hovenkamp explain that the investment exemption of the Clayton Act "does not apply if actual anticompetitive effects are shown, and particularly not if the holder is voting the shares in question."[84] There are multiple qualifications to make to that accurate statement in light of the 2023 MG.

First, because the definition of "anticompetitive" in merger analysis has shifted dramatically under the 2023 Merger Guidelines compared to prior guidelines and established case law, the investment exemption should not be disregarded solely upon a showing of actual anticompetitive effects as defined by those 2023 Guidelines—effects that remain highly controversial, if not outright contrarian. For instance, an investment in assets of a multi-sided platform may reduce competition on the platform (i.e., intra-platform competition) by enabling vertical integration of assets, but it may also increase competition between platforms (i.e., inter-platform competition) by strengthening the market position of the platform against an incumbent platform. These contradictory effects are encapsulated in the self-contrarian Guideline 9 which states that "when a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform." Therefore, the overall anticompetitive effect of such investment is highly uncertain given the self-contradictory Guideline 9. Consequently, because this overall anticompetitive effect is unclear, the reliability of the investment exemption of Section 7(3) of the Clayton Act cannot be excluded. This conclusion applies equally to virtually all the guidelines of the 2023 MG. In other words, given the contentious notion of anticompetitive effect of a merger under the 2023 MG, the dormant investment

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82. 15 U.S.C. § 18.

83. *See* United States v. Tracinda Investment Corp., 477 F. Supp. 1093, 1099 (C.D. Cal. 1979); Anaconda Co. v. Crane Co., 411 F. Supp. 1210 (S.D.N.Y. 1975). *See also* Janet H. Winnigham, *"Solely for Investment Purposes": Evolution of a Statutory Exemption Under Clayton Section 7*, 12 LOY. U. CHI. L.J. 571 (1981) (considering that Section 7(3) investment exemption is "a viable defense to antitrust actions brought pursuant to section 7.").

84. Morton & Hovenkamp, *supra* note 82.

exemption of Section 7(3) of the Clayton Act may very well be reactivated thanks to the confusing nature and ambiguity of the 2023 MG.

Second, Guideline 11 fails to be faithful to Section 7(3) of the Clayton Act: it contravenes the letter and spirit of the statutory language. Indeed, Section 7(3) makes clear that only a substantial lessening of competition can deprive the investment exemption of any effect. But the 2023 MG err in faithfully enforcing the statutory language of Section 7(3) of the Clayton Act. First, they lower the evidentiary threshold to neutralize the investment exemption: whereas the statutory language requires a "substantial lessening of competition" to set aside the investment exemption, the 2023 MG refers to a mere possibility of lessening competition, thereby removing the need for a "substantial" anticompetitive effect.[85] Second, the 2023 MG unreasonably increases the number of concerns from partial ownerships, thereby depriving Section 7(3) of the full scope of the investment exemption. Indeed, the 2023 MG are over-inclusive. They state that Guideline 11 will enable antitrust agencies to look at "partial ownership or minority interests," which may give "the investor rights in the target firm, such as rights to appoint board members, observe board meetings, influence the firm's ability to raise capital, impact operational decisions, or access competitively sensitive information." Besides the last two examples which obviously cannot lead the investments to be categorized as passive, an investment that give an investor rights in the target firm include all investments. Indeed, all investments give investors, at minimum, property rights in the target firm. In that regard, Guideline 11 is over-inclusive as it fails to distinguish between property rights, which do not stop the investment from being passive, and other investors' rights, which provide active involvement in the target firm. Additionally, Guideline 11 specifies that activities like appointing board members indicate that the investments are no longer passive, thereby disqualifying them from the Section 7(3) exemption. But the appointment of board members following investments is regulated by Section 8 of the Clayton Act.[86] Guideline 11 cannot reasonably include board appointment in the Section 7 merger analysis because Section 8 analysis completely differs from Section 7 merger analysis.[87] Board appointment is an

85. *See, e.g.*, 2023 MG, *supra* note 1, at 28–29 ("First, a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm . . . . Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete . . . . Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm.").

86. Section 8 of the Clayton Act prevents potential collusion or a threat to competition which may arise from the same individuals serving as officers or directors of competing firms.

87. Section 8 is both over and under-inclusive of Section 7 merger analysis. Over-inclusive because, as opposed to Section 7 which requires a substantial lessening of competition, Section 8 does not require any effect on competition. Therefore, 2023 MG cannot legitimately block a merger for its alleged anticompetitive effects on the basis of a provision that does not require anticompetitive effect. Either Guideline 11 includes the practice covered by Section 8 and thus cannot engage in an antitrust analysis of the acquisition, or the Guideline 11 does not cover the practice covered by Section 8 and thus is misguided as written. Additionally, Section 8 is under-inclusive because the whole section is subjected to its subsection c which explicitly excludes "(5)

activity that is outside the scope of Section 7, and thus it cannot reduce the ambit of the Section 7(3) exemption. Moreover, the ability to observe board meetings does not make an investment active since observing—as opposed to voting—is essentially a passive exercise.[88] Thus, Guideline 11 erroneously includes activities that should not make the investment active and should not, therefore, neutralize the application of the Section 7(3) exemption. Also, the ability to influence the firm's ability to raise capital is inherent to all investments, both passive and active, since investments into the target firm will have consequences on the ability of the firm to raise capital by demonstrating that the target firm has successfully attracted investments. This influence says nothing about whether the investment is passive or active, therefore unreasonably including factors to neutralize Section 7(3) that Congress did not intend to include. As a consequence, Guideline 11 fails to neutralize the Section 7(3) exemption in a coherent manner and, by doing so, frustrates congressional intent.

When Congress realized that the original version of the Clayton Act failed to capture mergers and acquisitions of assets, they amended the Clayton Act with the Celler-Kefauver Act.[89] In other words, to expand the ambit of the Clayton Act, a congressional amendment to the Clayton Act is necessary. Regulatory agencies' soft laws, however ambitious and overreaching, cannot frustrate congressional intent and cannot de facto amend the Clayton Act.[90] The Supreme Court is clear about the need for regulatory agencies to be faithful to congressional intent and not to rewrite the law by expanding its jurisdiction.[91]

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transactions specifically exempted from the antitrust laws by Federal statute; (6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General . . . ." In other words, the argument is circular: the inclusion of board appointments as factors to ignore the Section 7(3) exemption leads to Section 8(c) exemptions which refers to antitrust exemptions such as the one mentioned in Section 7(3). The antitrust agencies cannot reasonably ignore the statutory language of the Clayton Act by including practices such as board appointments but ignoring the associated exemptions of such practices.

88. Dorothy Shapiro Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018).

89. The Celler-Kefauver Act passed in 1950 expanded the Clayton Act by closing the loophole that allowed companies to avoid antitrust rules by purchasing the assets of another company rather than its stock. It also extended the scope of antitrust laws to cover vertical and conglomerate mergers, which were not explicitly addressed in the Clayton Act.

90. The Administrative Procedure Act (APA) entrusts the judiciary the role of policing statutory boundaries, directing federal courts to "set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." *See* 5 U.S.C. § 706(2)(A), (C).

91. It can be argued that given the clear meaning of Section 7(3), the *Chevron* deference does not apply. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611 (1991); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995); Astrue v. Capato ex rel. B.N.C., 566 U.S. 541, 551 (2012). *See also* Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006); Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014); Emp. Solutions Staffing Grp. II, L.L.C.

Unfortunately, Guideline 11 attempts to re-write the Section 7(3) investment exemption of the Clayton Act by shrinking its ambit, lowering its evidentiary thresholds, and ignoring Section 8's related exemptions. In other words, provided that Guideline 11 constitutes the basis of an already adopted questionable policy consisting of conducting merger analysis of investments that should be exempted from merger analysis, the constitutionality of the enforcement actions brought about by the FTC under Guideline 11 may be unconstitutional by frustrating the statutory language of the Clayton Act. This is the constitutional dilemma that antitrust agencies face: either they endorse the misguided approach of Guideline 11 and, in an apparent paradox, unfaithfully follow statutory language thereby creating constitutional challenges to enforcement actions, or, antitrust agencies refrain from triggering enforcement actions under Guideline 11 and they fail to revolutionize their merger policy and undermine the first actions they have already adopted under this flawed approach.[92]

CONCLUSION

We have outlined the two dilemmas of the 2023 MG—namely, the restraint dilemma where an aggressive merger policy may encourage restraints of trade, and the constitutional dilemma, where a misguided application of the Clayton Act may generate constitutional challenges. Neo-Brandeisians cannot escape these dilemmas in the courts: judges will have to shed light on the persuasiveness and usefulness of the radical departure of merger analysis encapsulated in the 2023 MG in light of judicial precedents.

To be sure, Neo-Brandeisians have successfully repurposed antitrust policy towards achieving a wide range of public policy objectives including reducing economic inequality, addressing environmental concerns, increasing consumer protection, and protecting democracy.[93] To achieve these objectives, they weaponize antitrust to the protection of small businesses, independent proprietors, and startups against the bigness of modern industrial corporations. In that regard, the assertive merger policy that the 2023 MG foretell fits particularly well into the Neo-Brandeisian agenda of deconcentrating the economy in the hope of delivering a wide range of social benefits such as

v. Office of Chief Admin. Hearing Officer, 833 F.3d 480, 484 (5th Cir. 2016); Miller v. Johnson, 515 U.S. 900, 923 (1995). In any case, the very notion of the Chevron deference is imperiled, *see* David French, *Overturning Chevron Can Help Rebalance the Constitutional Order*, N. Y. TIMES, (Jan. 21, 2024), https://www.nytimes.com/2024/01/21/opinion/supreme-court-chevron.html ("Chevron disrupted the constitutional order by effectively giving the president the power to make, interpret and enforce laws acting solely through his administrative agencies. It injected the presidency's lawmaking abilities with steroids. This is not the way the United States was intended to function.").

92. *See* F.T.C., Order to File a Special Report, P246201, https://www.ftc.gov/system/files/ftc_gov/pdf/P246201_AI_Investments_6%28b%29_Order_and_Resolution.pdf [https://perma.cc/7Q2Q-YLVZ].

93. *See generally* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).

income equality, business dynamism, economic democracy, and overall fairness.

However, one consequence of the 2023 MG's quasi-*per se* condemnation of mergers in oligopolistic and concentrated market structures independently of their overall effects on output, prices, and quality is likely to disproportionately harm smaller companies and entrepreneurs. The longevity of the 2023 MG, beyond the two dilemmas they carry, is put into question by the unintended consequences they have on small businesses and the entrepreneurial dynamism they generate. In other words, beyond the legal contradictions inherent to the 2023 MG, the economic toll they take on innovation and welfare may be a decisive factor for judges to circumscribe, if not ignore, the 2023 MG.