Reevaluating Out-of-Market Efficiencies in Antitrust

John M. Yun, Antonin Scalia Law School, George Mason University

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REEVALUATING OUT-OF-MARKET EFFICIENCIES IN ANTITRUST

John M. Yun[*]

Antitrust analyses relegate efficiencies to a second-class status. Not only are they often an after-thought when assessing conduct within a relevant market, but the Supreme Court, in 1963 with its Philadelphia National Bank (PNB) *decision, established that efficiencies realized outside of the relevant market construct, that is, "out-of-market" efficiencies, are not even counted. While the* PNB *case involved a horizontal merger between two Philadelphia banks, many interpret the* PNB *precedent as establishing a prohibition of out-of-market efficiencies in non-merger cases as well. The precedent and associated out-of-market efficiencies principle have had an immense influence on the enforcement of antitrust laws. Yet, the principle is increasingly out of step with sound assessments of business conduct—particularly in digital markets with network effects. Further, the principle unreasonably handicaps defendants, which is an increasing concern due to the current policy movement to severely tilt antitrust enforcement in favor of plaintiffs. Consequently, this Article argues that the out-of-market efficiencies principle needs serious reform—but in a specific way. Rather than considering "within market" and "out-of-market" efficiencies under different standards (including outright exclusion), there should be one unified, "relevant" efficiency classification. Out-of-market efficiencies must be "interdependent" with the relevant market to be a relevant efficiency—which this Article demarcates based on established economic principles. This reformed approach has the advantage of providing more flexibility to courts to consider adjacent, or related, markets that are not strictly within a relevant market, while also mitigating the administrative burden of assessing all possible efficiency claims. Relevant efficiencies must still be verifiable, and plaintiffs can show that there are less restrictive alternatives available to achieve the same benefit. This proposal seeks to harmonize scholarship that has been highly critical of* PNB *with scholarship that believes in preserving the precedent.*

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[*] Associate Professor of Law, Antonin Scalia Law School, George Mason University. Previously served as an Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. I thank Henry Butler, Bruce Kobayashi, Thom Lambert, Alexander Raskovich, and the workshop participants of the Manne Forum at Scalia Law School for valuable comments and suggestions. I also thank Scalia Law students Thyme Hawkins, Kimberly Brooking, and Drew Wilson for excellent research assistance.

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INTRODUCTION

There is no shortage of exhortations to reform antitrust laws to substantially tilt antitrust enforcement in favor of plaintiffs.[1] The litany of proposals includes lowering the threshold to find anticompetitive harm,[2] banning certain types of mergers outright,[3] prohibiting practices such as self-preferencing,[4] and, simply, breaking up companies.[5] Yet, curiously, there is one area of antitrust that has received significantly less attention in the reformation movement. That area is efficiencies.[6] In fact, the most notable attention recently given to efficiencies is an off-hand comment from the chair of the Federal Trade Commission (FTC) that "the word 'efficiency' doesn't appear anywhere in the antitrust statutes."[7] This dismissal of efficiencies,

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[1] *See, e.g.*, STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 377–78 (Comm. Print 2020); STIGLER COMMITTEE ON DIGITAL PLATFORMS, FINAL REPORT (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

[2] *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (1st Sess. 2021) (implementing, inter alia, a more expansive merger standard from "substantially" lessening competition to "an appreciable risk of materially" lessening competition).

[3] *See, e.g.*, Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (1st Sess. 2021) (prohibiting almost all acquisitions by large platforms).

[4] *See, e.g.*, American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (1st Sess. 2021) (prohibiting a laundry list of conduct for certain digital platforms).

[5] *See, e.g.*, Competition and Transparency in Digital Advertising Act, S. 4258, 117th Cong. (2d Sess. 2022) (forcing large advertising platforms to breakup); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (1st Sess. 2021) (disallowing certain platforms from owning businesses across different product lines). *See also* STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 1, at 378 ("Subcommittee staff recommends that Congress consider . . . structural separation and line of business restrictions.").

[6] The term "efficiencies" is used to broadly capture the procompetitive aspects of business conduct. For instance, an efficiency from a merger "enhance[s] the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) [hereinafter 2010 GUIDELINES]. *See also* Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 189 (2005).

[7] Guy Rolnik, *Q&A with FTC Chair Lina Khan: "The Word 'Efficiency' Doesn't Appear Anywhere in the Antitrust Statutes,"* PROMARKET (June 3, 2022), https://www.promarket.org/2022/06/03/qa-with-ftc-chair-lina-khan-the-word-efficiency-doesnt-appear-anywhere-in-the-antitrust-statutes/. *See also* Lina Khan & Sandeep Vaheesan,

particularly as it relates to horizontal mergers, is not surprising[8] and also not new.[9] Efficiencies are frequently an afterthought and considered only when courts find claims of anticompetitive harm to be almost completely unpersuasive.[10] The current leadership of the U.S. federal antitrust agencies have revealed, through their behavior, a hostility towards considering efficiencies.[11] The paradigm of "balancing" both harms and efficiencies within

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*Market Power and Inequality: The Antitrust Counterrevolution and Its Disconten*ts, 11 HARV. L. & POL'Y REV. 235, 277 (2017) ("Many legal scholars have studied the major antitrust statutes and shown that Bork's argument about efficiency is not supported by the legislative history.").

[8] *See, e.g.*, Ted Tatos & Hal Singer, *The Abuse of Offsets as Procompetitive Justifications: Restoring the Proper Role of Efficiencies after* Ohio v. American Express *and* NCAA v. Alston, 38 GA. ST. U. L. REV. 1179, 1188 (2022). ("[T]treatment in merger cases generally rejects offsetting harms in the relevant market with some exogenously derived justifications."); Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PENN. L. REV. 1941 (2020) (arguing to limit the efficiency defense even further in merger cases).

[9] *See, e.g.*, Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980) (countering arguments made in the 1970s that antitrust should deny an efficiencies defense). It was not until economist Oliver Williamson in 1968 and the subsequent, detailed incorporation of efficiencies into merger analysis with the *1984 Merger Guidelines* that efficiencies more explicitly became formalized into agency processes. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1969); 1984 MERGER GUIDELINES, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf; William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003).

[10] *See* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017) ("[E]fficiency claims . . . are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful. The decisions that credit claimed efficiencies as justification typically also find that the government failed to make out its prima facie case against the merger."). *See also* Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 360 (2011) ("The formal position of the antitrust enforcement agencies and courts in the United States and the European Union is that merger efficiencies count only weakly, if at all, toward sustaining the legality of questionable mergers.").

[11] For instance, in rescinding the *2020 Vertical Merger Guidelines* (*VMGs*), the FTC chair and several other commissioners explicitly attacked the Guidelines' recognition of efficiencies and the incentive to lower prices due to the elimination double marginalization (EDM). *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034, Sep. 15, 2021, https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair

antitrust's merger analysis and rule of reason framework is both a conceptual ideal and a practical fiction.[12] Indicative of the second-class status that efficiencies occupy in antitrust, an entire category of efficiencies is believed to have been discarded under the principle of "out-of-market" efficiencies. The principle emerged in the Supreme Court's *Philadelphia National Bank* (*PNB*) decision,[13] which set the precedent—at least for horizontal mergers—that efficiencies are disqualified if they are not in the same "relevant market" as the alleged harm.[14]

On the surface, the "out-of-market" efficiencies principle seems like a sensible administrative tool to put limits on antitrust inquiries by excluding markets that presumably have nothing to do with the one housing the

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_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on .pdf at 3–4 ("[E]ven if a merger does create efficiencies, the statute provides no basis for permitting the merger if it nevertheless lessens competition. . . . The VMGs' reliance on EDM is theoretically and factually misplaced."). Yet, as Shapiro and Hovenkamp explain, these assertions on the statute and EDM are "baffling" and "flatly incorrect as a matter of microeconomic theory," respectively. *See* Carl Shapiro & Herbert H. Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sep. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/. Additionally, with an eye towards withdrawing the *2010 Horizontal Merger Guidelines*, the leadership of both the FTC and DOJ have issued a Request for Information on Merger Enforcement, https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers/ (questioning the validity of an efficiencies defense).

[12] *See* Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1695, 1698 (2010) ("This Article examines twenty-five years of Section 7 Clayton Act cases in which efficiency claims were raised. The analysis reveals a disturbing pattern. Although courts claim to be balancing merger generated efficiencies with other negative factors affecting market competition, they are not in fact doing so.").

[13] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963). This interpretation of *PNB* is not universal, however. *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 140 (2017) (arguing that *PNB* did not involve a question of cross-market balancing as the case did not involve "multiple markets across which the court could have balanced.").

[14] A "relevant market" is a specific legal and economic construct designed to delineate the competitive boundaries to assess the anticompetitive harms of a disputed practice. *See* United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377, 395 (1956); Brown Shoe v. United States, 370 U.S. 294 (1962). *See generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007).

potential harm. Yet, markets are not always so neatly divided and independent. For example, suppose Firm A competes in two relevant markets, M_1 and M_2. Further suppose that Firm B also competes in M_2 but in M_3 as well. If both firms merge, then the harm will be assessed in M_2, which means, under the *PNB* precedent, efficiencies that benefit consumers in M_1 or M_3 are not considered. This rule holds even if the relevant product market for all three is the same, the only difference being that M_1, M_2, and M_3 are in different relevant geographic markets.[15] The principle excludes improved logistics that benefit the entire national operations of a firm to the extent they do not directly benefit consumers in M_2 despite clear benefits to consumers in geographies M_1 and M_3.

A similar point holds where relevant markets involve the same geographies but different sets of relevant products. Consider the proposed merger of office supply retailers Staples and Office Depot in 2015. The FTC challenged the deal under the relevant market of "consumable office supplies to large business-to-business customers" but excluded "ink and toner for printers and copiers," "janitorial or break-room products," and all products sold to retail customers.[16] Holding aside the question of whether the agency's market definition makes sense, this exercise to find harm in a relatively narrow market could have little to do with business realities of operational efficiencies that are spread over multiple products—that is, not just over the overlapping ones where there is a competitive concern.[17]

Finally, consider an app store platform that facilitates transactions between software developers and users. Some have called for courts to consider the different groups that interact on a platform, e.g., developers and

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[15] The relevant geographic market combined with the relevant product market form the basis for the overall "relevant market." *See* 2010 GUIDELINES, *supra* note 6, at § 4.2.

[16] Complaint at 6, In the Matter of Staples, Inc. & Office Depot, Inc., No. 9367 (F.T.C. Dec. 7, 2015).

[17] *See generally* Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 153 (2011) ("Narrow markets inevitably lead to the atomization of classes of consumers, whereby a market may be defined by picking a harmed consumer and defining a relevant market around that individual. Skepticism of this approach is broadly animated by fears that narrower markets obscure the competitive benefits of the merger that are 'outside' the market.").

users, to be in two separate relevant markets.[18] If so, suppose the platform implements privacy controls that harm developers but benefit users. Under a strict application of the out-of-market efficiencies principle, the benefit to users would be irrelevant to an inquiry of whether the platform violated the antitrust laws based on harm to developers.

As antitrust markets increasingly narrow[19] and digital markets with cross-group network effects are increasingly important,[20] efficiencies that create tangible and quantifiable benefits to consumers will increasingly be thrown out—or will deter procompetitive conduct from occurring in the first place. Thus, a formulaic exercise limiting efficiency considerations to strict, narrowly defined markets is contrary to sound economics and is increasingly unwarranted. A reform is long overdue.

This Article reexamines the out-of-market efficiencies debate and proposes an alternate approach. Efficiency analysis should implement a two-step, unified "relevant" efficiencies approach. Step one determines whether an efficiency is relevant to the business conduct inquiry, which automatically includes all within-market efficiencies. For out-of-market efficiencies,

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[18] *Cf.* Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners at 22, Ohio v. American Express Co., 138 S. Ct. 2274 (2018) ("[T]his Court held, in a case where the defendant operated a two-sided platform, that each side represented a 'separate . . . market' and that injuring competition in the restrained market alone was sufficient to violate the Sherman Act.").

[19] *See, e.g.*, Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55 (2021); Werden, *supra* note 13, at 122 ("The practice of market delineation was quite different in 1962. All the merging firms' products sharing a common production process often were placed in the same relevant market on the basis that they were good substitutes in supply."). As a recent example, consider the FTC's Complaint against Meta/Facebook's acquisition of Within where the agency defines the relevant market as "VR [virtual reality] dedicated fitness apps in the United States." *See* Complaint, Federal Trade Commission v. Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Case 3:22-cv-04325 at ¶ 37 (F.T.C. July 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20 Complaint.pdf.

[20] Multisided platforms are principally characterized by the presence of significant cross-group network effects, that is, when the presence of one group (e.g., online marketplace buyers) attracts the participation of a different group (e.g., online marketplace sellers)—where each group retains some control over the terms of the interaction. *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 320, 334–35 (2003).

however, only those that are "interdependent" with the relevant market are relevant efficiencies. Step two establishes whether a relevant efficiency is cognizable, that is, whether the efficiency is (a) verifiable and (b) specific to the conduct at issue, and (c) do not arise from an anticompetitive reduction in output or service.[21] This second step is like the current approach in antitrust to evaluate if efficiency claims are cognizable.[22]

The key to the reform proposal is the idea of an "interdependent" efficiency. Economically, interdependence can occur on both the demand- and supply-side. This Article identifies four key categories of efficiencies that could be considered "interdependent." While there may be other categories,[23] the following four can serve as a baseline to establish bounds on the meaning of "interdependence." Specifically, on the demand-side, there are two primary categories of efficiencies that may be interdependent with the relevant market: (1) complementary products and (2) multisided platforms with indirect, cross-group network effects. On the supply-side, there may be interdependent efficiencies due to (3) economies of scope in production[24] or (4) upstream and downstream markets within the same supply chain.[25] Any of these four categories of interdependency can potentially bring an out-of-market efficiency into the set of relevant efficiencies.

This reformed approach is consistent with the general movement in antitrust to focus directly on effects rather than filtering everything through

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[21] *See* 2010 GUIDELINES, *supra* note 15, at 30.

[22] *Id*.

[23] For instance, if a restriction in one relevant market is necessary for the creation of a new product in a related, but separate, relevant market, then this could be considered interdependent. Another potential application is to the debate regarding whether common ownership (that is, when a stock investor holds ownership of minority stakes across various firms in an industry) is an antitrust problem—if we consider the potential benefits from inter-industry diversification. *See generally* Thomas A. Lambert, *Mere Common Ownership and the Antitrust Laws*, 61 B.C.L. REV. 2914 (2020).

[24] *See* John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268, 268 (1981) ("There are economies of scope where it is less costly to combine two or more product lines in one firm than to produce them separately.").

[25] This interdependency is the most applicable in considering efficiencies associated with vertical mergers, vertical controls (e.g., exclusivity, tying, bundling, resale price maintenance), and conduct which impacts labor markets. *See infra* Section II.B for further discussion.

market definition.[26] Further, it deemphasizes the idea that efficiencies that occur "outside" of the relevant market are somehow discounted or considered a type of exception to a general rule.

In this Article, Part I details the genesis of the out-of-market efficiencies principle arguably established in *PNB*. Additionally, this part sets out to clarify the scope of the current principle—namely, its reach beyond horizontal mergers. After *PNB*, there are conflicting court opinions and academic views on this question; however, ultimately, the principle's applicability outside of horizontal mergers is highly questionable. For instance, for vertical mergers, courts routinely weigh the net effect of a merger across various relevant markets along the same supply chain.[27] This raises the larger question of consistency in the application of antitrust principles across various types of conduct.

Next, Part II makes the case to reform how antitrust should assess out-of-market efficiencies. While prior scholarship has argued to abolish the principle established in *PNB*,[28] this Article, as detailed, proposes a fundamental reform to how agencies and courts consider efficiencies. The idea is to include only those efficiencies that are interdependent. This part also addresses potential shortcomings and criticisms of the proposal—including an argument that considering out-of-market efficiencies is inconsistent with the statutory language.

Finally, in Part III, this Article examines how this reform proposal would work "in the wild" and reexamines several cases, including *PNB*, the Facebook-Giphy merger, labor market cases (including *NCAA v. Alston*[29]), and multisided platform cases. The goal is to assess whether incorporating relevant efficiencies is not only administratively feasible, but whether such an

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[26] *See, e.g.*, 2010 GUIDELINES, *supra* note 6, at § 4 (detailing how evidence of adverse effects "may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

[27] Thus, proposals to legislatively memorialize the principle of banning all out-of-market efficiencies in antitrust cases is not consistent with the case law—let alone sound economics.

[28] *See* Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out? Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE, vol. II (Nicholas Charbit, Elisa Ramundo, & Anna Pavliková, eds., 2014); Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397 (2015); Werden, *supra* note 13 (although, disputing whether *PNB* actually involved multiple markets).

[29] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

incorporation is desirable. What emerges is that courts are effectively already considering the key out-of-market efficiency claims but may lack the proper lens to link them to the relevant market. Further, there are clear gains in having a more harmonious treatment of horizontal mergers, vertical mergers, and conduct cases, and the proposal offers a more sensible interpretation of the Clayton Act, § 7 as amended in 1950.[30]

Fundamentally, this Article argues that business conduct cannot always be understood by limiting the inquiry to a narrow relevant market. Such an approach is inconsistent with economic principles that clearly and materially link several markets whether on the demand- or supply-side. Further, such an approach is inconsistent with the consumer welfare standard that seeks to examine the full impact of conduct on market outcomes rather than stopping the analysis when harm to some group in a particular market is identified.[31]

I. State of the Law Regarding Out-of-Market Efficiencies

To establish the scope of the current out-of-market efficiencies principle, this Part revisits *PNB* as well as *Topco*,[32] which some believe expanded the scope of the principle. Next, this Part explores subsequent court decisions and their treatment of out-of-market efficiencies. The reality is that, since the Supreme Court did not explicitly limit the principle to horizontal mergers, there is some belief that *PNB* left the door open for a broader application. However, omission does not mean admission. The Court has not ruled on the principle outside of a horizontal merger context; thus, there is little basis to suggest that the principle has been adopted outside of § 7. In fact, antitrust's treatment of vertical mergers *ipso facto* disproves the proposition

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[30] *See infra* Section II.C.1 for a discussion of the 1950 amendment.

[31] *See, e.g.*, Herbert Hovenkamp, *On The Meaning of Antitrust's Consumer Welfare Principle*, CONCURRENTIALISTE (Jan. 17, 2020), https://www.networklawreview.org/herbert-hovenkamp-meaning-consumer-welfare/ ("For most people familiar with the term today, 'consumer welfare' refers to the aggregate welfare of consumers as consumers, disregarding the welfare of producers.").

[32] United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

that the principle applies across all types of conduct and cases—as vertical mergers link several different relevant markets along the same supply chain.[33]

A. Establishing the "Out-of-Market" Efficiencies Principle

The genesis of the out-of-market efficiencies principle is the *Philadelphia National Bank (PNB)* decision.[34] *PNB* involved the proposed acquisition of two Philadelphia-based banks, Philadelphia National Bank and Girard Trust Corn Exchange Bank. To assess the legality of this horizontal merger, the Supreme Court defined the relevant geographic market as the four-county metropolitan area centered around Philadelphia.[35] Further, the Court delineated the relevant product market as "commercial banking."[36] Notably, "commercial banking" is not literally a product a banking customer can "consume" since commercial banking does not actually exist. Rather the phrase represents a litany of products that the Court deemed appropriate to group together.[37] As the Court itself acknowledges, commercial banking is a "cluster of products .

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[33] This is apparent in the *2020 Vertical Merger Guidelines*, which explicitly invokes assessing welfare effects in more than one relevant market. *See* DEP'T OF JUST., VERTICAL MERGER GUIDELINES 3 (2020), https://www.justice.gov/atr/page/file/1290686/download ("When the Agencies identify a potential competitive concern in a relevant market, they will also specify one or more related products. A related product is a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market. For example, a related product could be an input, a means of distribution, access to a set of customers, or a complement. The same transaction can give rise to more than one vertical concern, and different concerns may affect different relevant markets.").

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

[35] *Id*. at 360.

[36] *Id*. at 356.

[37] *Id*. ("We have no difficulty in determining the 'line of commerce' (relevant product or services market) and 'section of the country' (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking,'…composes a distinct line of commerce.").

. . and services."[38] This is the "line of commerce" the Court considered relevant for the inquiry.

At the time of the proposed merger, PNB and Girard represented the second and third largest banks in Philadelphia, respectively, and the combined entity would become the largest bank surpassing the First Pennsylvania Bank and Trust Company.[39] The Court memorably found that a horizontal merger with a combined share in the relevant market above thirty percent is presumptively sufficient for plaintiffs to meet their prima facie burden of proving anticompetitive harm.[40] This structural presumption remains today and has both its defenders and its critics.[41]

While a finding of anticompetitive harm is a necessary condition to find an antitrust violation, defendants still can present an efficiencies defense to justify a merger.[42] In *PNB*, importantly, the combined entity offered two efficiency defenses related to the out-of-market efficiencies discussion. The first is that the post-merger firm can now offer larger loans, which allows them to compete for certain consumers who previously looked to New York banks for supply.[43] The reason the merger allows this efficiency is that banking was and is a highly regulated industry involving various government entities

[38] *Id*.

[39] *Id*. at 330–31.

[40] *Id*. at 363.

[41] *Compare* John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns*, 81 ANTITRUST L.J. 837 (2017) (defending the presumption based on a sample of cases), *with* Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 380 (2015) (advancing that the "30 percent is an outdated threshold above which to presume adverse effects upon competition; rather, it is . . . an inappropriate starting point for the analysis of likely competitive effects").

[42] *See generally* Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107, 2117 (2017) ("The plaintiff, public or private, must meet an initial burden of production sufficient to show that the conduct is likely to be anticompetitive. If it makes that showing, the burden of production shifts to the defendant, who can undermine the plaintiff's evidence . . . and/or offer affirmative evidence showing a recognized procompetitive justification likely to eliminate any anticompetitive tendency of its conduct.").

[43] 374 U.S. at 370 ("[I]t is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans.").

including the Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).[44] In this case, large banks can avoid regulatory restrictions on lending limits.[45] Thus, the efficiency is certainly merger-specific—as organically growing to a size to avoid the lending limit would take a significant amount of time and investment. The relevant geographic market for these larger loans appears to be national—or at least encompassing both the Philadelphia and New York areas.

In rejecting the first efficiency defense, the Court made the following argument: "If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it, in the end, as large as the industry leader."[46] In what appears to be an obiter dictum, however, the Court then proceeded to address the substantive merits of the defense and found it wanting:

> Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of $8,000,000 each. The only business located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities.[47]

With this dictum, perhaps the Court simply wanted to leave no doubt that this efficiencies defense had no merit, both in terms of the law and the economics.

The second defense offered by the banks is that the combined entity would attract more business to Philadelphia and create a positive spillover effect to the Philadelphia area.[48] Specifically, the claim is that a larger bank would "promote the economic development" of the city and "stimulate its

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[44] *Id.* at 327.
[45] *Id*. at f.9.
[46] *Id*. at 370.
[47] *Id*. at 371.
[48] *Id*. at 334 ("[T]he resulting bank . . . would attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area."); *id*. at 371 ("Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development.").

economic development." In rejecting the second efficiency defense, the Court ruled:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and, in any event, has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[49]

In this ruling, the Court seemingly appeals to the language of § 7 in asserting that weighing "social or economic debits and credits" is prohibited. The Court also adds that such a comparison is "beyond the ordinary limits of judicial competence," which arguably is an appeal to the administrative costs of engaging in such an exercise.

In sum, the Court rejected the two out-of-market efficiencies defenses on different grounds. The first was rejected based on a "slippery slope" argument that allowing a benefit in one market to outweigh a harm in another would lead to excessive market concentration.[50] Although, given that the Court addressed the merits of the defendants' first claim in dictum, the Court clearly found the defense unconvincing as well. The second claim was rejected as incompatible with § 7 and, concurrently, beyond judicial competence. Combined these rationales established the out-of-market efficiencies principle.

After *PNB*, some courts and authorities cite *United States v. Topco Associates*[51] as reinforcing and expanding the application of the out-of-markets

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[49] *Id*. at 371.

[50] *See* Crane, *supra* note 28, at 402 ("Slippery Slope to Monopoly…*PNB*'s rejection of balancing effects across markets rested on the assertion that such balancing inevitably would lead to mergers creating undue market concentration, since small firms could always justify their mergers as merely ramping up to par with the industry leader.").

[51] 405 U.S. 596 (1972).

efficiencies principle beyond § 7.[52] *Topco* involved a Sherman Act, § 1 claim.[53] Topco Associates was a cooperative of approximately twenty-five regional supermarket chains operating across thirty-three states. Originally, the cooperative formed to combine the purchasing power of its members to better compete with large supermarket chains. The cooperative, however, also had a private label Topco brand that it territorially allocated to its members.[54] Specifically, each member of the Topco cooperative could only sell Topco branded products within the marketing territory allotted to it.[55]

The Court ruled that territorial exclusives among cooperatives is a per se violation of the Sherman Act, § 1, and thus condemned the practice on its face without an "'elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'"[56] However, in ruling that the practice should be considered a per se violation, the Court also asserted: "The fact is that courts are of limited utility in examining difficult economic problems. Our

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[52] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM 292, n.51 (2019) ("*Topco* has been treated by lower courts as precluding cross-market welfare trade-offs in non-merger litigation."); Tatos & Singer, *supra* note 8, at 1187–88 ("*United States v. Topco Associates* illuminated the rule-of-reason analysis and discarded the logic of attempting to balance cross-market economic harms. . . , Notably, the *Topco* Court cited precedent in *United States v. Philadelphia National Bank*, and in doing so, the Court underscored the nexus between antitrust aims in merger and conduct cases."). Werden provides additional citations; although, he disagrees with the interpretation. *See* Werden, *supra* note 13, at n.49:

> *See, e.g.*, United States v. Am. Express Co., 88 F. Supp. 3d 143, 229 & n.54 (E.D.N.Y. 2015) (As a general matter, . . . a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market." (citing *Topco*)); Law v. NCAA, 902 F. Supp. 1394, 1406 (D. Kan. 1995) ("Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market." (citing *Topco*)); 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 80 n.478 (8th ed. 2017) ("The Supreme Court also has said that procompetitive effects in one market may not be balanced against anticompetitive effects in another market." (*citing* Topco))."

[53] *See* 15 U.S.C. § 1 (2018) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[54] 405 U.S. at 602 ("[E]ach new member signs an agreement with Topco designating the territory in which that member may sell Topco brand products. No member may sell these products outside the territory in which it is licensed. Most licenses are exclusive.").

[55] *Id*. at 602 ("Most licenses are exclusive, and even those denominated 'coextensive' or 'non-exclusive' prove to be *de facto* exclusive.").

[56] *Id*. at 607 (citing Justice Black in Northern Pacific R. Co. v. United States, 356 U. S. 1, 5 (1958)).

inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."[57] The Court further explained: "Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[58]

Ultimately, *Topco* is about how to assess territorial allocations. Once the court determined that territorial allocations are a per se violation of the Sherman Act, § 1, *then* it turned to the question of how to assess procompetitive justifications. Thus, the case is more about refining the scope of business conduct that falls under the per se umbrella[59]—and the principle that per se cases do not consider any efficiency claims—rather than an explicit affirmation of *PNB*, and it is certainly not an expansion of *PNB* beyond § 7.

Nonetheless, the Court did address one of the fundamental tenets of the out-of-market efficiencies principle: the inability to weigh "in any meaningful sense" harm in one "sector" against benefits in "another sector." Yet, a close reading of the decision reveals that what the Court regarded as weighing "one sector" versus "another sector" was a description of intra-brand versus inter-brand competition.[60] Crucially, only several years later, the Court explicitly endorsed weighing inter-brand versus intra-brand effects in *GTE Sylvania*.[61]

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[57] *Id*. at 609–10.

[58] *Id*. at 610.

[59] *See id*. at 608 ("Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us.").

[60] *Id*. at 611 ("On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco brand products. Without territorial restrictions, Topco members may indeed '[cut] each other's throats.' . . . If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress, and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions, and courts are ill-equipped and ill-situated for such decisionmaking.").

[61] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 (1977) ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."). The Court attempted to

Consequently, unless the Topco brand is a relevant market in and of itself,[62] then the Court's use of "sector" or "portion" of the economy is more in line with describing different brands *within* a relevant market rather *across* relevant markets. Thus, if we assess the substance of the Court's ruling in *Topco*, it first and foremost established that territorial agreements are per se violations of § 1.[63] Second, in support of that substantive ruling, the Court explained how it is unwilling to weigh possible inter-brand benefits against the clear intra-brand harm.[64] Thus, the case does not and cannot ultimately address the out-of-market efficiencies principle—as expressed in *PNB*. Especially since, even if we accept *Topco* on its own terms (that is, defining "sectors" as intra-brand and inter-brand competition), the Court in *GTE Sylvania* rejected the idea that comparisons across sectors is impermissible.[65]

B. Scope of the Out-of-Market Efficiencies Principle

After *PNB*, the Court left the out-of-market efficiencies ruling lie fallow. This Section examines several developments that arguably filled some of the

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distinguish *Topco* from *Sylvania*, however. *Id*. at 57, fn. 27 (*Topco* "is not to the contrary, for it involved a horizontal restriction among ostensible competitors."). Despite this attempt, the line between vertical and horizontal restrictions along a supply chain can be a blurry one. *See, e.g.*, Stephen Martin & John T. Scott, GTE Sylvania *and Interbrand Competition as the Primary Concern of Antitrust Law*, 51 REV. INDUS. ORG. 217, 222 (2017) ("[V]ertical collusion can restrict horizontal competition.").

[62] *See, e.g.*, Milton Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 COLUM. L. REV. 415, 422 (1973) ("Topco did not deal with different sectors of the economy or with different geographical markets. The case had to do with a single market, to wit, the retail distribution of food products.").

[63] *See Topco*, 405 U.S. at 613–624 (Burger, C.J., dissenting) (where the dissent focused entirely on the per se classification of the behavior and made no commentary on weighing the effects across "sectors").

[64] This idea is clear when considering Topco's defense that it "needs territorial divisions to compete with larger chains; that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition in the sale of Topco brand goods, the association actually increases competition by enabling its members to compete successfully with larger regional and national chains." *Id*. at 605.

[65] 433 U.S. at 58.

void and gave further shape to the principle of omitting out-of-market efficiencies.

Specifically, Section I.B.1 details how several appellate cases have wrestled with the reach of the logic of *PNB* outside of § 7. In the Third Circuit's *Muko* case, the majority and dissent disagreed over the applicability of *PNB* and *Topco* to Sherman Act cases involving vertical restraints.[66] In the First Circuit's *Sullivan v. NFL* decision, however, the court offered a coherent integration of the Supreme Court's *GTE Sylvania*'s decision with the out-of-market efficiencies principle expressed in *PNB*.[67]

Next, Section I.B.2 discusses how the federal antitrust agencies have injected their own interpretation of whether to consider out-of-market efficiencies with a notable footnote to the *Horizontal Merger Guidelines*.[68] Specifically, the agencies explain that when efficiencies are "inextricably linked" to the relevant market, then they may exercise prosecutorial discretion to consider the efficiencies. However, the term "inextricably linked," while perhaps instinctively appealing, ultimately offers little concrete guidance to courts—to the extent the agencies' view of out-of-market efficiencies shape the judiciary's view of the principle. Without a firm grounding in foundational economic principles, it is significantly easier for policymakers to unilaterally delete the footnote in future revisions to the merger guidelines and for courts to consider the exception as merely a question of prosecutorial discretion.

1. A Pair of Appellate Cases

Two circuit court cases are notable for their interpretation of the applicability of the out-of-market efficiencies principle to Sherman Act cases. In *Muko*,[69] because local unions picketed and leafleted at a Long John Silver's fast-food location, the chain only employed unionized general contractors to build its Pittsburgh-area restaurants.[70] Larry Muko, a general contractor, sued the chain and the trade union for entering an agreement to only award contracts to union contractors, in restraint of trade under the Sherman Act, §

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[66] Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Const. Trades Council, 670 F.2d 421 (3d Cir. 1982).
[67] Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994).
[68] 2010 GUIDELINES, *supra* note 6, at f.14.
[69] Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Const. Trades Council, 670 F.2d 421 (3d Cir. 1982).
[70] *Id*. at 423.

1.[71] The Third Circuit held the chain's agreement with the trade union was not unreasonable per se because it was not a classic group boycott, that is, a concerted refusal to deal.[72] Further, the Third Circuit noted "procompetitive effects were demonstrated—Silver's gained a position in the otherwise crowded Pittsburgh-area fast food market."[73]

The dissent in *Muko*, however, invoked both *PNB* and *Topco* to argue that "antitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another."[74] In response, the majority defended its decision by cabining *PNB* to § 7 cases.[75] As for *Topco*, the majority dismissed its relevance to the facts in *Muko* since *Topco* "involved a horizontal territorial restraint."[76] Further, the majority cited *GTE Sylvania* for the broader proposition that vertical restraints are no longer per se violations.[77] What this exchange between the majority and dissent illustrates is a degree of confusion about the scope of *PNB* and *Topco*. The dissent believes both prohibit cross-market comparisons, while the majority—citing *GTE Sylvania*—seemingly recognized that assessing vertical restraints under a rule of reason framework *is* engaging in cross-market comparisons.

This recognition that vertical restraints can involve cross-market comparisons came to fruition in the First Circuit's *Sullivan v. National Football League (NFL)* decision.[78] *Sullivan* involved an NFL policy that prohibited the sale of ownership through publicly traded stock. William Sullivan wanted to sell his ownership interest in the New England Patriots through a public offering, but, due to the NFL's policy, he alleged that he sold his interest in the team for less than it was worth.[79] Sullivan brought a Sherman Act, § 1 claim

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[71] *Id*. at 424.
[72] *Id*. at 432.
[73] *Id*. While the entry of Long John Silver's into the Pittsburg fast food market was undoubtedly beneficial, the proper counterfactual is whether the entry would have occurred at a lower cost or higher quality but for the exclusion of non-unionized contractors.
[74] *Id*. at 439 (Sloviter, J., dissenting).
[75] *Id*. at 433 ("*United States v. Philadelphia National Bank*…cited by the dissent for the proposition that a procompetitive effect in one market will not excuse an anticompetitive effect in another, was a merger case under section 7 of the Clayton Act.").
[76] *Id*. at 432.
[77] *Id*. at 433.
[78] Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994).
[79] *Id*. at 1096.

against the NFL.[80] A jury sided with Sullivan, and the NFL appealed on the basis that the district court improperly instructed the jury to balance harms and benefits to competition only *within* the relevant market for ownership in NFL team.[81] The NFL argued that all procompetitive effects, even in another market, should be considered.[82] The alleged other relevant market was the market for NFL football games compared to other entertainment, and the NFL argued its ownership policy enhanced its entertainment product.[83]

While the First Circuit's decision in *Sullivan* does not cite to *PNB* or *Topco*, the court rejected the idea of considering "some unrelated benefits to competition in another market" within the rule of reason analysis.[84] This seemingly endorses the out-of-market efficiencies principle's application to the Sherman Act. However, the court immediately qualifies this is not an absolute rule.[85] Specifically, the court found that "benefits flowing indirectly" can have a positive "impact on competition in the relevant market itself."[86] More fully, the court explicitly endorsed considering benefits in "closely related" markets, in this case, "the market for NFL football," when considering alleged harm in the market for NFL ownership.[87] Further, the court recognized the importance of the *GTE Sylvania* decision in the out-of-market efficiencies debate: "*Continental T.V.* explicitly recognized that positive effects on interbrand competition can justify anticompetitive effects on intrabrand

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[80] *Id*. at 1095.
[81] *Id*. at 1111.
[82] *Id*.
[83] *Id*. at 1112–13.
[84] *Id*. at 1112 ("[T]he ultimate question under the rule of reason is whether a challenged practice promotes or suppresses competition. Thus, it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market.").
[85] *Id*. ("On the other hand, several courts, including this Circuit, have found it appropriate in some cases to balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets.").
[86] *Id*. at 1113.
[87] *Id*. at 1112 ("Arguably, the market put forward by the NFL—that is the market for NFL football in competition with other forms of entertainment—is closely related to the relevant market found by the jury such that the procompetitive benefits in one can be compared to the anticompetitive harms in the other. Clearly this question can only be answered upon a much more in-depth inquiry that we need not, nor find it appropriate to, embark upon at this time.")

competition. … [H]ere is also some indication that interbrand and intrabrand competition necessarily refer to distinct, yet related, markets."[88]

In summary, the *Sullivan* decision recognized the close relationship markets can have along the same vertical supply change—in this case, the market for NFL owners and the market for NFL games. The fact that ownership structures might matter for the quality of NFL games, holding aside the validity of the argument, is—strictly speaking—comparing the welfare of different groups (owners v. fans).

Thus, both *Muko* and *Sullivan* reject the proposition that welfare across different relevant markets cannot be compared; although, the road to this recognition was arguably a bit rocky. *Sullivan*, in particular, recognized that courts should not consider all out-of-market benefits but only those closely related to the relevant market. However, what qualifies as an "unrelated benefit" and what qualifies as a "closely related" benefit? The 1997 revision to the *1992 Guidelines* picked up this theme three years later.

2. *The Horizontal Merger Guidelines' "Inextricably Linked" Markets Exception*

Arguably, the biggest challenge to the out-of-market efficiencies principle did not occur in the courts but at the agencies. In 1997, the DOJ and FTC carved out an exception to the principle when it revised the efficiencies section of the *1992 Guidelines*.[89] In a footnote, the 1992/1997 *Guidelines* allowed that:

> In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.[90]

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[88] *Id*.
[89] 1992 HORIZONTAL MERGER GUIDELINES, https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.
[90] *Id*. at f.36.

In 2010, the agencies revised the guidelines once again. The "inextricably linked" exception remained; however, in the *2010 Guidelines*, the agencies dropped the following sentence: "Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger."[91] This suggests the agencies became more receptive to out-of-market efficiencies at the time of drafting the *2010 Guidelines*.

While the impact of the footnote is hard to measure—given that prosecutorial discretion is largely unobservable to the general public,[92] it remains a key development in the out-of-market efficiencies debate. Although there are questions about the weight of the insight outside of the agencies,[93] the insertion of the footnote appears to be reflective of the Agencies' recognition of the confusion and inconsistency in the case law. In turn, as in other cases where courts have adopted parts of the *Guidelines*, this footnote offers a guide to how the confusion and inconsistency in the case law could be resolved. Given that the antitrust agencies are about to release a draft of a newly revised guidelines—with clear indications of a hostility towards efficiencies,[94] it is questionable whether the footnote will survive. Thus, there

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[91] 2010 GUIDELINES, *supra* note 6, at f.14.

[92] *See* Crane, *supra* note 28, at 401 ("How frequently the agencies invoke this prosecutorial discretion in practice is difficult to say."). In its 2006 commentary, the agencies did highlight a use of this discretion when it permitted the merger of United States Bakery and Gai's Seattle French Bakery Co. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), https://www.justice.gov/atr/file/801216/download at 57 ("Critical to the Department's assessment was the fact that the merger-specific efficiencies would benefit all customers, and the restaurant and institutional customers potentially of concern accounted for only about 20% of the companies' sales."). *See also* Kolasky & Dick, *supra* note 9, at 231 (detailing how the FTC cleared a merger between companies that operated natural gas gathering transport systems that harmed competition in several areas but generated substantial benefits to "all producers served").

[93] *See* Baker, *supra* note 52, at 190 ("As a matter of prosecutorial discretion in merger review, the antitrust enforcement agencies may permit benefits in one market to offset harms in another when the two are inextricably linked, but under *Philadelphia National Bank*, which still controls, courts cannot follow suit.").

[94] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (2022), https://www.regulations.gov/document/FTC-2022-0003-0001 at f.18 (citing Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967): "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); also citing United States v. Anthem, Inc., 855 F.3d 345, 353 (D.C.

is even more urgency to expound upon—using economic principles—what "inextricably linked" means in a systematic way.[95]

3. *Current State of the Principle*

After *PNB*, and even *Topco,* academics and practitioners are divided on the question of the scope and application of the out-of-market efficiencies principle. There are some who argue that *PNB*, while still a binding precedent, only applies to Clayton Act, § 7 cases and does not inform other conduct.[96] Others, however, do not have such a narrow reading of the precedent.[97]

Clearly, the principle's stronghold firmly centers on § 7 mergers. Yet, one appellate case stands out as potentially chipping away at the strength of

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Cir. 2017) ("[I]t is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7."). For a detailed analysis as to why *Procter & Gamble* cannot stand for the proposition that Supreme Court denied a role for efficiencies as a negating defense, see Alexander Raskovich et al., *Efficiencies in Merger Review: Global Antitrust Institute Comment on the DOJ-FTC Request for Information on Merger Enforcement*, George Mason Law & Economics Research Paper No. 22-18, at 13, Apr. 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089959.

[95] Few commentaries exist that connect "inextricably linked" to economic concepts in a comprehensive way. The closest is Orszag & Smith, who offer several examples that would qualify, such as, when there are complementarities in demand. *See* Jonathan M. Orszag & Loren K. Smith, *Toward a More Complete Treatment of Efficiencies in Merger Analysis: Lessons from Recent Challenges*, ANTITRUST SOURCE 3-6 (Oct. 2016).

[96] *See, e.g.*, Werden, *supra* note 13, at 126 ("*Philadelphia National Bank* did not create a rule applicable in Sherman Act cases, and no subsequent merger decision by the Court has been cited as authority for the merger-specificity rule. For guidance on cross-market balancing in rule-of-reason cases, we must look elsewhere."). Similarly, others only discuss the principle within the context of Clayton Act cases. *See* Crane, *supra* note 28; Rybnicek & Wright, *supra* note 28.

[97] *See, e.g.*, Baker, *supra* note 52, at 190 ("Consistent with the case law involving harms to suppliers, antitrust law does not permit courts to offset competitive harms in one market with competitive benefits in another. . . . The same rule [not permitting benefits in one market to offset harms in another] applies in non-merger litigation."); Steven C. Salop, Daniel Francis, Lauren Sillman, & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, at 24 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3959827 ("Benefits in one market cannot normally be invoked to justify harms in another market. This rule certainly governs merger cases. And while the Supreme Court has not been entirely clear, there is a basis for thinking that it applies also in conduct cases."); Tatos & Singer, *supra* note 8, at 1190–91 ("If merger cases have properly ignored such offsets, permitting conduct cases

the principle—even for horizontal mergers: *FTC v. Tenet Healthcare Corp*.[98] The case involved the proposed merger of Tenet's Lucy Lee Hospital and Poplar Bluff Physicians Group's Doctors' Regional Medical Center (DRMC), which are the only hospitals in Poplar Bluff, Missouri. Both hospitals provide general acute primary and secondary care services, which the hospitals agreed—considered as a whole—were the relevant product market to assess the merger.[99] Despite agreeing to the relevant market, the parties claimed an efficiency outside of that market. Specifically, they claimed that the merger would create efficiencies in tertiary care services.[100] The district court, citing *PNB*, immediately rejected the defense.[101] Therefore, the district court agreed with the plaintiff that the merger would substantially lessen competition.[102]

However, the Eighth Circuit reversed the ruling on appeal. The appeal did not disturb the district court and parties' agreement that acute primary and secondary services are the relevant product market.[103] Critically, however, the appellate court did not wholly dismiss the parties' out-of-market efficiencies argument:

> We further find that although Tenet's efficiencies defense may have been properly rejected by the district court, the district court should nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger. . . . The merged entity will be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care. . . . The evidence

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to do so implies a distinction in regulatory objective where none exists. After all, antitrust claims brought under the Clayton Antitrust Act and Sherman Act have a singular central purpose: to protect competition and to disperse economic power. Why permit one type of anticompetitive conduct to benefit from specious defenses generally condemned under another?").

[98] F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999).

[99] *Id*. at 942 ("The parties agree that the product market is general acute care in-patient hospital services, including primary and secondary services, but not including tertiary or quaternary care hospital services.").

[100] *Id*. at 948 ("Defendants claim that the proposed merger will allow Tenet to bring open heart surgery and other tertiary services to Poplar Bluff.").

[101] F.T.C. v. Tenet Healthcare Corp., 17 F. Supp. 2d 937 (1998) ("These alleged benefits, even if possible, cannot justify the proposed merger because the relevant market in this case includes acute care services, not tertiary care services.").

[102] *Id*. at 948–49.

[103] F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1051–52.

> shows that the merged entity may well enhance competition in the greater Southeast Missouri area.[104]

The appellate court makes a clear reference to an out-of-market efficiency both in terms of the product market (by referencing tertiary care) and the geographic market (by referencing the greater Southeast Missouri area).[105] Given that the decision came shortly after the 1997 revision to the *1992 Guidelines*, perhaps the "inextricably linked" footnote had some influence—although the judge did not explicitly cite it. This deviation, however marginal, from *PNB* is even more surprising given that the district court cited the *PNB* precedent. Further, within academia and practitioners, there is a belief that *PNB* unequivocally disallowed out-of-market efficiencies in § 7 cases.

On the other hand, perhaps it was not the merger guidelines footnote that opened a crack in the principle but the *PNB* decision itself. As detailed in *supra* Section I.A, the Court in *PNB* considered and rejected two efficiency defenses—but it treated the two differently. The first defense was the post-merger ability to make larger loans. This ability is unquestionably merger-specific and a direct result of combining the operations of both banks. While the Court dismissed the claim based on a "slippery slope" argument,[106] it still examined the defense and found the parties' entry into larger loans to be inconsequential. What if the Court found the opposite? Would the Court still have rejected the defense? In contrast, the second efficiency claim was based on vague notions of bringing "business to the area and stimulat[ing] its economic development."[107] This sounds like the type of argument made when city leaders attempt to justify hosting the Olympics or building a new stadium.[108] The Court seemingly invoked the burden of administrative costs and a general unwillingness to weigh social "debits" and "credits" across the

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[104] *Id*. at 1054–55.

[105] While the appellate court rejected the district court's geographic market (i.e., a 50-mile radius from downtown Poplar Bluff), the appellate court never stated it believed the correct market was as large as the greater Southeast Missouri area. *Id*. 1052-54.

[106] *See* Crane, *supra* note 28, at 402.

[107] 374 U.S. at 371.

[108] *See, e.g.*, Pasquale Lucio Scandizzo & Maria Rita Pierleoni, *Assessing the Olympic Games: The Economic Impact and Beyond*, 32 J. ECON. STUD. 649, 649 (2018) ("The general findings appear to be controversial with some hints of positive overall effects, but also with a well-documented tendency to exaggerate the benefits and underestimate the costs of holding the Games in the *ex ante* versus the *ex post* studies.").

economy. Importantly, the Court also found the entire exercise as incompatible with the purpose of § 7. Therefore, the foundation of the out-of-market efficiencies principle established in *PNB* is on significantly firmer ground for vague, broader efficiency claims versus those that are more closely tethered to the relevant market and conduct at issue. The distinction and differential treatment of out-of-market efficiencies that are "inextricably linked" to a relevant market, versus those that are not so linked, thus appears to be implicit in both *PNB* and *Tenet*, as well as being explicitly recognized in the *Guidelines*.

Outside of § 7 cases, however, the applicability of the out-of-market efficiencies principle is exceedingly weak. Contrary to how some interpret *Topco*, the Supreme Court did not address out-of-market efficiencies. The decision was primarily about clarifying that efficiency claims—even *within* a relevant market—will be not considered when the conduct is per se illegal. Thus, the Third Circuit's *Muko* and First Circuit's *Sullivan* decisions, which involved Sherman Act, § 1 claims under the rule of reason, permitted the consideration of out-of-market efficiencies.

Yet, the inclusion of out-of-market efficiencies outside of § 7 is not absolute. There is a general sense, especially in the language of *Tenet* and *Sullivan*, that courts are not willing to simply consider every possible efficiency defense and engage in a broad exercise to weigh all cross-market harms and benefits.[109] Thus, there is a notion that some out-of-market efficiencies are valid while others are not. Not surprisingly, however, there is some degree of confusion as to what types of efficiencies qualify to be "counted."

This confusion is evident in how some interpret the Supreme Court's ruling in *NCAA v. Board of Regents*.[110] The case involved the NCAA's restriction in the early 1980s on the number of televised games each member school could broadcast.[111] The University of Georgia and University of Oklahoma brought a § 1 claim against the NCAA. The relevant market was determined to be the

[109] *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 ("[I]t seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market.").
[110] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).
[111] *Id*. at 94.

live broadcast of college football games.[112] The Court made two notable rulings. First, given the nature of the product, applying a per se rule was inappropriate.[113] Second, even under the rule of reason, the agreement was anticompetitive.[114]

Yet, in arriving at this latter ruling, the Court in *Board of Regents* considered two very different efficiency claims. For the first claim, the Court was unpersuaded that limiting the number of televised games promoted live attendance,[115] which is not part of the relevant market. As for the second claim, the Court was also unpersuaded that the restraint was necessary to protect "competitive balance" among the teams.[116] Importantly, however, there are both within-market and out-of-market elements to this second claim. The within-market effect is that promoting greater competitive balance arguably improves the quality of the relevant product, that is, the live broadcast of college football games. Yet, the restraint also negatively impacts the labor market (i.e., student athletes) since the goal is to deprive some athletic departments of money,[117] which, in turn, arguably harms the student athletes at those schools.[118] The point is that the restraint impacts the welfare of

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[112] *Id*. at 112 ("It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts.").

[113] *Id*. at 100–01 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.").

[114] *Id*. at 103.

[115] *Id*. at 116–117.

[116] *Id*. at 117 ("Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.").

[117] *Id*. at 119 ("The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others.").

[118] *See* Tatos & Singer, *supra* note 8, at 1191 ("*Board of Regents* opened the door to offsetting harms to athlete labor in the input market with claimed demand-enhancing benefits to downstream viewers of the sporting events produced in the output market."). Thus, this rationale for the restraint involved—not an out-of-market efficiency claim—but an out-of-market injury claim, that is, to the upstream labor market. Consequently, an alternative approach to assess *Board of Regents* is that the case involved two relevant markets (one upstream and one downstream); although, there is still the question of whether an efficiency in one relevant market (downstream) can offset harm in the other relevant market (upstream).

"consumers" in both the labor market as well as the final product market, which are obviously very different markets.

At first blush, the Court's consideration of efficiencies in *Board of Regents* seems contrary to its ruling in *PNB* and perhaps even *Topco*, yet there is a crucial difference. A labor market (e.g., student athletes) and output market (e.g., live broadcasted college football games) are on the same supply chain; thus, restrictions placed on labor markets may ultimately impact output markets.[119] While these are technically different "relevant markets" in that there is an inability to substitute between inputs and outputs, this is very different from how the Court in *PNB* considered cross-market comparisons. The cross-market comparison in *PNB* was *horizontal*—across final consumer groups, while the cross-market comparison in *Board of Regents* was *vertical*—across groups within the same supply chain. A possible take-away is that the out-of-market efficiencies principle from *PNB* is not strictly about different relevant markets per se but rather different relevant markets that ultimately impact a different set of final consumers.[120] Disallowing cross-market comparisons along the same supply chain would render most vertical control analyses moot (e.g., resale price maintenance, tying, exclusivity). Beneficial vertical controls may involve placing restraints upstream or downstream in order to gain efficiencies downstream or upstream, respectively.[121] Therefore,

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[119] This general principle is clear in *Fraser v. Major League Soccer*, which cites to *Board of Regents*. *See* Fraser v. Major League Soccer, LLC, 7 F. Supp. 2d 73, 78 (D. Mass. 1998) ("[A] restraint on competition in the market for player services might have corresponding, and necessary, procompetitive effects in the market for soccer matches or for sports entertainment generally.").

[120] *See, e.g.*, Werden, *supra* note 13, at 125 ("Although an antitrust decision might be expected to use 'market' in its antitrust sense, contemporaneous antitrust decisions by the Court clearly used 'market' to mean 'customer group.' If the Court meant to articulate any rule, it had to be a rule against trading a benefit to one customer group off against harm to another customer group.").

[121] *See generally* Daniel O'Brien, *The Economics of Vertical Restraints in Digital Markets*, *in* THE GAI REPORT ON THE DIGITAL ECONOMY 265 (Joshua D. Wright & Douglas H. Ginsburg, eds., 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733740.265 ("[M]any important motivations for vertical restraints involve designing contracts that provide the contracting parties with incentives to make independent decisions that maximize their joint profits (their 'fully integrated' profits), so they can divide those profits with transfer payments. This means that in many contexts, vertical restraints can have similar or even the same effects as vertical integration, depending on the context.").

we should be cautious when interpreting the out-of-market efficiencies principle established in *PNB* (and, for some, *Topco*) as fundamentally about disallowing the comparison of welfare across groups.[122]

The implication of the above distinction can be quite important. In *Ohio v. American Express* (*Amex*), the Supreme Court included both merchants and cardholders in the same relevant market.[123] Some have been highly critical of the Court for defining a single, integrated market to assess credit card governance rather than two markets: one for cardholders and one for merchants.[124] One strand of critics argue that the Court violated the principle established in *PNB* and *Topco* that welfare across groups should not be conducted in antitrust—such as, cardholders and merchants.[125]

In summary, the state and scope of the out-of-market efficiencies principle established in *PNB* are still live issues. Even within § 7, there is a recognition that not all out-of-market efficiency claims are the same. This is particularly evident in the agencies' recognition that some markets are "inextricably linked." Outside of § 7, the general unwillingness to weigh distant benefits remains. The next Part proposes a reform to create a unified, coherent structure to assess out-of-market efficiency claims.

II. MOVING FROM "OUT-OF-MARKET" EFFICIENCIES TO "RELEVANT" EFFICIENCIES

This Part presents the case for reforming how agencies and courts consider out-of-market efficiencies. While the soundness of the *PNB* decision

[122] *See, e.g.*, Tatos & Singer, *supra* note 8, at 1184 ("The offset defense in conduct cases also runs afoul of precedent in *Philadelphia National Bank* in which the Court correctly noted that balancing harms and benefits across groups is the proper domain of the legislative branch, not the judiciary").

[123] Ohio v. American Express, 138 S. Ct. 2274 (2018).

[124] For a summary of the various critics see Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of* Ohio v. American Express, 54 REV. INDUS. ORG. 717 (2019).

[125] Tatos & Singer, *supra* note 8, at 1216 ("[I]n addition to arguing for a statutory repeal of the *American Express* decision, we propose a prohibition on judicial balancing of claimed benefits to any group other than the group that suffered an antitrust injury.").

has been previously questioned,[126] several recent developments increase the necessity in implementing a reform in how all efficiencies, both in-market and out-of-market, should be assessed. To that end, this Part proposes a reformed, structured approach to considering whether efficiencies are "relevant" to the conduct at issue. Finally, several potential criticisms of the proposal are addressed.

A. An Argument for Reform

Relevant markets in antitrust cases have narrowed considerably over the past fifty years.[127] The current merger guidelines explicitly builds in narrower markets,[128] and the pending revised guidelines will likely narrow them even further. Defining markets narrowly is an endogenous decision that strategically magnifies the alleged anticompetitive harm while minimizing the potential for the defense to offer an in-market efficiencies explanation.[129] As a consequence, what would have been an in-market efficiency 20 years ago could conceivably be an out-of-market efficiency today—based simply on a legal conclusion of what is considered the "relevant market." This narrowing, however, may not calibrate with the economic realities regarding the benefits from a particular practice. The answer will be case-specific. The point is that defining the relevant market is not an exogenous exercise to ascertain the "true" parameters of competition[130]—either from a harms or efficiencies

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[126] *See* Werden, *supra* note 13; Crane, *supra* note 28; Rybnicek & Wright, *supra* note 28.

[127] *See, e.g.*, Wilson & Klovers, *supra* note 19; Werden, *supra* note 13, at 122.

[128] Joshua D. Wright, *Comment on the Proposed Update on the Horizontal Merger Guidelines: Accounting for Out-of-Market Efficiencies*, at 1 (May 31, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656538 ("There is not much debate that the methodological approach adopted by the 2010 Proposed Horizontal Merger Guidelines ('new HMGs') will result in narrower relevant markets.").

[129] *See, e.g.*, *id*. at 2 ("[A]n approach that leads to narrower markets, even assuming the approach more accurately identifies anticompetitive effects, also increases significantly the potential for enforcement decisions that would enable the Agencies to successfully challenge mergers that would simultaneously violate Section 7 in one relevant market but produce net consumer welfare gains as a result of increased competition in other relevant markets.").

[130] *See, e.g.*, Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107, 124 (2011) (maintaining that courts "are free to decide as they wish and to ratify their decisions through an essentially ex post choice of market definition. That is, if they wish to reject a

perspective. Rather, the market definition exercise is a moving target from case to case and from era to era. The idea that efficiencies perfectly map to these changing boundaries intended to focus on alleged harm defies economic logic.[131]

The increasing importance of multisided platforms with associated cross-group network effects further reveals the untenability of the current approach to out-of-market efficiencies. As *Amex* illustrated, determining the "relevant market" to assess conduct is not always as conceptually straightforward as determining whether Yuengling is a substitute for Budweiser. For instance, consider ride sharing platforms, which seek to match drivers with passengers. Are the drivers in the same relevant market as the passengers? It would seem so. Yet, there are some who would place drivers in a separate relevant market from passengers.[132] If so, what happens to efficiency arguments that are not neatly cabined to passengers and drivers (which is particularly likely given the presence of strong cross-group effects)?[133] What this example illustrates is, again, that relevant market definitions are endogenous. It is fungible based on the nature of the business, conduct, and, even, the current merger guidelines. If so, then the out-of-market efficiencies principle would force the efficiency analysis to follow in lockstep with the boundaries used to examine the harm—even if there is little economic basis for doing so.

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merger because they believe that it is anticompetitive they can—essentially for that reason—choose the narrow market definition, and conversely if they believe the opposite").

[131] Even further, the entire paradigm of considering the welfare effects of mergers through the lens of relevant markets can miss the forest for the trees. For instance, Henry Manne detailed how mergers may be an efficient mechanism to gain corporate control to implement more efficient management at poorly run companies. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

[132] The parallel in *Amex* is the view that cardholders and merchants should be two separate relevant markets. *Cf*. Brief of 28 Professors, *supra* note 18, at 18 ("[T]here is in fact no logical way to include two different 'sides' of a company's platform or business model in one antitrust market.").

[133] For some advocates of a separate markets approach to assess multisided platforms, the answer is clear. *See, e.g., id.* at 22 ("*[A]mici* would still strenuously urge this Court not to approve of any 'netting' or 'balancing' analysis across relevant markets—even if they are 'both sides' of a two-sided platform—because that exercise is fundamentally inconsistent with the antitrust laws' core purposes.").

Arguably, anticipating this potential for antitrust gerrymandering in platform markets, Justice Thomas in *Amex* preempted the possibility by including both sides of a transactional platform, that is, credit card merchants and cardholders, into one unified "relevant market" to consider the alleged anticompetitive conduct.[134] Perhaps, in the absence of the nebulous out-of-market efficiency debate,[135] the Court would have felt a greater license to define several, interrelated relevant markets in *Amex* rather than a single market.[136] What this shows is that the treatment of out-of-market efficiencies can shape how courts define markets which, assuming a court is sympathetic to an efficiency defense, could unnecessarily dilute the anticompetitive harm in an effort to expand the scope of the inquiry to include all the efficiencies. Again, the point is that harms and benefits are two levers in antitrust. They may correspond perfectly such that the relevant market to examine harms precisely captures all the benefits as well. Or, as detailed in the following section, the economics of the conduct may not follow such a neat mapping. Thus, forcing courts and agencies to move both harms and efficiencies with one lever rather than two may result in clumsy markets in either direction—either too narrow or too broad.

A third point in support of reforming the current approach is that economies of scope may be becoming more important—particularly in the digital sector.[137] Economies of scope occur when it is cheaper to produce two

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[134] Ohio v. American Express, 138 S. Ct. 2274 (2018).

[135] *See, e.g.*, Brief of 28 Professors, *supra* note 18, at 11 ("As an example, this Court in *NCAA v. Board Of Regents of University of Oklahoma* . . . did not permit the NCAA to defend a restriction on televising college football games on the theory that it would 'protect live attendance.' That justification rested on the view that exercising market power and restricting output (i.e., limiting broadcasts) would lead to benefits elsewhere in the economy, and so was 'inconsistent with the basic policy of the Sherman Act.'").

[136] Of course, this begs the question: why did the *Amex* Court not simply settle the out-of-markets efficiency debate for § 1 cases? The Court may not have felt the need to do so. By defining the relevant market to include both sides of the payment platform, and there are good economic arguments for doing so, considering out-of-market efficiencies became irrelevant.

[137] *See* MARC BOURREAU & ALEXANDRE DE STREEL, DIGITAL CONGLOMERATES AND EU COMPETITION POLICY 9 (2019), ("[W]e argue that two key characteristics of the digital economy may also explain the rise of digital conglomerates: on the supply side, the presence of important economies of scope in the development of digital products and services; on the

or more goods or services within one firm than across multiple firms. Specifically, if goods or services share multiple inputs that are not highly rivalrous in use (e.g., a particular patent that can be used for multiple products, servers with excess capacity), then this can significantly lower costs from joint production. For instance, in digital markets, large technology firms often engage in a portfolio of services that are related to a degree but are not close substitutes, *e.g.*, messaging, operating systems, app stores, video sharing, search engines, advertising hosting. Thus, digital firms can leverage their existing infrastructure, intellectual property, and other competencies into new services. Ultimately, to the extent that economies of scope are relevant to a business, cabining efficiency gains to one market is unnecessarily limiting. For instance, a merger between two digital platforms may result in one overlapping market to focus the inquiry of potential harms but may also result in cognizable benefits across several services and products.

Another illustration of potential economies of scope is a firm that operates in multiple geographic markets. Suppose a firm has a presence in five states, and its operations in each state is deemed to compete in separate geographic markets for antitrust purposes. Assume the firm merges with another firm where there is an overlap in only one of the geographic markets. It is not hard to fathom that combining their operations would also result in tangible efficiencies across numerous other states besides the overlapping one. Under a strict application of the out-of-market efficiencies principle, however, a finding of harm in the overlapping market would end the inquiry and bar consideration of the benefits accruing in the other states. As the relevance of economies of scope grows, this increases the potential welfare loss from preventing welfare-enhancing conduct from occurring if courts disallow these out-of-market efficiency gains.

A fourth argument to reform how out-of-market efficiencies are considered relies, not on conceptual principles, but on the current disorder in the out-of-market efficiencies debate. As detailed, there are various interpretations of cases such as *Topco* and disagreement over the scope of the *PNB* ruling for non-merger conduct cases—and even within merger cases. In parallel, there is also growing recognition that some effects, while strictly

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demand-side, consumption synergies derived by consumers when adopting product ecosystems.”).

outside of a relevant market, so closely relate to the conduct that a blanket exclusion of these effects is unwarranted. Yet, an effect also must reasonably relate to the conduct at issue, and courts should not engage in broad comparisons across markets, industries, and sectors.

In sum, there are several reasons to reform the current out-of-market efficiencies approach—both conceptually and practically. These reasons include an increasing trend towards defining markets narrowly; the growing importance of cross-group network effects; the importance of considering economies of scope in production; and the need for greater clarity and harmonization across various types of antitrust cases.

B. Towards a Reformed Standard: Relevant Efficiencies

This Section proposes a structural change to how agencies and courts should consider efficiency arguments. Efficiency analysis should discard with strict in-market and out-of-market classifications but rather should consider whether the benefit from business conduct, such as, a merger, is a “relevant” efficiency. The idea is to implement a two-step inquiry. Step one determines whether an efficiency is relevant. All efficiencies that directly impact the consumer group that a particular business practice negatively impacts are automatically classified as relevant efficiencies. However, for efficiencies that impact a different group—whether on the same supply chain or across final product markets, only those that are “interdependent” with the relevant market will be relevant efficiencies. Step two establishes whether a relevant efficiency is cognizable, that is, whether the efficiency is (a) verifiable and (b) specific to the conduct at issue, and (c) do not arise from an anticompetitive reduction in output or service. This second step is no different from the current antitrust approach to evaluating if efficiency claims are cognizable.

The key to the reform proposal is the idea of an efficiency that impacts an “interdependent” market. This is the limiting principle, which is best illustrated with examples. The following four categories of interdependence are not necessarily the full set of situations where interdependence might arise; however, these categories are based on established economic principles, which can serve as a foundational benchmark. Specifically, on the demand-side, two primary categories of efficiencies may be interdependent with the relevant market: (1) complementary products and (2) multisided platforms.

On the supply-side, there may be interdependent efficiencies due to (3) economies of scope in production and (4) the connection of markets on the same supply chain. The following analysis discusses each category in turn.

The first category on the demand-side is complementary products. For example, when the price of printers increases, this reduces the demand for ink. The interdependency stems from the joint consumption of the two products. Suppose, for instance, that two hospitals are contemplating a merger. There may be a concern, for instance, over a cluster of services labeled "in-patient" services. However, further suppose both hospitals also provide physical therapy services, which are complements to many in-patient treatments. While there are two areas of overlap, that is, in-patient services and physical therapy, suppose that there are viable substitutes for physical therapy at non-hospital facilities. Further suppose that a divestiture of the in-patient services from the physical therapy services is infeasible. In this case, possible efficiency gains from having two physical therapy locations under a common ownership should be a relevant efficiency under step one.

The second category of interdependent markets on the demand-side are markets linked through significant cross-group network effects. Multisided platforms are commonly defined based on the presence of one or more cross-group network effects. The economic relationship between various groups linked through the network effect(s) is the interdependency. Consider a transactional platform such as an online marketplace that matches independent sellers with buyers. Or even a non-transactional platform such as a search engine that monetizes through the management of an ad network. If a particular merger or governance practice of the platform creates an anticompetitive concern for one group, e.g., sellers or advertisers, then, due to the presence of strong cross-group network effects, benefits to the other side, e.g., buyers and users, respectively, could be a relevant efficiency.[138]

The third category—on the supply-side now—is economies of scope, which, again, result from sharable inputs.[139] For example, providing cable television and high-speed internet is presumably cheaper together than supplying them separately. Suppose that a merger between two cable

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[138] Not all multisided platform cases will necessarily invoke the *Amex* precedent, so it is likely that future cases will involve relevant markets that incorporate only one side of a multisided platform.

[139] *See* Panzar & Willig (1981), *supra* note 24.

providers creates a concern, yet the merger also combines their high-speed internet capabilities which face more competition from other technologies, such as 5G networks, fiber optics, and satellite. The interrelationship in this case is on the supply-side, and there are clear potential efficiency gains in high-speed internet services to contemplate alongside potential harms in cable television. This interdependency category would also capture companies that compete in multiple regional or local markets where a concern may be over a specific geographic region but obtain gains over a broader network—e.g., transportation cost savings.

The fourth category, also on the supply-side, is an interdependence from being on the same supply chain. All vertical mergers and vertical control cases involve a consideration of various "markets" along the same supply chain. For example, the provision of cable television services can involve the market for content creation (e.g., studios), content aggregation (e.g., television stations), and content distribution (e.g., cable companies). Further, each level of the supply chain associates with various input markets, e.g., labor markets. All these markets are interdependent—to a degree—as they are essential to delivering the final product to consumers. Vertical mergers and vertical control cases today already consider these interrelated markets.[140] Thus, their inclusion in this classification of relevant efficiencies is more for completeness than a presentation of a new idea. This further illustrates how comparison across markets and groups of "consumers" occurs today—although, importantly, there is still one final consumer in a supply chain.

Overall, the primary goal of this proposal is to properly frame the consideration of out-of-market efficiencies based on economic principles. In other words, the proposal is to add an additional prong to the inquiry into cognizability: interdependence—as in-market efficiencies automatically satisfy the interdependence criterion. There are several reasons for instituting an interdependence approach to considering out-of-market efficiencies. First, conceptually, it establishes a sound economic relationship between markets outside of a strict, relevant market designation. Second, it also puts logical bounds on inquiries and analysis outside of the relevant market. In essence, the idea is that the closer efficiencies are to the relevant market, then the lower

[140] Notably, "complementary goods" and "vertically-related goods" are conceptually very similar from the standpoint of the antitrust analysis of efficiencies.

the administrative cost to consider the efficiencies (all else equal). Third, it harmonizes the treatment of efficiencies across major categories of antitrust cases, that is, horizontal mergers, vertical mergers, and conduct cases.

Critically, there are legitimate concerns of administrative burdens from adjudicating complex antitrust cases.[141] Hence there is a need to distinguish legitimate, interdependent effects from purported efficiencies that only have a tenuous connection to consumers in the relevant market, such as claims that a merger will "benefit the general public." Combined these reasons give a foundational basis to avoid considering efficiency claims too removed from the relevant market. Additionally, the more distant the benefit, then the harder it is to establish the existence and magnitude of the effect in a way to enable balancing with the anticompetitive effects.

C. Addressing Potential Shortcomings of the Relevant Efficiencies Reform

This Section addresses several potential criticisms of the reform proposal. These criticisms are not new and defend the current status quo regarding the treatment of out-of-market efficiencies. Nonetheless, this section examines these criticisms through the lens of this Article's reform proposal.

1. Not Consistent with the Statutory Language of § 7

Perhaps the strongest argument against reforming the current out-of-market efficiencies principle is not an economic argument but a statutory one. Specifically, § 7 prohibits acquisitions "*where in any line of commerce or in any activity affecting commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[142] The language seems to map well to the current merger

[141] *See, e.g.*, Note, *A Suggested Role for Rebuttable Presumptions in Antitrust Restraint of Trade Litigation*, 1972 DUKE L.J. 595, 596 (1972) ("Thus, the typical suit involves the presentation by the Government or by a private party plaintiff of a massive collection of material, a presentation by the defendant of equally massive amounts of rebuttal material, followed by an exhaustive legal-economic analysis of all the evidence by the court.").

[142] Clayton Act, 15 U.S.C. § 7 ("No person engaged in commerce or in any activity affecting commerce shall acquire . . . the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, *where in any line of commerce or in any*

guidelines definition of a relevant market, which combines (1) a geographic market ("in any section of the country") with (2) a product market ("in any line of commerce"). The idea is that the identified relevant market is central to the inquiry, and the statutory language prohibits considering effects outside of the "spotlight,"—even if doing so is economically and conceptually valid.[143]

There are several points to consider in response to this argument, however. First, even if applicable, this would limit the out-of-market efficiencies principle to § 7 cases. Second, antitrust jurisprudence rarely parses statutory language to provide guidance on specific practices due to the common law evolution of antitrust law.[144] Thus, concepts such as *stare decisis* have considerably less currency in antitrust—as the Supreme Court has repeatedly made clear.[145]

Third, even within the confines of the statutory language, the phrase "in any line of commerce" could be consistent with a concept of relevant efficiencies. Is "commerce" really the same as today's narrow view of "relevant markets"? That would seem peculiar as the concept of a relevant market has evolved and, as detailed, has narrowed. Even if *PNB* is correctly

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activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

[143] *See, e.g.*, Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1061 (2019) (finding the *PNB* decision "consistent with the statutory language which provides that a merger is unlawful if it harms competition in 'any' line of commerce and section of the country").

[144] *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."); United States v. Topco Assocs., 405 U.S. 596, 620-21 (1972) (Burger, J., dissenting) ("Senator Sherman [stated] 'I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.'" (quoting 21 Cong. Rec. 2457, 2460)). *See also* Crane, *supra* note 28, at 404 ("For better or worse, however, disciplined textual exegesis has rarely characterized Section 7 jurisprudence.").

[145] *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997). In *Khan*, Justice O'Connor wrote for a unanimous court that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" *Id*. at 5, 20–22 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978)); Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2412 (2015) ("This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act.").

interpreted as "firmly establishing" that out-of-market efficiencies never count in horizontal mergers, the establishment of the principle is not so firm as to be sheltered by *stare decisis*, as case law evolves in the face of economics.[146]

The merger guidelines recommend that relevant markets be defined using "a small but significant and non-transitory increase in price" (SSNIP) test. That is, would a 5 or 10 percent price increase be profitable for a hypothetical monopolist over a set of candidate products? The SSNIP paradigm enjoys widespread support in antitrust and is a prominent example of the influence the merger guidelines have had on the courts. Yet, is this what "commerce" means? Maybe commerce means something broader. For instance, a "line of commerce" could be the locus of economic activity impacted by a merger, which can encompass multiple individual relevant markets. This idea has some support in the discussions surrounding the 1950 amendment to the Clayton Act, § 7—as the hallmark of the 1950 amendment was to clarify the flexibility with which "line of commerce" can be applied in the antitrust analysis of mergers.[147]

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[146] To illustrate this point, consider the antitrust treatment of the glass container industry. One year after *PNB*, the Court disallowed Continental Can from acquiring Hazel-Atlas Glass Co. and, in doing so, grouped metal and glass containers into the same "relevant lines of commerce." *See* United States v. Cont'l Can Co., 378 U.S. 447 (1964) ("As for the product market, the court found, as was conceded by the parties, that the can industry and the glass container industry were relevant lines of commerce."). However, 50 years later, the FTC sought to block Ardagh's acquisition of St. Gobain under the significantly narrower definition of glass bottles for a specific categories of products including beer and spirits. *See* Complaint, *In re* Ardagh Group S.A., Docket No. 9356 at ¶ 22 (F.T.C. 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf ("The relevant product markets in which to analyze the Acquisition's effects are: (1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers.").

[147] *See A Study of the Antitrust Laws: Hearings Before the S. Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary to Study the Antitrust Laws of the U.S. and Their Administration, Interpretation, and Effect Pursuant to S. Res. 61 Part 6 General Motors*, 84th Cong. (1955), at 156 ("The markets in which the consequences of an acquisition are to be evaluated are the markets in which the acquiring and acquired companies operate and the markets affected by what happens in these markets. In economic terms, this appears to mean that market facts define the meaning of the relevant line of commerce and section of the country and that the actual and potential competitive consequences of an acquisition are to be tested…at whatever market levels (trade levels) they may occur."). *See also id.* at 157 ("Under the 1914 Act, examination of competitive consequences was confined to competition between the acquiring and acquired

If so, then even if the relevant market paradigm is useful to focus the analysis of harm and benefits, there are times when the impact of a practice is so close to the relevant market, but not strictly "in" the relevant market based on the SSNIP test, that the umbrella of "commerce" still applies to both the relevant market and the related market. Of course, this is not a license to link completely unrelated markets and consumers.

In sum, the statutory language of § 7 invoking "any line of commerce" cannot mean that, once a harm exists somewhere within that line of commerce, then the case becomes exclusively about that specific area—as "line of commerce" may span multiple "markets." Business conduct is too complex and multifaceted to be subject to such a naïve approach. Rather, a more sensible interpretation is that we give primacy and weight to the central market of concern but also recognize that the full impact of a merger (or conduct) cannot be determined without at least some examination of the benefits to consumers in interrelated markets. Thus, little in the statutory language hinders the use of the relevant efficiencies concept.

2. *Administrative Costs Are Already Too High*

Another potential criticism is that incorporating a relevant efficiencies regime unnecessarily complicates an already complex rule of reason analysis.[148] This criticism is not specific to efficiency claims but to almost everything that involves calls for greater evidence.[149] It is likely the most

company; the 1950 Act applies to any market level at which competitive consequences may work themselves out.").

[148] *See* Rose & Sallet, *supra* note 8, at 1979 ("[C]oncerns about administrability of an 'out-of-market' standard counsel against the introduction of cross-market effects."); Baker, *supra* note 52, at 191 ("The judicial prohibition against cross-market welfare trade-offs has an obvious administrability justification: the prohibition reduces the complexity of the reasonableness evaluation of the conduct under review."); Marinescu & Hovenkamp, *supra* note 143, at 1061 (arguing that "making quantitative assessments of benefits in one market and harms in a different market would place heroic demands on the courts").

[149] *See, e.g.*, Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107, 2130 (2020) ("Plaintiffs continue to face arguments about conduct, institutions, and market structure to persuade courts to impose overly demanding burdens of production and proof.").

common complaint against modern antitrust's focus on evidence-based economic analysis.[150]

The argument is based on the idea that the collected set of documents, depositions, and other evidence focus specifically on the relevant market where the harm is allegedly occurring. Therefore, incorporating efficiencies that are not strictly within that relevant market requires a whole new set of documents, depositions, and other evidence. While there is clearly some truth to the concern, the argument can be overstated. There is almost inevitably going to be a significant amount of overlap of evidence between the relevant and interrelated markets. Second, casting a slightly "wider net" at the outset of a case to consider both harms and interrelated efficiencies could be quite useful to a court and decision-maker.[151] Narrowly focusing on a specific area of commerce without a larger context could be unnecessarily limiting and is probably something most agencies and courts avoid even today. In other words, while there are costs to examining interrelated effects, there are clear benefits as well.[152]

More generally, there are always benefits and costs when considering more evidence. These issues cannot be completely resolved on a conceptual level. Nonetheless, this is where the importance of limiting out-of-market efficiency considerations to those interdependent with the relevant market is critical. Incorporating relevant efficiencies is not a proposal to move to an

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[150] *See* Robert Pitofsky, Chairman, Fed. Trade Comm'n, Efficiencies in Defense of Mergers: 18 Months After, Remarks at the George Mason Law Review Symposium: The Changing Face of Efficiency (Oct. 16, 1998), http://www.ftc.gov/public-statements/1998/10/efficiencies-defense-mergers-18-months-after ("[I]t is not practical in run-of-the-mill merger cases to trade off pro- and anti-competitive effects across markets.").

[151] A prominent example is the potential harm from mergers involving non-geographically proximate hospitals. *See, e.g.*, Leemore Dafny, Kate Ho, & Robin S. Lee, *The Price Effects of Cross-Market Mergers: Theory and Evidence from the Hospital Industry*, 50 RAND J. ECON. 286 (2019) (finding within-state cross-market hospital mergers led to price increases between seven to nine percent); Keith Brand & Ted Rosenbaum, *A Review of the Economic Literature on Cross-Market Health Care Mergers*, 82 ANTITRUST L.J. 533 (2019) (summarizing the literature).

[152] *Cf.* United States v. Topco Assocs., 405 U.S. 596, 622 (1972) (Burger, C.J., dissenting) ("We can undoubtedly ease our task, but we should not abdicate that role by formulation of per se rules with no justification other than the enhancement of predictability and the reduction of judicial investigation."). An economic analogy is how to consider the objective of a firm. While it is desirable to reduce fixed and variables costs to the lowest possible level, that is not the ultimate goal of the firm, which is to maximize profit.

economy-wide "general equilibrium" analysis. Essentially, antitrust cases are about understanding a firm's conduct within the constraints of a legal proceeding—which includes considerations of administrative costs. At times, one cannot understand the economic incentives firms face without considering the welfare of more than one group.[153] Further, antitrust is not literally about quantifying and weighing harmful and beneficial effects.[154] Rather, courts take the totality of the evidence to ultimately determine whether the preponderance of the evidence suggests harm to the competitive process and to consumer welfare.

Moreover, defendants bear the burden of production to validate their efficiency claims. This is an appropriate burden—as the defendants are the low-cost providers of the information and have the full incentive to present all the pertinent evidence supporting their efficiency claims. Thus, incorporating relevant efficiencies (which will not always involve out-of-market efficiencies claims) may not result in a significantly greater burden on plaintiffs (although, there are likely some additional costs associated with rebutting the evidence).

Lastly, the administrative cost argument against incorporating out-of-market efficiencies is peculiar when, apparently, there is ample willingness to increase the complexity of antitrust analyses through a fundamental expansion of the objectives of the antitrust laws. Recent proposals to expand the scope of antitrust inquiries include, *inter alia*, assessing the impact of business conduct on the environment, income inequality, labor markets, political corruption, and combating "fake news."[155] Not only would

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[153] *See* Werden, *supra* note 13, at 135 ("A restraint can be justified only on the ground that it promotes competition, but nothing in the logic or language of the Supreme Court's Sherman Act jurisprudence requires that the justification focus on the same competitive process as the plaintiff's prima facie case.").

[154] HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1912i, at 371 (3d ed. 2011) ("The set of rough judgments we make in antitrust litigation does not even come close to this 'balancing' metaphor.").

[155] *See, e.g.*, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 24–25 (2015) ("[T]he Supreme Court could recognize the economic and social concern with inequality as an antitrust goal, along with consumer welfare and efficiency. . . . We recognize that implementing this approach in practice for mergers, which we will use as an example, would require undertaking a detailed distributional analysis. The difficulty of determining the downstream effects of price increases on intermediate inputs often would make this type of distributional analysis challenging."); Lauren Sillman, *Antitrust*

expanding the scope and objective of antitrust cases require significantly more evidence, these considerations would profoundly reorder how antitrust is adjudicated and the nature of enforcement.[156] Further, many of these proposals inherently involve comparing the welfare of the participants in a relevant market with those outside of the market.[157]

3. *Slippery Slope*

Finally, the slippery slope criticism is likely the oldest justification for prohibiting out-of-market efficiencies—as it was in the original *PNB*

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for Consumers and Workers: A Framework for Labor Market Analysis in Merger Review, 30 KAN. J.L. & PUB. POL'Y 37, 41 (2020) ("This paper similarly argues that buyer power-and specifically buyer power in labor markets-deserves greater antitrust scrutiny and, to that end, develops a framework for systematically evaluating labor market power in merger analysis."); Sally Hubbard, *Fake News is a Real Antitrust Problem*, COMPETITION POL'Y INT'L ANTITRUST CHRON. 1, 6 (Fall 2017), https://www.competitionpolicyinternational.com/fake-news-is-a-real-antitrust-problem/ ("The current situation is not sustainable, and either a non-discrimination regulatory regime or stronger antitrust enforcement is inevitable. Measures that do not alter market structure or provide competitive pressure to combat fake news will face limits.").

[156] *See, e.g.*, Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 746 (2018) ("[W]hile antitrust enforcement does tend to reduce income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role. Nor can antitrust be the primary policy for dealing with the corruption of our political system and the excessive political power of large corporations. . . . Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire."); Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1223 (2016) ("Proving the crosscutting wealth effects on senior managers, midlevel managers, laboring employees, shareholders, vertically related firms, and different classes of consumers (and all of these same constituencies of other competitively affected firms) even in a single-market case could easily swamp already complicated merger or monopolization cases."); Seth B. Sacher & John M. Yun, *Twelve Fallacies of the "Neo-Antitrust" Movement*, 26 GEO. MASON L. REV. 1491, 1516 (2019) ("[C]onsiderations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology.").

[157] *See, e.g.*, Sacher & Yun, *supra* note 156, at 1518 ("[T]he conflicting goals of innovation and lower prices on the one hand and the effect on possibly low-skilled and low-income workers on the other, would appear to create conflicting values with no similar adjudicatory framework.").

decision.[158] The concern is that allowing cross-market comparisons would incentivize firms to "go big" and merge across multiple areas, and this would ultimately lead to excessive market concentration. For instance, imagine that firms A and B could merge in two possible markets. Further suppose that a merger in the first market would bring enormous benefits while a merger in second market would bring modest harms. The argument is that firms would have an incentive, without the restraint of considering only in-market efficiencies, to merge in both markets rather than just the first one.

This argument is unconvincing—as courts already afford plaintiffs the ability to show there are substantially less restrictive alternatives to achieve the same efficiency.[159] Thus, in the prior example, courts would require a divestiture in the second, problematic, market, which preserves the procompetitive effects in the first market—assuming, of course, that a divestiture is feasible. If a divestiture is not feasible, such as, if the operations are too intertwined, then this effectively negates the slippery slope concern because, by construct, the two markets cannot be feasibly separated to preserve the efficiencies.

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[158] 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it, in the end, as large as the industry leader.").

[159] *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929 (2016) ("Courts and agencies apply this less restrictive alternative (LRA) test widely, from agreements in restraint of trade to monopolization to mergers."). Importantly, in performing such analyses, it is important that decisionmakers "do not insist upon a less restrictive alternative that is merely theoretical." 2010 GUIDELINES, *supra* note 6, at § 10. Further, such analyses should consider the full costs of alternatives including incremental transaction costs, collateral effects, and greater exposure to uncertainty and potential opportunistic behavior. In other words, the LRA test should not be reduced to possibility theorems that ignore the real-world frictions that hinder obtaining efficiencies through contracts versus integration. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

III. WILL IT WORK IN THE WILD?

This final Part examines whether the relevant efficiency proposal is workable and leads to desirable results by reexamining several prior cases under the relevant efficiencies lens. The result is that courts are already considering these claims (in determining whether to throw them out or include them), which further weakens the "higher administrative costs" argument against such a reform. Additionally, incorporating and considering these efficiency defenses are integral to understanding the relevant business conduct.

A. PNB *Revisited*

In *PNB*, the combined entity of Philadelphia National Bank and Girard offered two efficiency defenses. The first is that the post-merger firm, due to its size, can legally offer larger loans to commercial customers who previously had to look to New York banks for supply.[160] While the Court rejected this defense with the slippery slope argument, the Court also, in dictum, rejected the defense on evidentiary grounds. Specifically, the Court opined that the current lending limits are high enough that the "only business located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities."[161] In other words, the impact of PNB-Girard's entry into this higher-tier of lending would be immaterial to competition.

This first efficiency argument, under this Article's reform proposal, would be a relevant efficiency due to economies of scope. Specifically, by combining assets, the firm would be able to lower its costs to some manageable amount. Otherwise, if PNB and Girard attempted to supply higher-tier loans separately, each of their costs would increase (due to the regulatory prohibition).

The second efficiency defense was that the combined entity would attract more business to Philadelphia and concurrently create a positive

[160] 374 U.S. at 370.
[161] *Id*. at 371.

spillover across the Philadelphia area.[162] In rejecting this defense, the Court invoked administrative costs and statutory intent.[163] There is also an economic argument for rejecting this defense: there are no meaningful interdependencies between commercial banking services and "promoting" and "stimulating" economic development. Perhaps a vibrant, combined PNB-Girard would create a positive spillover across Philadelphia as a financial center and hub of economic activity on the East Coast, yet this is inherently speculative and hard to measure. Importantly, this proposed benefit is far removed from the central inquiry and lacks a material tether to the relevant market. Thus, rejecting this efficiencies defense was proper and would be consistent with the reformed approach.

B. Facebook-Giphy Merger and Nascent Competition Cases

In May 2020, Facebook (recently rebranded as Meta Platforms) announced its acquisition of Giphy, which is a website with a catalog of GIFs that also displays ads.[164] In announcing the acquisition, the parties touted the synergies from combining complementary businesses.[165] While no U.S. authority brought an antitrust action, the UK's Competition and Markets Authority (CMA) issued a final order to block the acquisition under a theory of nascent competitive harm. Hence, the CMA ordered Facebook to sell Giphy.[166] The theory is that Giphy represents an emerging competitive threat to Facebook's display advertising business—as well as representing a valuable input to other social networks that Facebook could foreclose post-merger. Facebook appealed the CMA's decision to the UK's Competition Appeal Tribunal, which is a specialized court that deals with competition and regulatory cases. In June 2022, the Tribunal largely upheld the CMA's case

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[162] *Id*. at 334.
[163] *Id*. at 371.
[164] *See* Vishal Shah, *Facebook Welcomes GIPHY as Part of Instagram Team*, META (May 15, 2020), https://about.fb.com/news/2020/05/welcome-giphy/.
[165] *Id*. ("[W]e plan to further integrate their GIF library into Instagram and our other apps so that people can find just the right way to express themselves.").
[166] Competition and Markets Authority, *Completed Acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., Final Report*, U.K. (Nov. 30, 2021), https://assets.publishing.service.gov.uk/media/61a64a618fa8f5037d67b7b5/Facebook__Meta__GIPHY_-_Final_Report_1221_.pdf [hereinafter CMA Final Order].

against the merger but also remanded the case to the agency due to procedural irregularities that denied Facebook the ability to see all the relevant evidence.[167] Holding aside the merits of the allegations, the Facebook-Giphy case raises critical issues associated with allegations of harm due to the elimination of a potential or nascent competitive threat.

In the U.S., the case would be subject to a Clayton Act, § 7 violation analysis.[168] The theory of eliminating a potential or nascent threat relies on projecting future competition and weighing the potential loss of competition with the potential gains from efficiencies.[169] We can consider the analysis with a simple framework. Suppose there are two markets: M_1 (e.g., social networks) and M_2 (e.g., GIF sites). At the time of the merger, that is, period 1, the merging parties—Firm A (e.g., Facebook) and Firm B (e.g., Giphy)—compete only in M_1 and only in M_2, respectively. The theory is that in period 2, Firm A *and* Firm B will compete in M_1 while Firm B continues to compete in M_2. The relevance of this framework for out-of-market efficiencies is that, under the principle established in *PNB*, efficiencies from the merger can only "count" if they occur in M_1, since this is the relevant market where the alleged harm is occurring. Thus, the competitive analysis involves weighing the alleged harm in M_1 in period 2 against the alleged benefits in M_1 in both periods 1 and 2.

However, suppose that the merger lowers Giphy's quality-adjusted costs and results in greater innovation, which ultimately benefits consumers in M_2. Again, under the prevailing interpretation of *PNB*, courts cannot consider this benefit in assessing the legality of the merger. Yet, given that

[167] Meta Platforms, Inc. v. Competition & Markets Authority, (2022) Competition Appeal Tribunal 1429/4/12/21 (U.K.), https://www.catribunal.org.uk/judgments/142941221-meta-platforms-inc-v-competition-and-markets-authority-judgment-14-jun-2022 [hereinafter Competition Appeal Tribunal Decision].

[168] Arguably, there could also be a Sherman Act, § 2 claim of preserving monopoly power. *C.f.*, C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1898–903 (2020) (discussing this possibility for potential and nascent competition cases). Yet, there are fundamental differences between adjudicating § 7 and § 2 cases—namely, the counterfactual exercise is very different. *See* John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQ. L. REV. 613, 636–43 (2021).

[169] *See* Yun, *supra* note 168, at 621–29 (detailing the legal and economic difference between potential and nascent competition theories of harm).

users of Facebook and Giphy consider these services to be complements,[170] M_1 and M_2 are interdependent and, consequently, efficiencies benefiting consumers in M_2 are eligible for consideration as relevant efficiencies. Thus, under the reformed efficiency proposal, efficiencies occurring in either M_1 or M_2 in both periods 1 and 2 would be relevant.

What about the administrative costs of considering such an expansion? For the Facebook-Giphy case, the CMA and Tribunal already performed an extensive analysis of *both* the social network and GIF markets in assessing the theories of harm.[171] Given this groundwork, the idea that considering efficiencies in the GIF market is an unworkable burden is more than a stretch—especially considering that the merging parties would surely bear much of the evidentiary costs. Moreover, the entire point of the inquiry is to understand current and future competition in these interrelated markets; thus, considering harms in all the markets but limiting the consideration of benefits to just one of the markets is simply indefensible to this larger objective. More broadly, this analysis suggests that all potential and nascent competition cases should involve an assessment of all the relevant harms and benefits in all the associated markets involved in the inquiry.

C. Labor Markets

There has been a marked increase in concern with labor markets within antitrust, including over monopsonies and non-compete clauses.[172] This focus raises several conceptual issues. The first is whether policies that impact labor

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[170] *See* Shah, *supra* note 164 ("A lot of people in our community already know and love GIPHY. In fact, 50% of GIPHY's traffic comes from the Facebook family of apps, half of that from Instagram alone.").

[171] *See* CMA Final Order, *supra* note 166; Competition Appeal Tribunal Decision, *supra* note 167.

[172] *See, e.g.*, Marinescu & Hovenkamp, *supra* note 143; Tatos & Singer, *supra* note 8; The White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ ("In the Order, the President: Encourages the FTC to ban or limit non-compete agreements. . . . Encourages the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another.").

markets, in and of themselves, can represent restraints of trade and competitive harm—e.g., cases involving the NCAA and student athletes. The second is how to consider the impact of a "standard" antitrust case on labor markets—e.g., increased market consolidation leading to greater monopsony power.[173]

The Court in *Board of Regents* established that cross-market comparisons vertically along the same supply chain are permissible. Thus, conduct that may impact upstream labor markets can also impact downstream output market; thus, the totality of the effects must examine both markets. In other words, out-of-market efficiencies should count when assessing the impact of a business practice on worker welfare. Similarly, appellate courts in *Muko* and *Sullivan* concluded that policies that impact upstream input markets (that is, the use of unionized labor and NFL ownership, respectively) should be assessed jointly with the effects on the downstream output market (that is, fast food restaurants and NFL games, respectively). The point is not that these effects always matter or necessarily legitimize an illegitimate practice. Instead, the principle is that downstream effects may be material to understand the rationale for a practice. The relevant efficiencies approach would simply formalize this current recognition by courts. Upstream and downstream markets are on the same supply chain, which is a classic example of interdependency.

For example, in *NCAA v. Alston*, the question the Court addressed was whether the NCAA's restriction on education-related benefits to student athletes violates § 1 of the Sherman Act since the members are colluding to deny student athletes these benefits.[174] A key purported justification offered by the NCAA is that the restriction promotes downstream output demand since final consumers allegedly value a notion of "amateurism."[175] The Court ultimately, and properly, rejected the NCAA's efficiencies defense, but the

[173] *See, e.g.*, Bruce Kobayashi et al., *Monopsony and Labor Markets in Merger Review: Global Antitrust Institute Comment on the DOJ-FTC Request for Information on Merger Enforcement*, George Mason University Law & Economics Research Paper Series 22-17 (Apr. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089952.

[174] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

[175] *Id*. at 2152 ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.").

Court was right to consider it.[176] This is in line with the relevant efficiencies approach as there are clear interdependencies between labor and output markets. This particular restriction was shown convincingly to reduce overall welfare—as the amateurism defense was largely unquantifiable and likely marginal. Yet, *some* restrictions make sense and should not be unilaterally condemned without a rule of reason assessment and efficiency considerations.

Yet, there are calls to disrupt the Court's *Board of Regents* approach. The belief is that courts should strictly apply *PNB*'s out-of-market efficiencies principle to labor market cases.[177] This an attempt to elevate procedural technicalities above the primary objective of antitrust inquiries: to understand, first and foremost, the nature and impact of business conduct on welfare. Doctrinally eliminating all output market considerations when examining labor market concerns results in a fundamentally incomplete analysis.

D. Multisided Platform Cases

The leading precedent when considering multisided platforms is *Ohio v. American Express*, which established that the relevant market to assess conduct for transactional platforms is a single market integrating the various platform participants, e.g., both cardholders and merchants.[178] This approach negates the need to explicitly determine how to treat out-of-market efficiencies (that are interrelated based on cross-group network effects) as the Court brought everything under "one roof."

Critics of the decision argue that this places too high a burden on plaintiffs to demonstrate anticompetitive harm—as plaintiffs now need to incorporate the welfare of all groups that participate on the platform into their

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[176] *Id.* at 2162 ("While we agree with the NCAA's legal premise, we cannot say the same for its factual one.").

[177] *See* Marinescu & Hovenkamp, *supra* note 143, at 1061–62 ("[S]uppose a merger is challenged as anticompetitive in a labor market but the merging firms offer evidence that the merger will lead to reduced costs in the product market in which they sell. Once again, they would be asking the court to tolerate an anticompetitive outcome in one market, labor, for the benefit of a different group who purchases in the product market. Existing law would not countenance such an approach, nor as a general matter should it."); Tatos & Singer, *supra* note 8.

[178] 138 S. Ct. 2274 (2018).

analysis of harm.[179] Consequently, there are vocal calls to overturn *Amex* based on the desire to assess platform conduct using separate relevant markets for each group rather than a single, integrated approach.[180] This is despite the fact that the *Amex* Court already recognized that not all platforms are the same.[181] In fact, the Court's mid-20th century decision, *Times-Picayune Pub. Co. v. U.S.* (involving an illegal tying claim against the leading New Orleans newspaper), which *Amex* left intact—did not use, nor need, to define a single relevant market integrating advertisers and readers.[182] Additionally, a one-size-fits-all approach ignores the fact that not all platforms are the same.[183] The type of platform and the nature of the restraint should dictate the approach to assess platform conduct.[184]

As for efficiencies, the key point is that their assessment should not be based on whether courts use one or two (different but related) relevant markets. The danger is that an ad hoc declaration that prohibits courts from counting out-of-market efficiencies will lead to the undesirable outcome that identifying harm to just one group is sufficient to condemn a practice—

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[179] *See, e.g.*, Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 60 (2019) ("What the Supreme Court majority was apparently trying to do is force the plaintiff to consider burdens and benefits on both sides of the platform as part of its prima facie case."); Gregory J. Werden, *Views on Antitrust Issues Relating to the Digital Marketplace*, Submitted to the Subcommittee on Antitrust, Commercial, and Administrative Law, at 3 (Apr. 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642738 ("The courts allocate and calibrate burdens to determine which uncertainties are held against which litigants, and in my view, burdens now placed on antitrust plaintiffs can be excessive. I believe the burden was excessive in a case I worked on at the Department of Justice, *Ohio v. American Express Co*.").

[180] *See, e.g.*, Salop et al., *supra* note 97, at 2 (advancing that "the *Amex* framework is simply unsustainable, and that the decision should in these respects be promptly overruled, or otherwise corrected"); Tatos & Singer, *supra* note 8, at 1216 ("To achieve this goal, in addition to arguing for a statutory repeal of the American Express decision, we propose a prohibition on judicial balancing of claimed benefits to any group other than the group that suffered an antitrust injury.").

[181] 138 S. Ct. 2286 ("Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.").

[182] 345 U.S. 594, 598 (1953).

[183] *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 320, 334–35 (2003); Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 297–300 (2014).

[184] *See, e.g.*, John M. Yun, *Antitrust Has Forgotten Its Coase*, 23 NEVADA L.J. (forthcoming 2023).

regardless of whether there are potentially large benefits to the other group(s).[185]

For instance, consider a scenario where a search engine implements a new requirement on advertisers where they must go through a rigorous approval and certification process to be an approved advertiser. Further suppose that this new requirement significantly increases the cost to advertise, reduces the number of advertisers, and, due to error costs, prohibits some legitimate advertisers from participating. The search engine argues that the new requirement materially increases the quality of the ad results—as users benefit from seeing more relevant and vetted apps with a corresponding drop in the number of fraudulent transactions. In contrast, plaintiffs argue that the search engine is anticompetitively excluding and raising the costs of rivals with competing online services who want to advertise. Under a relevant efficiencies approach, irrespective of whether a court ultimately determines the relevant market as integrated or separate, assessing the legality of the practice would involve weighing the welfare of both advertisers and users. Yet, under a strict out-of-market efficiencies principle approach, finding harm to advertisers would be sufficient to condemn the practice as anticompetitive—irrespective of the large welfare gains to users.

In sum, properly assessing digital markets is clearly a central policy debate within antitrust. For platforms, the discussion is almost completely based on whether to define a single market or separate markets for each group. The right answer depends on the nature of the platform and the nature of the allegation. However, what should not occur is that determining the relevant market narrowly around one group gives license to exclude the welfare of groups linked by significant cross-group network effects—just because a legal determination is made that, for example, merchants and cardholders are in separate relevant markets.[186]

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[185] *See, e.g.*, Francesco Ducci, *Out-Of-Market Efficiencies, Two-Sided Platforms, and Consumer Welfare: A Legal and Economic Analysis*, 12 J. COMP. L. & ECON. 591, 595 (2016) (cautioning that "narrow market definition makes it easier for a competition authority to find an exercise of market power, and reduces or, in some jurisdictions, excludes the possibility of taking into account the efficiencies obtained outside the relevant market").

[186] *See* DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN *AMERICAN EXPRESS* (2019) at 26 (warning that

CONCLUSION

Efficiencies have a long history in antitrust, but their place at the antitrust table seems to be a tenuous one. For instance, the current leadership at the U.S. antitrust agencies have openly questioned the legitimacy of counting efficiencies.[187] Further, there is a mounting reform movement to displace, marginalize, and perhaps eliminate efficiency defenses altogether in antitrust jurisprudence. The question is how. One common approach is to parse statutory language and to question legislative intent.[188] Another, more subtle, approach is to leverage the current out-of-market efficiencies principle established in *Philadelphia National Bank*, which prohibits counting benefits that occur outside of the relevant market, to more areas of the law. For instance, some maintain that the principle is universal and not limited to § 7 merger cases.[189] Some maintain that the principle prohibits courts from considering benefits in output markets when there is harm to welfare in labor markets.[190] Some maintain that if markets are defined narrowly, then efficiencies can only be counted, as a matter of law, if they occur strictly within that same narrowly defined boundary.[191]

This Article presents a case that the above representations of efficiencies are not only incorrect, but contrary to sound economic principles. "Relevant markets" are legal and economic constructs that help decision-makers focus the analysis to assess competitive harm. Yet, those constructs do not always map perfectly to the relevant benefits that conduct can have. Thus, this Article proposes a move away from the current disordered state of considering out-of-market efficiencies. Moving to a "relevant efficiencies" approach based on

"[u]nfortunately, the conclusions of a *legal* analysis under the three-step structure of rule of reason analysis in U.S. courts can depend critically on this choice of market definition").

[187] *See* REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (2022), *supra* note 94, at f.18.

[188] *See, e.g.*, Khan & Vaheesan, *supra* note 7, at 271 ("In pursuing their ahistorical and anti-democratic elevation of efficiency above Congress's stated goals, the proponents of this vision also adopted a benign view of conduct previously considered anti-competitive, highlighting the purported efficiency benefits.").

[189] See discussion in *supra* Section I.B.3.

[190] *See, e.g.*, Marinescu & Hovenkamp, *supra* note 143, at 1061–62; Tatos & Singer, *supra* note 8, at 1191.

[191] *See, e.g.*, Brief of 28 Professors, *supra* note 18, at 22.

clear, identifiable limits, can bring much needed clarity as to when incorporating out-of-market efficiencies makes sense and when it only leads to wasted administrative resources and costs.