May 27, 2026

RETHINKING ANTITRUST

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#41

Bilal Sayyed & Gregory J. Werden Discuss the Draft EU Merger Guidelines

Bilal Sayyed

Gregory J. Werden

> *"The EU is using the consumer welfare standard to allow extraneous considerations to be brought in, because everything has a consumer welfare dimension, even if they have to stretch a little to do it. … Resilience is good for consumers, sustainability is good for consumers."*

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Guidelines Without Guidance? Greg Werden Evaluates the Draft EU Merger Guidelines

A Critical Evaluation

- **These Guidelines do not really guide.**
  They say far too little about which mergers the Commission is actually likely to challenge.

- **Competition analysis is being diluted by broader policy goals.**
  Resilience, sustainability, competitiveness, and similar concepts are folded in so broadly that the focus on competition has becomes less disciplined.

- **Theory of harm / theory of benefit could be one of the draft's most constructive features.**
  Those concepts can provide a clean way to organize the agency's story about why a merger harms competition and the merging parties' story about why it helps consumers or competition.

- **Major theories appear without workable guidance.**
  Unilateral effects, innovation, important competitive force, foreclosure, and ecosystems are all invoked, but too often without the explanation needed to make them usable or credible.

- **The draft expands discretion more than it increases clarity.**
  It preserves maximum room for the Commission to maneuver while giving firms and counsel limited predictability.

- **Efficiencies are accepted in theory but burdened in practice.**
  The draft appears to demand levels of proof, quantification, and verification that may be economically unrealistic, especially for dynamic or forward-looking benefits.

Bilal: The European Commission has released a draft of revised Merger Guidelines for public comment.[1] The revision would replace the 2004 Horizontal and 2008 Non-Horizontal Merger Guidelines and substantially expand the theories of competitive harm and possible cognizable benefits from those guidelines.[2] The draft revision introduces new concepts—resilience, sustainability, investment competition—to the guidelines lexicon. And these concepts are not just new to the EU, but also to the merger guidelines of other competition agencies.

Do the revisions reflect a more interventionist approach? Do they introduce industrial policy considerations into competitive effects analysis? Do they merely incorporate two decades of enforcement experience and economic learning, sometimes in tension, into the guidelines? We will discuss this and a whole lot more with our guest, Greg Werden.

This is the RETHINKING ANTITRUST podcast, and I am Bilal Sayyed.[3]

Greg needs no introduction to our listeners. He has been on the podcast twice,[4] once to discuss the initial draft of what became the 2023 U.S. Merger Guidelines,[5] and once to discuss the EC draft Guidelines on Exclusionary Conduct.[6] He retired from a 40-year career as an economist in the Antitrust Division and is one of, if not the, preeminent experts on agency antitrust guidelines.[7] He remains active as an author and as a well-regarded participant in significant antitrust cases, filing very thoughtful amicus briefs on a regular basis.

[1] European Commission, (Draft) Guidelines on the Assessment of Horizontal and Non-Horizontal Mergers (Apr. 30, 2026).

[2] European Commission, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5; European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6.

[3] This is a lightly edited and annotated transcript of the podcast discussion (edited for clarity and to provide citations to cases and other materials referenced in the discussion). The podcast is available at RETHINKING ANTITRUST PODCAST # 41, Guidelines Without Guidance? Greg Werden Evaluates the Draft EU Merger Guidelines.

[4] RETHINKING ANTITRUST # 12: The EC Draft Guidelines on Abusive Exclusionary Conduct by Dominant Firms (Nov. 6, 2024); RETHINKING ANTITRUST # 2: Do the Proposed Merger Guidelines Promote the Rule of Law? (Sept. 22, 2023).

[5] U.S. Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines (2023).

[6] European Commission, (Draft) Guidelines on the Application of Article 102 To Abusive Exclusionary Conduct By Dominant Undertakings (2024).

[7] Submission of Gregory J. Werden to the Competition Bureau of Canada, in Response to Request for Feedback on Merger Enforcement Guidelines (2026); Gregory J. Werden, Comments on Draft Merger Guidelines (US) (Aug. 12, 2023).

He has also written a wonderful book, THE FOUNDATIONS OF ANTITRUST, EVENTS, IDEAS, AND DOCTRINES.[8] We will have him on soon to discuss the book.

Greg, thank you for being here. Let's start with a question you have previously answered, but which I think is a good way to evaluate the utility of guidelines. What is the purpose of merger guidelines?

Greg: Thank you, Bilal. Rule of law obliges every enforcement agency of any kind to explain how it exercises discretion. Merger guidelines should tell potential merging firms, to the extent possible, which mergers are likely to be targeted and which mergers are not. Telling potential merging firms which mergers will be targeted makes the law largely self-enforcing, and it avoids substantial costs of abandoning mergers. Telling potential merging firms which mergers will not be targeted avoids interference with efficient and pro-competitive transactions.

A distinct purpose of merger guidelines is educational. Good guidelines educate both the judiciary and the agency's own staff. Merger guidelines in the U.S. have been highly effective in these ways.

Bilal: Before turning to a discussion of the draft here, I want to ask you to reflect a little bit on the importance of the 2004 Horizontal and 2008 Non-Horizontal Merger Guidelines in the development of EU merger analysis. I was working for Tim Muris[9] when those guidelines came out, and I remember them being viewed relatively favorably and as relatively aligned, at least with respect to the 2004 Guidelines, with the 1992 Horizontal Merger Guidelines.[10] How important were those guidelines?

Greg: Well, they were a major transition, and they largely brought EU merger enforcement in line with that of the U.S. The first merger regulation in the EU prohibited only mergers that created or strengthened a dominant position, so that was very different. The European Commission was pretty happy with that until 2002, when it had one of its decisions overturned by a court. That's the *Airtours* case.[11] They started over. They got a brand-new Merger Regulation that was drastically different in 2004. The standard is not the same as the U.S., but it's kind of close.[12] For all intents and purposes, it is the same.

[8] Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES (2020).

[9] Tim Muris was Chairman of the Federal Trade Commission, June 4, 2001-August 15, 2004.

[10] U.S. Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992).

[11] Case T-342/99, *Airtours plc v. Comm'n*, 2002 E.C.R. II-2585.

[12] Council Regulation (EC) No 139/2004 of 20 Jan. 2004 on the Control of Concentrations Between Undertakings, OJ L 24, 29.1.2004.

The Commission was then obliged to issue guidelines explaining how it applies the new law, and it did so very promptly for horizontal mergers and later for non-horizontal mergers. While this was all going on, another major development that was closely related was that the part of the Commission that does antitrust, which is called DG-Comp, decided to make economics more important and more visible. So they created the position of Chief Economist. They staffed it with PhD economists called the Chief Economist Team, and economists were involved in the merger guidelines and other major policy statements.

Bilal: Mario Monti was the Commissioner then, and he was an economist. I always thought that had some influence on how they reacted, not only to the *Airtours* decision, but, I think, to *Tetra Laval* and *Schneider Electric*.[13] Do you think the analytical framework of the current draft, the 2026 draft, reflects confidence in the analytical framework or the use of economics as defining that framework that I think we both agree is present in the 2004 and 2008 Guidelines?

Greg: Well, it's a little hard to tell, I think, because the way the guidelines are written is so drastically different. But I think the answer is yes. I don't think the EU has changed its basic analytical framework at all. The new draft makes it seem, I think, that economics has become less important. But I don't think that's true at all. I just think it's the style the guidelines are written in.

Bilal: Why might people miss the economic framework?

Greg: Because it's well concealed. I am speculating on this, but I have to say that I believe that no economist was actually involved in the drafting. They were allowed to add footnotes and maybe correct a sentence here or there, but not fundamentally change a single paragraph in the document. Again, pure speculation, but that's how it reads to me.

I see this as the revenge of the Legal Services. I know from speaking to people at the Commission that earlier guidelines were written by DG-Comp and then reviewed by Legal Services. I have doubts that that's still the way it's done.

You can't read these documents and think that an economist was an author. When it discusses economics, it's kind of clumsy and in some places wrong, but DG-Comp has good economists.

Bilal: You made the same point, I think, when we talked about the 2024 draft of the Exclusionary Guidelines, how they look substantially different than the 2008 guidance note on exclusionary conduct.[14]

[13] Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071; Case C-12/03 P, *Comm'n v. Tetra Laval BV*, 2005 E.C.R. I-987.

[14] European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Dec. 5, 2008).

I read the draft, the 2026 draft, to place significant emphasis on competitiveness, resilience, innovation, and scale. Now, do you think these are consistent themes, if you think they are themes, or do they require trade-offs to take account of those factors?

Greg: I think the only thing that's consistent is that DG-Comp is responding to political pressures of various sorts. I don't know what they all are. I poked around a little bit online and discovered that the talk about resilience and sustainability started a few years ago. It's not new in these guidelines.[15]

One impetus for the guidelines was the 2024 Draghi competitiveness report,[16] which didn't really attack merger enforcement, but did talk a lot about excessive regulation, especially by the member states, and I'm sure that DG-Comp had to do certain things to respond to that. There's no doubt that the Commission is going to make what I consider to be impossible trade-offs. It's admitted right in the document. They say, well, they're going to do the best they can.

To the extent there is a principle, it's consumer welfare. That is not new by any means. I question whether the merger regulation allows for it. There's no reference to it in there. It talks about competition. I want to stress that advocates of the consumer welfare standard in the U.S. should take note of what the EU thinks they can do with it.

Robert Bork articulated the standard to keep all sorts of extraneous considerations out of antitrust,[17] but the EU is using the consumer welfare standard to allow such considerations to be brought in, because everything has a consumer welfare dimension, even if they have to stretch a little to do it. Of course, the Europeans have faith in the administrative state, but not in the market.

Bilal: Do you think consumer welfare, as a potential unifying principle, is different from what we saw in the U.S. Guidelines? Earlier iterations of the guidelines were clear. The unifying theme of those guidelines, post-1968, that mergers should not be permitted to create, enhance, entrench, or facilitate the exercise of market power. Is that the same thing as a consumer welfare standard?

Greg: I don't think it's the same. There may not be a lot of difference there, but consumer welfare potentially opens the door to a lot of things that have nothing to do with competition. And most advocates of the consumer welfare standard say, well, yeah, but it's got to have to do with competition

[15] See European Commission, Guidelines on the Applicability of Article 101 of the TFEU to Horizontal Co-Operation Agreements (Jul. 21, 2023) at §9.

[16] Mario Draghi, THE FUTURE OF EUROPEAN COMPETITIVENESS (European Commission, Sept. 2024).

[17] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

because it’s just a competition statute. But I don’t see that in the EU draft. And, by the way, I’m the one who wrote that sentence you’re referring to.[18]

Bilal: You’ve not been an advocate for the consumer welfare principle or framework for antitrust, but for the competitive process.

Greg: Exactly. The competitive process standard is pretty straightforward.[19] Although most people say there’s nothing to it at all, I say it’s simple. The idea is that antitrust is about competition, so that’s all that matters. And that makes it simpler, not more complicated. Although I must say that the difference is minimal in mergers, but it’s maximal in price fixing.

In price fixing, the logic of the law has always been that competitors that agree on what price to charge are sabotaging the competitive process in a way that is not compatible with antitrust law in any way, shape, or form, and we don’t have to ask any more questions. There’s no ambiguity about this. We don’t need to look at effects. We don’t care if there are any effects. We don’t even care if they implemented the agreement. What they did was sabotage the competitive process. That’s illegal.

With mergers, we are trying to make a prediction. What’s going to happen with the merger? Economists think in terms of models, and models predict specific things like price. We don’t really have a metric for competition. We look at it backwards. If the model predicts price goes up, then we say, ah, that means competition is reduced. But there are limits to that. Price can go up for reasons that have nothing to do with competition. Advocates of the consumer welfare standard frequently say, we don’t care if competition was adversely affected. We only care if consumers are hurt. I say – and the agencies in the United States said in the 2023 Merger Guidelines – no, we care about competition.[20]

Now, the EU has taken it to extremes and said: resilience is good for consumers, sustainability is good for consumers. If a merger promotes these things, then we’ll say it’s good for consumers and that’s all that really matters. Well, I don’t go along with that, and I don’t know how to read the Merger Regulation to allow it. A substantial impediment to effective competition is the test.[21] The word

[18] The U.S. Dep’t. of Justice 1982 Merger Guidelines and 1984 Merger Guidelines, and the U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines and 2010 Horizontal Merger Guidelines each contained a common unifying principle, which the 2010 Horizontal Merger Guidelines expressed as “mergers should not be permitted to create, enhance, or entrench market power, or to facilitate its exercise.” U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at 2.

[19] Gregory J. Werden, *The Competitive Process Standard*, 86 (2) ANTITRUST L. J. 579 (2024).

[20] “Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits.” U.S. Dep’t. of Justice & Fed. Trade Comm'n, Merger Guidelines (2023) at 1.

[21] Council Regulation 139/2004, art. 2(2)-(3), 2004 O.J. (L 24) 1.

competition is used more than 50 times in the merger regulation. There are references to consumers, but only a handful, and it's not in any of the paragraphs that refer to the standard.

I would just look at competition, and in some ways that would make it much easier, although I have to say that it is very difficult to figure out what effect a merger has on competition in things other than price and output, the simple static things that we know how to model. It does affect those things, and in some cases the effect is very much the same, and then we've got guidance on that from the models. Where it's different, we're hard-pressed to figure out what the effects of mergers are.

Bilal: You'd mentioned the "SIEC" test.[22] The draft here is explicit about the burden of proof and about the Commission needing a sufficiently cogent and consistent body of evidence in either finding harm or accepting benefits. So how important do you think that language is? Do you think it is reasonably constraining on what the Commission may accept, either on the harm side or the benefits side? And is there a U.S. corollary to that?

Greg: If one ignores the profound procedural differences between the U.S. and the EU, I think the burdens are the same, or the differences between them are too subtle for me to detect. But the EU has an administrative system in which the Commission has to prove nothing to the satisfaction of a judge, and that really matters.

When Commission decisions are taken to a court for review, the court says the standard is more likely than not, exactly the same as the United States. But here's where it gets to be different. The court also says that the Commission enjoys what they call a "margin of discretion" – earlier decisions called it a "margin of appreciation," but "discretion" is a better word – on every one of those judgment calls that requires agency expertise.

They need concrete evidence to prove up all the factual foundation for a case. But, once they get to the hard questions, they just make a call. It's really not the same in the United States. There's certainly an analog because the FTC can make administrative merger decisions. They can be reviewed by courts, but that review process isn't the same. The U.S. court would defer to FTC fact-finding, whereas EU courts do not defer to European Commission fact-finding. They will reconsider all the facts. EU courts do defer to the Commission's judgment calls that draw on expertise.

Bilal: The draft is also clear: no hierarchy, no meaningful distinction, but no hierarchy between qualitative and quantitative evidence. I thought this was something that the Biden Administration folks were also sensitive to, but maybe sensitive in a different way. I think they were concerned about the reliance by the courts and even the agency on quantitative evidence of harm. So here the Commission says no hierarchy, no distinction between qualitative and quantitative evidence. Do you think this is

[22] Significant Impediment to Effective Competition.

sensible or do you think merger analysis needs a stronger preference for one category or the other of evidence, and why, and maybe where?

Greg: Well, I could just say it's complicated. But I'll say more. First, let me say that I see the lawyer at work when I read that there's no hierarchy between qualitative and quantitative evidence. This is the lawyer saying, we're not going to set ourselves up for failure. If we say certain evidence was required, then the court will say it's required. We can't impose that burden on ourselves. I think that might be more true in Europe than the United States, but I heard the same thing many times in the United States when we were writing guidelines and doing other things. So I'm sensitive to that.

And I know for a fact that quantitative evidence is enormously important in merger assessment, both in the United States and Europe. And that is not going to change. There's an issue about how sophisticated and complicated this quantitative evidence needs to be. On that, my view is frequently, it doesn't have to be very complicated at all. There are lots of little questions that make up the big question in a merger case, dozens, maybe hundreds of them. You work your way through all of this, if you're an economist, using quantitative evidence. This number, that number, put these things together, think about it. Yes, I know that isn't possible. Let's go down a different road. That's how economists think.

They understand how competition works and what the likely effects of a merger are by using quantitative evidence in 100 different ways, some of which are very subtle, and it may be very simple evidence. I'm all for the most robust description of the marketplace to be put together and presented in court because economists will use it … for something, sometime.

Bilal: What are some of the simple quantitative tests or evidence you refer to here?

Greg: It's not really tests, but some lawyer will say, well, why doesn't somebody do this? You may be able to find that there's some constraint that they can't do it. You may be able to find that there's some reason why they can't make money doing it. You may be able to find that they tried to do it, it didn't work. I can't think of one in particular, but many times in my appellate work, I would comb the record for basic facts so that I could make a simple legal argument that would have an anchor. We know this is true and this is true, and we can reason from that to something else. The basic anchors are all the little numbers, not complicated analyses, not econometrics, but all the little descriptive numbers.

Bilal: Thinking about the framework they're setting out, the discussion of "theory of harm" and "theory of benefit." Do you find those two principles or two organizing frameworks or theories to be useful organizing structures?

Greg: I think they're very useful and I don't think they've been fully utilized in the draft. I equate "theory of harm" with the agency's full narrative of why and how the merger harms competition. You have to have that narrative, and you might as well call it something. "Theory of harm" is as descriptive a term as anything. That's what I would naturally understand theory of harm to mean.

But, when I read the draft, I get the feeling that the Commission thinks a theory of harm is something less than that. In particular, I think they're leaving out the why. To them, a theory of harm is that the merger will cause less innovation, but not how or why it will cause less innovation. And, that's a problem, because I'm never going to believe that it causes less innovation until you tell me why.

It's similar with "theory of benefit." You might find this hard to believe, but I was writing comments on the draft paragraph by paragraph as I read them. I had already written "theory of benefits" in my comments before I got to the paragraph that talks about a "theory of benefit." I said, in my comment, well, if the Commission's got a theory of harm, the merging firms are going to have a theory of benefit. They've got a counter-narrative. That's how you do this, whether you're in court or in front of the agency.

Anybody who's done merger cases knows that the merging firms or their lawyers put together a story that is an alternative to the agency story. This is how they say competition works, how the merger affects competition. I think that the draft means something less than that. I think they're only referring to what we would call an efficiencies claim. The merger reduces costs this way, this amount—although it doesn't have to strictly be cost, because they use the term efficiencies very broadly—but it matters what it is.

It is absolutely clear in the draft that the way the Commission conceives a theory of benefit and theory of harm, they can both be true, in which case, you do a weighting. And the draft says – whether the courts would agree or not is a matter of a different question – the merging parties have the burden of proof on the weighing. But even if the Commission has the burden of proof, it would get a margin of discretion in judicial review.

But if the theories refer to the narrative and the counter-narrative, and the question then is which is the most convincing story, then plainly the Commission has the burden of proof, which means at least they have to cite evidence from which a reasonable person would agree that they have the more convincing story. That's the way I really think it ought to work.

About 10 years ago, I started thinking in terms of narrative and counter-narrative, how all the moving parts of antitrust fit into that. I think it's a good way to think about it. Every trial lawyer I talk to agrees, well, yes, it's all about the narrative. That's what we do. Even if you're not in trial, it's about a narrative, a story. The story has lots of parts. They all fit together in a way if it's a good story. They're based on provable facts. Then there's got to be some economics to stitch it all together and get a conclusion. That's what I think of as a theory of harm and a theory of benefit.

Bilal: So do you think of it as both those categories, either individually or collectively, as broader than what I would call a competitive effects analysis? And if it's broader, is it broader because, at least particularly on the benefits side, and I guess on the harm side, they are accepting a broader set of non-price factors or metrics? I think perhaps this plays into the discussion of sustainability and resilience and maybe investment competition.

Is that why they sort of move away, I think, from the more limited framework of 2004 and 2008? I don't read this as necessarily constraining them to what we think of as a competitive effects analysis, but that the harms can be outside of what you usually think about and the benefits can be outside of what you usually think about within a competitive effects analysis.

Greg: I'm not so sure the harms can be outside of what we usually think of as a competitive effects story. Again, it comes back to lawyers versus economists. I think this is a lawyer saying, this is how I want to tell my story and I don't need no stinking economics. I think he does. I'm not sure really what to make of it. I get the clear impression that the theory of benefit can include anything that is a goal of the European Union, which is new and different. But the harm, I don't think, is that broad. I don't know why there's an asymmetry.

Bilal: Do you think the evidentiary discussion, the section on evidence and forms of evidence, do they improve legal certainty or is there too much discretion to the Commission and the Commission staff?

Greg: I don't think there's too much discretion, but neither does it increase legal certainty. Giving someone a list of possible sources of evidence is entirely useless as far as I'm concerned. I opposed having an evidence section in the 2010 Horizontal Merger Guidelines. I think all the sentences scattered throughout the 2023 Merger Guidelines are useless. You could condense it all down to one sentence: the agency is going to look high and low and rely on anything it finds useful.

Bilal: I'm sympathetic to that view.   Unilateral effects analysis: does it get it right?

Greg: I think it's too clumsy. It's way too long and obviously wasn't written by an economist. Where it tries to do economics, I don't think it does it very well. It may be just a problem with the writing, but I think there's more to it. I think important things are being left out and important things are being misstated. I'll give you a couple of examples.

One is bargaining as a setting of competition. The U.S. Guidelines specifically talk about analyzing competition and bargaining as a unilateral effect. We know how to do that. We've been doing that, and the EU has been doing that quite a bit. It's referred to in the Guidelines at least a half a dozen times, but there is no paragraph that talks about unilateral effects in the context of bargaining. There ought to be.

The draft has lots of sentences that are like sentences you've seen before, but they're a little off. The draft refers to diversion ratios, but suggests they're useful in all kinds of contexts where I've never seen them used and I don't know how they propose to use them. Not just differentiated consumer products—and there's all kinds of stuff about how they inform innovation. And the diversion is not in products. It's in something else.

The simple, straightforward unilateral effects analysis basically just uses diversion ratios and margins. They do refer to margins in the draft, but what they stress is diversion ratios and pre-merger market power, which is not the same thing by any means. If they really had to prove a case, they would not want to have to prove market power rather than margins, because margins are really easy to prove up from straightforward accounting data, and market power is another thing altogether.

There are lots of industries with high margins without market power, because they have lots of sunk costs and they've got to recover them. So they have high margins under competitive conditions, maybe 90%. In manufacturing, from countless cases I worked on, I observed that margins in manufacturing typically run around 50%. Most people would think that's awfully high. Well, it's not. There's a lot of fixed costs. But in some industries where there are a lot of sunk costs, margins may be 80 or 90%. It's just the structure of technology that determines the margins. There is a relationship to competition, but it's secondary.

Bilal: There is this concept of important competitive force in the document. Do you know what that means? Is it economically coherent? Is it malleable in application? Does it mean whatever we think it means? How do you prove a firm exerts an important competitive force? How should we think about that differently than closeness of competition, I guess?

Greg: Oh, it's definitely different from that. Well, let me first say that this concept is an old friend. You don't know your 1968 Merger Guidelines. As far as I know, that's where the concept was introduced. Paragraph 8.[23] Go look at it. So what was it used for then? Well, a pretty sensible purpose. Don Turner says to himself, well, I've got these market share standards and I want to give myself an out. I want to be able to challenge mergers once in a while where the numbers are lower than the thresholds I've set out in my guidelines. How am I going to do that? Well, I'm going to say there's something special about this firm in the following sense: it's important to competition, disproportionately to its market share. And that concept has been in subsequent guidelines.[24] I remember writing those paragraphs.

[23] U.S. Dep't. of Justice, Merger Guidelines (1968) at ¶8(a) ("acquisition of a competitor which is particularly disturbing, disruptive, or otherwise [an] unusually competitive factor in the market"); (b) "despite an insubstantial market share, possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage").

[24] U.S. Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines (2023) at 2.3.A ("elimination of a maverick"); U.S. Dep't. of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (2020) at 5 ("a vertical merger may enhance the market's vulnerability to coordination by eliminating or hindering a maverick firm"); U.S. Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at 2.1.5 ("disruptive role of a merging party); U.S. Dep't. of Justice, Merger Guidelines (1984) at 3.44(c)("The firm to be acquired has been an unusually disruptive and competitive influence in the market.") and 4.222 ("elimination of a disruptive buyer"); U.S. Dep't. of Justice, Merger Guidelines (1982) at III.C.3.c ("The firm to be acquired has been an unusually disruptive and competitive influence in the market.").

Bilal: Would you equate important competitive force with sort of a disruptive competitor, a maverick, things like that?

Greg: That's one manifestation, but—

Bilal: New entrant?

Greg: That's only relevant to coordinated effects theory.

They have many variations on the theme of important competitive force so that they can use it no matter what their theory is. The way they use it is not ever explained. That's my biggest problem with it. A 10% firm is not equal to another 10% firm. I guess I'm willing to accept that. You can tell the difference. Okay, I'm willing to accept that too. Then I say, okay, what are you going to do with that insight? They don't tell me.

One possibility is there's an unwritten rule that if you're an important competitive force, you're not allowed to merge, even if you would become a more important competitive force. We just don't care about that. You are on the forbidden list. They don't say what the implication of being an important competitive force is. Not even two words. There's just nothing on that. I guess it's all implicit. You're supposed to know. These guidelines are 100 pages long, but an awful lot of the important stuff isn't there. You have to know it.

Bilal: Either you have to know it or maybe the idea is you sort of recognize it and develop it in the case law over time or the enforcement agenda over time.

Greg: There could be an implicit assumption that a merger will eliminate the important competitive force. Well, if that's your theory, why aren't you saying it's your theory and why aren't we going to test it? I did a quick look for U.S. cases on that and I came up empty, and I was surprised. I thought I would have no difficulty finding cases from the 1960s that talked about this, but I didn't.

Bilal: Why did you think you'd have no difficulty finding 1960s cases?

Greg: Because I expected the government to say it, and I expected judges to agree with it.

Bilal: I would not have expected it, but perhaps only because I felt that many of the higher-level opinions, whether appellate or Supreme Court, were often so structurally based that they would sort of rely on that. But it's a good point.

Greg: Remember, they were going down to such low market shares that you would think that they would say something about why it's okay to go down to these low market shares, but they didn't.

Bilal: Your point is good. I agree. Find some justification other than—

Greg: In *Von's Grocery;* it's a completely made-up trend toward concentration.[25]

Bilal: Yes. Well, that's what I was going to suggest, that that did the work that market share sometimes did not do, right? Trend toward monopolization.

Okay, so innovation competition. I believe they have a broader approach than we see in not only U.S. Guidelines, but U.S. cases. What do you make of their approach to innovation competition? Is it defined? Is it constrained? Is it empirically supported?

Greg: Well, there's no question that innovation competition exists and is important. Economists have known for a long time that technical change drives broad-based welfare gains. The earliest statement by an economist to this effect that I can find is from 1912.[26] Robert Solow wrote a famous article on it in the 1950s for which he won a Nobel Prize in the 1980s.[27] This is sound economics. What you can do with it is a different question. I applaud that the draft is trying to do something with it.

But the draft says, and I am roughly paraphrasing now, that, well, it's just like static price competition. Well, if it was, then we wouldn't need a long section on it, and it's not. There's a lot one can say on why it's not, but I'll make one very simple and very important point, which is conceded in a footnote in the draft. Price competition is mainly about fighting over a fixed stock of consumers, but innovation isn't. Innovation grows the market, sometimes tremendously. We all use everyday products that didn't exist 20 years ago, and we can't imagine life without them, even though we lived it.

Innovation is really important. It's not the same as static competition and the draft doesn't recognize the important difference. It matters a lot because the Commission seems to be wanting to use all the static tools with just a little tweak to make them into dynamic tools and ignore completely the ability of innovation to grow the market. You can't do that. If two competitors merge, they will no longer compete. It's that simple. That doesn't mean they'll innovate less. It's possible they'll innovate more. It's hard to figure that out. I don't have the tools to do it with.

Bilal: Static competition, static price competition, or static competition effect on price is different than innovation. We have different theories on how number of firms or how competition affects either the rate or the success or the incentive to innovate.[28]

[25] *United States v. Von's Grocery Co*., 384 U.S. 270 (1966).

[26] John Bates Clark & John Maurice Clark, THE CONTROL OF TRUSTS 134–35 (1912).

[27] Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957).

[28] See RETHINKING ANTITRUST # 31: Innovation and Competition Policy (Richard Gilbert, Jun. 10, 2025).

Greg: We have different theories, but they ask different questions. You find out that the answer depends a lot on what the question is, not surprisingly. One approach says competition is bad for innovation for a variety of reasons, but the most persuasive one is that it is very hard to keep the benefits of innovation to yourself. That's called "appropriation" in the literature. There's always a limit on what's called the "appropriability" of an invention. But if you're a monopolist, you've got really high appropriability. A monopolist, in that sense, has the most incentive to invent of anybody.

But competition matters. And in that sense, the monopolist has the least incentive to invent. So the bottom line is, well, it's complicated, and it's hard to predict. And the literature for 50 years has said, well, something in the middle between monopoly and competition is probably best. And that leaves us nowhere on predicting how mergers affect things.

There's pretty good consensus that monopoly is not the best. A merger policy is not so simple as merger to monopoly is illegal and everything else is okay. We've got to worry about that middle ground, and it's tough. It comes down—and I'm sure you saw this in your work at the FTC in particular cases—you think you know something based on what you've learned in that investigation about what incentives firms have, what histories they have, how they're likely to compete, what they're likely to do with ongoing projects.

You make a judgment based on that, and I'm sure that's what the Commission is going to do.

Bilal: I thought they had opened up sort of a broader approach, both with sort of a general theory of innovation harm and, related to that, sort of a general theory of harm to investment. What is the right number of firms or what is the degree of competition in an industry that maximizes investment? And it's not clear to me the Guidelines lay out a framework for thinking about that, but they do introduce it as a concept.

Greg: It looks to me like they treat investment and innovation in tandem. It's one and the same to them, and that's fine. They're obviously not the same thing, but they're related. Innovation is what you get out at the end and investment is what you put in at the beginning, so fine. I completely agree with the proposition that all this is important and it's worth a lot of pages. I don't think there's as much in those pages as might meet the eye because we haven't got this all figured out. I think it all comes down not to economics writ large or modeling, but to specific facts because that's all you can get a hold of in these cases.

Bilal: Do you think more could have been said in either the 2010 Horizontal Merger Guidelines or the 2023 Merger Guidelines on innovation competition?

Greg: I don't think that the U.S. Guidelines gave innovation its due, but I think there are quite understandable reasons for that. One reason is the general view that, for the most part, if you just look at the effect of the merger on competition, you can conclude as to every dimension of competition. So if a merger reduces competition, however competition manifests itself, you get an anticompetitive effect in that dimension. And that's certainly the theory of the 2023 Guidelines. And that's a very respectable approach. At least from the Justice Department's perspective, in writing the 2023 Guidelines, there was an attempt to move to the competitive process standard. It doesn't show up very much in the Guidelines, but it was said out loud by the head of the agency often, and I'm sure he meant it.[29]

The other reason for not getting into innovation competition is a point I've made several times already, which is that we don't have anything to say in guidelines. So had I been asked to write a section on innovation competition, I would be able to make some statements about how it exists, it's important, and mergers can reduce it. But I wouldn't be able to write those paragraphs on how we figure out which mergers reduce it and which mergers spur it. That would be a really big problem. And you've got to have those paragraphs.

Bilal: There is a lot of attention given to efficiencies and benefits here, at least as compared to 2004 and 2008. Do you think this is a real shift? Will efficiencies be more readily accepted by the Commission, or is that rhetorical? And the reason I ask about that is the requirements for showing efficiencies, showing benefits, do seem consistent: verifiability, merger specificity, pass-on. So has anything really changed if the test remains the same?

Greg: Well, a little has changed. What I see going on here is that the lawyers at the Commission have said the courts are going to make them seriously consider efficiencies, so they should do it. That doesn't mean that they have to reach any particular conclusions, but they have to seriously consider efficiencies. They have to begin by writing guidelines that talk about how they're going to seriously consider efficiencies. They did that. The guidelines have to have in them all kinds of provisions that will be the reasons that the Commission cites for why it rejected efficiency claims, and they're there. There's dozens of them. I'll give you a few.

One is that the Commission requires the efficiencies to be realized almost immediately, even when they're in things like innovation that are going to take years. Nope, got to be in the first year, they say. The Commission requires the merging parties to quantify the consumer welfare benefits, and I mean in terms of consumer surplus, of new and improved products. They want quantitative estimates of products that don't exist. They can never be very good estimates because you've got no basis for them.

They want it all documented by third-party studies that were done before the start of the merger negotiations. How are you going to do that? How are you going to figure out what new products you're going to produce that far in advance and get a third party to document this for you, giving away

[29] Jonathan Kanter, Assistant Attorney General for Antitrust, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022) ("Congress sought to protect competition and the competitive process. … Congress was right to set competition and the competitive process as our North Star. … The competitive process is how rivalry plays out in the market among multiple competitors.").

all your secrets? Now, you're going to swear this guy to secrecy, of course, but he's going to spill your beans.

They're just writing paragraph after paragraph of reasons to reject efficiency claims. The agencies were rejecting those claims pretty well without those paragraphs. But this is something they can draw on in court, and they will. You bet they will. I think they've gone way too far. I think they've loaded up a burden on the parties that is completely unreasonable. But their starting proposition, they've already got case law support for.

Courts have said that the merging parties have a burden of proof on efficiencies. What does it mean? I don't know what it means, but they said it.

Bilal: The Guidelines do seem to recognize that in some instances scale is a benefit and that benefit to competition, including improvements in resilience and sustainability and other similar factors. That does seem to accept, or might accept, a longer-term efficiency or benefit runway. They also seem to adopt the idea—accept the idea—of dynamic efficiencies. Doesn't that just automatically extend the period in which the efficiencies will be credited, or am I thinking about that incorrectly?

Greg: Well, that would seem so, but there are several very clear and straightforward sentences to the contrary in the draft. It's a little ambiguous, but it looks to me like they're going to do what the U.S. agencies have done with entry and just say, well, the easy thing to decide is it is not going to happen soon. Once we've decided that, we're done; we don't have to figure out any of the harder questions.

I think that's the thought process at the Commission—only speculating, but that seems to be it. But there are some tensions in the draft, and I think they're leaving plenty of room to do whatever they think is the right thing in a particular case. There's certainly going to be some mergers that are let through on grounds that will be called efficiencies and may relate to resilience or sustainability or scale or any of these things. They will explain it in some way that's consistent with the Guidelines because there's room to do it. There will be lots of times when they reject those arguments. I just hope they have a good basis for these decisions. The Guidelines really don't tell you what they're going to do.

Bilal: There's a lot of discussion of foreclosure. There's a lot of discussion of entrenchment, including around ecosystems and data-related theories. Maybe we separate the two. Do you see any novel thinking, new thinking, on foreclosure theories of harm that are not entrenchment theories of harm?

Greg: I don't think so. I think the foreclosure analysis is not innovative in any way, or at least certainly not meant to be. To the extent it's innovative, it's wrong—maybe just bad writing, I don't know. There's one paragraph that drives me nuts: Paragraph 238. It says that if you get a vertical merger, you're going to get the merged firm switching all its purchases of the upstream product to the upstream component of the merged firm because they now get to earn a margin on that. That's nutty.

First, the merged firm would transfer internally at marginal cost, so the margin is zero. Second, if for whatever reason the merged firm doesn't do what economics says it should do and instead runs the upstream component as a separate profit center and does take a margin, then that kills your foreclosure theory because they're not going to give up their profits to engage in this foreclosure scenario. Not if they're a profit center; can't do that.

Third, if they're going to foreclose, that means they have to reduce the total market output of that input that they're using to foreclose with. If the downstream merging firm shifts it purchases to the company they're merging with—that means they free up some production. The merged firm has to reduce its production even more. The net result will be that the merged firm produces less of the input than it did before. Otherwise, there's no foreclosure. It can't make an extra profit because it's going to sell less.

And finally, the Guidelines should recognize that the merged firm would have an efficiency reason to switch its purchases. That's why it's doing the merger, and this can relate to resilience. They don't explain – in a way I found very satisfactory – how you get to resilience, but here is a very simple explanation. You acquire a supplier because your supply of this input is critical and it's not entirely reliable. You want to make it as reliable as you can, so you buy the company. And now you can control its quality, you can do everything in your power to control its reliability, and this can increase resilience, and that can benefit downstream consumers.

Vertical mergers tend to be good. And there's no sense of that in the Guidelines.

Bilal: Ecosystems. Now, you mentioned the 1968 Guidelines before. I thought the ecosystem discussion, the entrenchment discussion around ecosystems, is a return to conglomerate-type analysis, portfolio-type analysis. What do you think? Entrenchment and ecosystems, is that old wine, maybe bad wine, in new bottles, or something different?

Greg: Well, it's bad wine, but it's not old wine.

I am fairly familiar with the conglomerate merger theories of the 1960s; there were basically two species. One is potential competition, but that is a straightforward horizontal theory or it's nothing.

The other was big companies are a threat. There are people in the U.S. and in Europe who believe that, but that is not what the draft says. The draft says that big companies that control ecosystems are a threat. There's more to it. It's not the size of the company. It's that it controls an ecosystem that makes it a danger. And because the Commission envisions somehow either displacing this dominant firm controlling an ecosystem completely, somehow from within, or chipping away at it piece by piece from within. But probably neither of those things is going to happen. But what you do is you undermine the ecosystem.

You have to appreciate that ecosystems have to be orchestrated. They have lots of moving parts. They have to harmonize or it doesn't work well. Somebody has to make decisions and control things. Not everything has to be controlled. We can use market mechanisms a lot, but some things have to be controlled and sometimes the firm that has the most invested in the ecosystem—they created it in the first place—is going to say, we need to expand our control in a particular way by buying a company. Or, if we buy the company, we can improve the ecosystem in a particular way. We can have it do new things or do them better by incorporating new technologies.

By and large, although this firm is out to make a profit and does make a profit, its interests correlate very well with consumer interests because making the ecosystem bigger and better is good for consumers and for that dominant firm. But there are lots of players in the ecosystem that want a free ride. They don't care much if they drag the ecosystem down. Because, first, they probably can't. They can free ride a lot and not impinge very much on the ecosystem. And second, if they do drag it down, well, they will have made their money and gone away, so it's okay—they don't care.

So if I were writing guidelines, I probably wouldn't touch this area. But if I did touch it, I would want to be more balanced and would want to include ecosystem efficiency theories along with my ecosystem anticompetitive effects theories because I think that antitrust in both the U.S. and Europe has unfairly treated ecosystems and that these Guidelines are symptomatic of continuing unfair treatment of ecosystems.

The tech giants are, I believe, unfairly being targeted. I will be filing a brief at the end of this month in the *Google Search* case explaining why Judge Mehta was wrong to find Google liable.[30]

I think the *Google Shopping* decision in the EU, which they're so proud of, is the clearest example of free riding I know of in an antitrust case.[31] It is quite literally free, and it was riding. So these comparison shopping sites were complaining that the quality of the free service they got from Google wasn't as good as they needed it to be.

Bilal: I thought some of the entrenchment theories I saw in the discussion read like the efficiencies offense in the *Procter & Gamble* case.[32] Do you see some of the entrenchment theories of harm as relying on an efficiencies offense, or efficiencies create impediments to future competition, future entrants?

[30] *United States v. Google, LLC*, 747 F. Supp. 3d 1 (D.D.C. 2024).

[31] Case C-48/22 P, *Google & Alphabet v. Comm'n* (Grand Chamber, Sept. 10, 2024); Case T-612/17, *Google and Alphabet v. Comm'n* (Nov. 10, 2021); Case AT.39740, *Google Search (Shopping)*, Comm'n Decision (June 27, 2017).

[32] *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

Greg: I think they have walked the fine line and not crossed it. I would say no. *Procter & Gamble*, of course, was an FTC case. It is fair to read the result as an efficiencies offense, but that certainly isn't the way the Supreme Court saw it. The competitive danger was that Procter & Gamble was so good at marketing products to consumers that no one would be able to compete with them. They certainly, after that case—and to a great extent before that case—grew only internally.

In that case, they acquired a bleach manufacturer because it was the easy way to go. They were doing pretty well. This was a post-consummation challenge, and they were doing pretty well with it, and that would never do, because nobody could compete with them now. They maybe could have competed with Clorox, but they can't compete with P&G. We can't have that. Most everybody thinks that was ridiculous.

I should mention that there was a potential competition theory here, but P&G never went into bleach after it divested Clorox. It didn't much go into home-cleaning products any more than it had. Detergent, soaps—they were fairly big on that. The case was probably a mistake, but it was consistent with the thinking of the time. All mergers were bad.

Bilal: I haven't thought about it in a little while, but I wondered if that could have been pursued as sort of a portfolio-type theory of harm, bundling-type theory of harm.

Greg: That was—you mentioned portfolio theory. I want to expand on my previous answer and maybe take it back a little bit. I think in the case of these portfolio theories, it might be fair to call that an efficiency offense. Again, it's a fine line, but they tell a story that a firm, through merger, puts together this bigger product line that now retailers have got to have. Why do they have to have it? Well, it must be because consumers want it. Retailers aren't going to stock stuff consumers aren't going to buy, so it must be good for consumers in some way that consumers respond to. It sounds like this is efficient. It sounds like it's pro-consumer. It sounds like everybody wins.

But no, the Commission says this makes it harder to compete with the guy who's got the whole portfolio. Well, yeah, it's also hard to compete with the guy who built the better mousetrap. But we say that's competition on the merits. Why isn't it competition on the merits to put together the portfolio? It seems to me that it is.

Bilal: Is one of the arguments, one of the claims in that scenario, that one possibility is that what the larger firm is acquiring is another vehicle for entry? It came up in the *Whole Foods/Wild Oats* transaction.[33] It didn't get much play in the Commission's briefing or opinion beyond a reference in the complaint; Wild Oats as a way for Safeway or other large standard grocery stores to get into the

[33] Complaint, *Federal Trade Commission v. Whole Foods*, ¶43.d (D.D.C. Jun. 6, 2007) (Wild Oats as a "springboard" for a conventional supermarket operator to enter the premium natural and organic supermarket market.). This theory did not get much attention in the litigation. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

premium natural organic space. That wasn't a portfolio theory of harm, but I can see how somebody might think Clorox, given the strength of Clorox, was, in the P&G case, a potential vehicle for building a competing smaller portfolio. I'm not saying that's a good claim, but I think there's some of that in these portfolio theories, in these entrenchment theories; there are strong products that may be able to develop an ecosystem or portfolio distinct from the existing firm.

Greg: Well, to the extent you're asking, is that what the Commission says? My answer is yes, that's what the Commission says. If your question is, is there much to that? My answer is no, there isn't much to that. I think I already said that the guy who's got a tiny role to play in this ecosystem is never going to be able to take it over and displace the dominant firm. He's not going to try. He may try for a much bigger piece of the action, and he may do it through fair means or foul. In the *Epic Games* case, I think foul is the answer, but the courts have aided and abetted.[34]

Bilal: Why do you think the target would not be able to displace the ecosystem?

Greg: Well, it doesn't have access to the necessary technology, doesn't have access to the capital. We're talking about displacing a trillion-dollar company in many cases. To do that, you would have to invest many billions of dollars. Now, where is it going to come from? Is the capital market going to put that money up? No, probably not, because they don't like the chances of getting it back. Somebody has to be putting up their own money. Who's going to do that? No sane person.

One of the things that comes out in the *Google* Search case is that Microsoft has lots of money, constantly did the calculation that it might be able to be as good as Google Search, but it didn't pay to invest the money that it would take.

Bilal: What I think I wanted to get at was that it's a factual question and it seems unlikely that anyone has the incentive to invest in this way, basically, to displace the significantly larger and more efficient firm. I think of firms with multiple products as more efficient than firms with single products.

Greg: Well, yeah, they've got something that they build on by offering more and more value. And that strikes me as a good thing.

Bilal: The innovation shield that's in the draft does seem to allow for a fairly smooth path for acquisitions of small startups by a broad array of acquiring firms. That shield does seem to carve out, to some degree, maybe to a large degree, acquisitions of startups by so-called gatekeepers.

[34] *In re Google Play Store Antitrust Litigation*, 147 F. 4th 917 (9th Cir. 2025); *Epic Games, Inc. v. Apple Inc.*, 67 F. 4th 946 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 682 (2024); *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021).

Greg: Or any kind of market leader.

Bilal: I think a lot of what you've just said suggests that is an unwise rule. It looks like it's preventing some of the firms who are best placed to make use of those assets from acquiring assets of small startups.

Greg: The spin on it that is pro-Commission is that they've created a safe harbor. They didn't do the opposite. There's no rule in there that if X and Y are true, then we will challenge your merger. In fact, there's none of that in the whole Guidelines, which may be one of the bad things about the Guidelines. They're not saying, literally, they're not saying, that the gatekeeper or the leading incumbent cannot acquire the startup. Now, I have to grant them that. They're not saying it. But when they say everybody else can acquire them, what's the effect going to be? It sends a couple of very clear signals. One of which is a signal to the startup, to the guys thinking about being startups, that they can't sell to the guy who can do the most with their technology and would pay the most for it. They're going to invest less.

The handwriting is on the wall that they are going to challenge acquisitions by the gatekeepers and the leading incumbents. The Commission doesn't really have to say it. It's implied. They're not going to make the acquisitions and then have to go through all the regulation and then come up empty. They're going to try to acquire the technologies in some other way than mergers, and they are coming up with ways to acquire the technologies other than mergers.

Bilal: What do you make of the removal of market share and concentration safe harbors for non-horizontal transactions?

Greg: I'm going to have to guess as to why. Here's my guess. It was a casualty of the organizational principle of the document. I guess I didn't do a search, but I'm not sure you'd find the word *horizontal* in there at all. You do find the word *vertical* and *conglomerate* a few times, but not very many. These concepts are not organizational in the document, and they could be organizational in two distinct ways. The traditional way, which I am opposed to, is characterizing mergers as horizontal, vertical, or conglomerate. Well, we all know that in many cases it's not that simple, and that characterization isn't very useful.

But I'm a strong advocate of the view that all merger theories are purely horizontal, purely vertical, or purely conglomerate. Those are very useful ways to characterize theories. I urged the U.S. agencies to do that, which they didn't. But they don't do any organization along these lines in the EU draft. And that made it very difficult to have a safe harbor for what is essentially vertical mergers.

They also don't have what guidelines traditionally had, which is thresholds over which they're likely to challenge. Because that was also rather inconsistent with the organizing principles of the document. And I think what's wrong is the organizing principles of the document.

Bilal: What do you mean by organizing as horizontal, vertical, or conglomerate?

Greg: Well, they've got seven things that are called competitive effects theories, although I'm not sure that's the exact wording that they use. The first of which is elimination of head-to-head competition. That is plainly a horizontal theory. Why don't we label it as such? In fact, all horizontal theories might come under this categorization. I think they don't.

I think that coordinated effects theories ought to be separate, and they are. They have a coordination category. Now, does that mean all the rest of the categories are not horizontal? Oh, no, no, no, no, no. They're mostly horizontal too. Elimination of innovation competition—well, isn't that elimination of head-to-head competition? Well, yes. There's a difference. What is it? We're not going to tell you.

Do they tell me exactly what mergers eliminate head-to-head competition and what are the mechanisms through which eliminating head-to-head competition produces a bad result? No, they try to mush several things together. They seem to have the differentiated-products theory in that category. I think they probably have Cournot-type theories in that category.

I think they've got dominant-firm-type theories as long as they're not in entrenchment. It's what economists refer to as the dominant firm theory. I think that's in that category. They want to make it one thing, not three things or five things or 12 things, depending on how many different models you think there are here. That's a mess. They don't articulate any of the theories clearly because they mush them all together.

Bilal: Before Aviv Nevo went to the Commission (FTC), I heard him say he would have liked to see a set of guidelines that were organized around unilateral, coordinated, and, I think he said, exclusionary theories. Is that either different than what you're describing, or is that what the Commission here has tried to do?

Greg: I don't think that's what the Commission here has done at all. I'm with Nevo, as I understand him from what you've just said, because I don't remember exactly what he said. He is describing a type of competitive effect. Perfectly consistent with what I'm saying. Whether there ought to be the exclusionary category, we can argue about. But theoretically, that is most of the vertical theories, and he thinks it's better to talk about exclusion as the organizing principle than verticality. Okay, that's a legitimate point.

To put it in the terms of the EU document, he's got head-to-head, he's got exclusionary, and he's got coordinated. They have more categories, and some of them relate to exclusionary. I'm not sure what he's doing with Cournot and auctions and bargaining. I'm not sure what the EU is doing with them either, although they do have a couple of paragraphs on auctions. But to me, the organizing principles should be the mechanism through which a merger causes an anticompetitive effect. A mechanism has several components. And mechanism is what the EU Guidelines just don't talk about.

Bilal: What would you say those components are, several components?

Greg: Well, the first component is the relationship between the merging firms. So, in a lot of your exclusion theories, the fact that they have a vertical relationship is the first step. What's the second step? You don't necessarily get any conclusion from the fact that they have a vertical relationship. There has to be something related to incentive and ability to do something that excludes. That's like your second and third steps. This is what we've been doing. I'm not saying anything new. I'm just saying how you organize merger guidelines. I don't particularly like the way it was done in the 2023 U.S. Guidelines. I really don't like the way it was done in the EU Guidelines.

I haven't been asked to do it myself lately, but I would have a number of—I have no idea what the number is—categories of mechanisms. I might have more than one exclusion mechanism. I really haven't thought about how I would break them down. I would include that because there are some legitimate vertical theories that involve exclusion, no doubt about that.

I would include coordination, although I'm not a big believer in coordinated effects theories; I think it is the least well documented. Most people say it's the opposite, but I think it's the least well documented of all the merger theories, of all the mainstream ones.[35] Conglomerate, of course, there's not much evidence that those are good theories.[36]

Bilal: Do you think these draft Guidelines guide?

Greg: Well, in the sense that I would use the term, the answer is no. I don't think they were meant to tell potential merging firms what mergers the Commission is likely to act against and what mergers the Commission is not likely to act against. I think what they were meant to do is tell potential merging firms how the Commission thinks about the analysis of merger. And the draft—it's a stream of consciousness. Assuming the draft does a good job of communication, the Commission's thinking seems rather chaotic.

I would say that a reason to write guidelines is to think it all through, and the Commission has done that. In that sense, I'm sure the Guidelines were productive.

Bilal: So when you say they're chaotic, is that because the number of theories, the framing of the theories, the articulation of the theories? What is it that makes it chaotic?

[35] Janusz A. Ordover, *Coordinated Effects*, 2 ISSUES IN COMPETITION LAW AND POLICY 1359 (ABA Section of Antitrust Law 2008); *David Scheffman* and *Mary Coleman*, *Quantitative Analysis of Potential Competitive Effects From A Merger*, 12(2) GEO. *MASON* L. REV. 319 (2003); J. Baker, *Why Did the Antitrust Agencies Embrace Unilateral Effects*, 12(1) GEO. *MASON* L. REV. 31 (2003).

[36] OECD, ROUNDTABLE ON CONGLOMERATE EFFECTS OF MERGERS – BACKGROUND NOTE (May 24, 2020).

Greg: There are just too many thoughts without clear directions. They don't tell you very much about what the Commission's going to do. You get vibes off these guidelines, but they don't really tell you much.

Bilal: I think that may be the right place to end. This has been the RETHINKING ANTITRUST podcast. My guest has been Greg Werden. Thank you for being here, as always. This has been, I think, a very good and informative discussion. I look forward to your comments on the draft.

Greg: You're welcome.