

Unilateral Effects in Technology Markets: *Oracle*, *H&R Block*, and What It All Means

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THE THEORY OF UNILATERAL EFFECTS has been a formal part of merger analysis since the 1992 Merger Guidelines. The Federal Trade Commission and Antitrust Division of the U.S. Department of Justice for many years have applied the principle that a merger violates Section 7 of the Clayton Act where “merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.”¹

Application of this principle has proven challenging in transactions affecting technology markets, where product differentiation is the norm, market shares often are in flux, and innovation developments are rapid and difficult to quantify. Often in such cases unilateral effects are unlikely, even where, as the 2010 Guidelines note, at the moment of the merger (or for a time period preceding the merger) “products sold by the other merging firm [are customers’] next choice.”² Practitioners who seek to rebut claims that merging firms in technology markets will have the ability profitably to raise prices or slow the pace of innovation must understand the evolution of the Agencies’ and courts’ application of the principles underlying unilateral effects cases, as well as the kinds of facts that that will best support such a rebuttal.

As with other aspects of merger policy, the Agencies’ application of unilateral effects theories is not static—the meaning, application, and scope of these theories continually have evolved, as have the tools employed by the Agencies and private parties to assess the likelihood of a merger’s negative effects on the relevant market. This constantly evolving understanding requires practitioners continually to adapt the

counter-arguments they make when the DOJ or FTC argues that a transaction will result in unilateral effects.

In particular, the DOJ’s recent victory in *H&R Block*³ has reinvigorated a mode of unilateral effects analysis that had been seriously undermined when the DOJ lost the *Oracle*⁴ case. In the aftermath of *H&R Block*, in which the court embraced much of the Agencies’ unilateral effects analysis articulated in the 2010 Guidelines, practitioners—particularly those whose clients are in technology markets—must be prepared to make a more robust presentation as to why their transactions do not raise unilateral effects concerns.

The Emergence of the Unilateral Effects Doctrine

Merger enforcement policy has not always acknowledged the theory of unilateral effects. The Merger Guidelines issued by the DOJ in 1982 focused almost exclusively on whether a merger would facilitate coordination among the remaining competitors. The phrase “unilateral effects” was not mentioned.⁵ As Jonathan Baker noted in a 1996 speech and subsequent 1997 article, the 1982 Guidelines, influenced in large part by Chicago-school economic thinking and modeling, contained only a narrow discussion of unilateral effects-like analysis.⁶ The 1982 Guidelines offered only a “leading firm proviso,” explaining the potential enhancement of market power via a dominant firm.⁷

Economic literature explaining that oligopolists may find mergers profitable, even without coordinated activity, led to a shift in antitrust thinking beginning in the early to mid-1980s.⁸ The development of new unilateral effects theories was complemented by the emergence of new empirical tools (including econometric models using computerized point-of-sale scanner data) that allowed the Agencies and merging parties to take reams of transaction data and estimate own- and cross-elasticities with seeming precision.⁹ These estimates could then be used in “merger simulation” models that relied on the basic teachings of the earliest industrial organization economists. Thus emerged a data-driven mode of analysis, supported by sophisticated statistical tools and well-accepted economic principles. These developments combined to offer the prospect of measuring how much prices would likely rise as a result of a merger between two close competitors.¹⁰

The 1992 Horizontal Merger Guidelines expressly acknowledged that a lessening of competition was possible through unilateral effects.¹¹ The 1992 Guidelines identified certain characteristics of markets that would make unilateral effects more likely, including firms identified by differentiated products and firms distinguished by their capacities, and also offered what some viewed as a unilateral effects safe harbor for transactions where the parties’ combined market share did not exceed 35 percent.¹² By the time a federal court decided *Oracle* in 2004,¹³ the theory of unilateral effects had become the mainstay of merger analysis at the FTC and DOJ. In fact, the 2006 DOJ and FTC Commentary on the Horizontal Merger Guidelines describes twelve actions to illustrate how

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the theory of unilateral effects played an essential role leading to enforcement actions.¹⁴

The 2010 Merger Guidelines provided an even more expanded and refined definition of unilateral effects and the framework by which the Agencies determine which mergers raise concern. The revised Guidelines assign far greater prominence to examining localized competition between the merging parties, regardless of how the Agencies define the relevant market. Professor Steven Salop has argued that the emphasis on market definition has been a flaw in antitrust analysis for some time:

Although market power and market definition have a role in antitrust analysis, their proper roles are as parts of and in reference to the primary evaluation of the alleged anticompetitive conduct and its likely market effects. They are not valued for their own sake, but rather for the roles they play in an evaluation of market effects.¹⁵

The 2010 Guidelines sought to “fix” that perceived flaw. Thus, according to the Agencies, in differentiated product industries, “A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.”¹⁶

That Was Then

The Agencies’ reliance on unilateral effects to demonstrate a substantial lessening of competition was significantly undermined in the mid-2000s. In February 2004, the DOJ and nine states sought to enjoin the acquisition of PeopleSoft, Inc. by Oracle Corporation.¹⁷ The government argued that the merger would combine two of the three leading providers of human resource management (HRM) and financial management service (FMS) enterprise software applications, resulting in higher prices and less innovation.¹⁸ The government contended that only three players competed in its proposed relevant product market: Oracle, PeopleSoft, and SAP. The complaint went on to describe Oracle and PeopleSoft as the two strongest players and closest substitutes, with SAP lagging behind as a somewhat distant player.¹⁹

In September of the same year, Judge Vaughn Walker of the U.S. District Court for the Northern District of California denied the government’s request for an injunction,²⁰ and shortly thereafter, the acquisition closed. The opinion in *Oracle*, which filled over 78 pages in the *Federal Reporter Supplement Second*, was highly detailed. Judge Walker’s opinion remains among the most expansive analyses of unilateral effects theories by the judicial branch.²¹

There is no shortage of thoughtful commentary addressing Judge Walker’s opinion and his focus on whether Oracle possessed the ability to increase price by virtue of the fact that the elimination of PeopleSoft would have eliminated price-constraining direct competition between the two firms.²² His opinion rejected, in exacting detail, the proposed product and geographic market definitions. As a result, he held that the government had failed to prove that there were a significant

number of customers who regarded Oracle and PeopleSoft as their first and second choices.²³ This failure, Judge Walker noted, resulted from the government’s use of “flawed and unreliable” customer and expert testimony.²⁴ Further, he found that the plaintiffs’ “evidence was devoid of any thorough econometric analysis such as diversion ratios showing recapture effects.”²⁵

This is Now

In the pre-2010 Guidelines world, the FTC’s challenge of CCC Holding, Inc.’s acquisition of Mitchell International, Inc. provided an important lesson in how to defeat claims of unilateral effects.²⁶ Despite the court’s conclusion that the FTC had proven the merger would likely result in anticompetitive coordinated effects and thus the transaction should be blocked, the court chose to examine the theories of unilateral effects anyway.²⁷ The FTC prepared three different models to demonstrate that the merger would likely cause adverse unilateral effects: a Bertrand price effects simulation, and two bidding models.²⁸ The court was unpersuaded by these models because the “data and predictions cannot reasonably be confirmed by the evidence on this record.”²⁹ Moreover, the opinion cited the 1992 Guidelines’ reference to a market share of at least 35 percent being necessary to presume the existence of unilateral effects.³⁰

The decision in *CCC Holdings* reflects the tension between judicial precedent—which is rooted in market definition and high market shares—and the approach increasingly taken by the Agencies—which focuses far less on market definition and much more on competitive effects. Requiring the Agencies (and private plaintiffs) to prove a relevant market as an essential element of a Section 7 claim has led the Agencies to take what courts seem to view as inconsistent approaches. On one hand, the Agencies have asked courts to look at their direct evidence of competitive effects (i.e., the evidence derived from the unilateral effects analysis), which does not require a market definition. On the other hand, the Agencies have been reluctant to simply ignore the market definition requirements of the case law. In an effort to identify “relevant markets” that are narrow enough to generate high market shares, the Agencies were forced to offer convoluted or arguably contrived market definitions that excluded products that were demonstrated at trial to be competitive to some extent with the products alleged to be in the market (e.g., Premium Natural and Organic Supermarkets in *Whole Foods*³¹) and submarket definitions (e.g., office supplies distributed through office superstores in *Staples*³²) in situations where what the Agencies really argued were unilateral effects in broader markets.

Perhaps most prominently, in *Oracle*, the DOJ argued that a firm’s product (Lawson Software’s ERP software) was outside the relevant product market, even though the DOJ itself had recently purchased that product via a competitive bidding process that included the merging firms’ products. In that case, the Agencies’ efforts to conform their unilateral

effects presentation to the legal requirements of Section 7 as set forth in case law provided defense attorneys with ample opportunities to end the case by showing that the government's market definition was flawed.

It was against the backdrop of these cases and the release of the 2010 Guidelines that, in 2011, a federal district court again addressed unilateral effects analysis in connection with the DOJ's challenge to the acquisition of 2SS Holdings, Inc. (TaxAct) by H&R Block, Inc.³³ In *H&R Block*, the DOJ alleged that the proposed transaction would reduce competition in the digital do-it-yourself (DDIY) tax preparation software market, and that as a result, consumers would see higher prices and reduced innovation.³⁴

Following a nine-day bench trial, Judge Howell issued an opinion granting the DOJ's request for a preliminary injunction to block the merger. In examining the DOJ's contention that the merger would result in anticompetitive unilateral effects, Judge Howell explained that unilateral effects were likely because the merger occurred in a market where products were differentiated; the products of the merging firms were reasonably close substitutes; other products in the market were sufficiently different from the products of the merging parties, such that a small increase in price of the products post-merger would be profitable to the merged entity; and repositioning by any remaining market participant (to make its products closer to the products of the merging party, such that they would be considered adequate substitutes) would be unlikely.³⁵

Of particular relevance to Judge Howell's evaluation was the fact that the merging firms represented the second and third largest providers of DDIY tax preparation products in an already highly concentrated market.³⁶ There was also ample evidence³⁷ that the merging parties were head-to-head competitors, and that while there were other players, they did not possess the same significance to the merging parties as the merging parties did to each other.³⁸ Of note, Judge Howell found that Intuit, Inc., owner of TurboTax, the largest provider of DDIY tax products, might be the closest competitor for both H&R Block and TaxAct, but that possibility did *not* prevent finding that unilateral anticompetitive effects were likely from the merger.³⁹

In Practice: How the Development of Unilateral Effects Theory Affects Technology Mergers

H&R Block revitalizes the unilateral effects doctrine that was significantly undermined by the court in *Oracle*.⁴⁰ The *H&R Block* opinion—which largely adopts the tone and tenor of the 2010 Guidelines—is critically important for practitioners to appreciate when representing technology companies. The *H&R Block* court, making use of many of the principles contained in the 2010 Guidelines, adapted the judicial doctrine of unilateral effects since the decisions in *Oracle* and *CCC Holdings* in a number of significant ways.

Market Share Presumptions. In *Oracle*, the court concluded that absent a market share that approached “essentially

a monopoly or dominant position,” a claim that the merging firms could unilaterally harm the market would be impossible.⁴¹ The *H&R Block* court rejected that analysis, concluding that impermissible price increases were possible even at “far lower market shares.”⁴² Indeed, the court even suggested that an appropriate market definition itself is not a prerequisite to a successful Section 7 claim because “a merger between two close competitors can sometimes raise antitrust concerns due to unilateral effects in highly differentiated markets.”⁴³

This evolution⁴⁴ presents important considerations for counsel: in technology markets, market shares often are not an indication of market power (or conversely, the absence of market power), as they are not a reliable measure of whether the merging firm would have the incentive and ability to raise prices or slow the decline of innovation.

Indeed, in some markets, market share totals may significantly underestimate the power of a firm to affect prices or innovation. Thus, for example, if a market is highly fragmented with several fringe firms, the merging parties—even with a 35 percent market share combined—could have the ability post-merger to affect prices or innovation if the merger had the likelihood of tipping a market to the merging parties' implementation of a technology because the market was susceptible to network effects or involved high switching costs⁴⁵ or because the merger combined competing patent portfolios that created a patent block or thicket where none previously existed.⁴⁶ It is thus important, even where market shares are not particularly high, for merging parties to be able to explain to the Agencies why the fringe is competitively significant; why competition will be unaffected by the combination; and why customers still will have viable alternatives to the merged parties' technologies.

On the flip side, notwithstanding the court's admonition in *H&R Block*, high market shares may not be an indication of market power. For example, in *Google/AdMob*, the FTC closed its investigation of the acquisition even though the Commission found that “Google and AdMob today are the leading competitors among mobile ad networks, which drive the availability of free or low-cost applications and content for smartphones and other mobile devices.”⁴⁷ Although the combined company would have a significant market share post-merger, market dynamics made the exercise of unilateral market power highly unlikely. During the course of the investigation, Apple entered the market through the acquisition of the third-largest mobile ad network. The Commission concluded that Apple's entry made any evaluation of AdMob's existing market share meaningless, as Apple had the ability and incentive to quickly gain share by leveraging its market-leading mobile operating system platform.

Even the mere *potential* entry of a firm with the ability and incentive to quickly compete in a market could be sufficient to defeat a claim of market power because of high shares. Thus, in *Brocade/McDATA*, the Commission cleared Brocade's acquisition of McDATA even though by some

accounts the combined entity had an 85 percent share in one market post-merger. It did so because a large third party, Cisco, had announced plans to enter within a year. The 85 percent market share itself was insufficient to sustain a claim that the post-merger company would be able to raise prices because there was insufficient evidence to suggest that Cisco would not be able to quickly gain share.

Win/Loss Data. Particularly in technology mergers in markets with differentiated products, win/loss data can be critical. In *Oracle*, Judge Walker rejected the DOJ's analysis of win/loss data as incomplete.⁴⁸ The government presented evidence that Oracle kept, in the ordinary course, win/loss data that demonstrated that it competed most heavily against PeopleSoft, the company it was acquiring. The court found little significance in that analysis because the same win/loss analysis also demonstrated that Oracle competed much of the time against SAP. Thus, because Oracle could demonstrate the presence of a third firm that apparently competed against Oracle almost as much as the merging party, the government could not sustain a claim using evidence that there was a unique "closeness of competition" between the merging parties sufficient to give rise to a concern of adverse unilateral effects.

In *H&R Block*, the court took a more expansive view of the importance of demonstrating the closeness of competition between the merging parties.⁴⁹ In evaluating the data, the court noted it was plausible to say that Intuit (the third party in the market) was a closer competitor to each of the merging parties than either was to each other. That did not prove dispositive to the court, which found that "the fact that Intuit may be the closest competitor for both [the merging parties] . . . does not necessarily prevent a finding of unilateral effects for this merger."⁵⁰ Indeed, a showing that the parties were each other's "second closest rivals after Intuit" was sufficient, so long as the DOJ had a theory as to how these close competitors would be able to profitably raise prices post-merger.⁵¹

The Agencies place great weight on the analysis of win/loss data. Notwithstanding *H&R Block*, in the face of win/loss data that demonstrate the parties are not close substitutes for each other, even in a concentrated market, the Agencies will think twice before challenging such a transaction. The European Commission analyzes such mergers similarly. Thus, in its evaluation of Sun Microsystems' acquisition by Oracle, the European Commission approved the merger even though: (a) Oracle was the leading relational database provider; and (b) Sun was a significant participant in the market, because the "investigation showed that although MySQL and Oracle compete in certain parts of the database market, they are not close competitors in others, such as the high-end segment."⁵² The win/loss data confirmed this conclusion; at the Oral Hearing, Oracle presented evidence that, notwithstanding the fact that both Sun and Oracle broadly competed in a relational database market, the parties rarely saw each other in the market. In particular, Oracle's win/loss database

mentioned Sun as a competitor in less than one percent of all competitive instances.

Win/loss trends demonstrating that the parties are growing apart from each other, or that third parties are emerging as competitors, are important pieces of evidence in defending a merger. This is particularly true in technology markets, where, for example, recent win/loss evidence demonstrating that a third party had begun to compete more frequently with each of the merging firms could prove sufficient to defeat a claim of unilateral effects, even where the totality of win/loss data shows close competition between the parties. Given the dynamic nature of these markets, it often is the case that the most recent data are far more informative than data that are only one year or six months old.

Discounting Data. In their analyses of whether mergers raise unilateral competitive concerns, the Agencies increasingly often examine discounting data kept in the ordinary course of business. In keeping with the 2010 Guidelines' emphasis on examining whether there is evidence of localized competition,⁵³ the Agencies look to see whether the parties discount more heavily off of list price when they compete against each other, as opposed to when they compete against third parties.

Again, *Oracle* is instructive. There, the DOJ presented evidence that Oracle discounted heavily when it competed against PeopleSoft, and argued that was strong evidence of localized competition between the parties. The court disagreed, noting that the fact that Oracle and PeopleSoft were close competitors was not itself relevant.⁵⁴ Rather, what was relevant was whether Oracle discounted similarly when it competed against other firms, or whether the discounts were less significant. The court explained that the DOJ failed to produce evidence demonstrating whether Oracle discounted differently against third parties such as SAP, than it did when it competed against PeopleSoft.⁵⁵

Evidence of discounting often is difficult to identify precisely. Many technology companies bundle their products, making it difficult to ascertain how to allocate a discount. The bundles often differ based upon the characteristics of the customer—some customers may require additional "seats" of a license; some may require additional hardware to run the software; some may demand additional professional services (which often have high margins, enabling greater discounting off of the value of the services); and some may involve long-term upgrade purchases as well for software that has long-term value to a company and is often not replaced.

Merger Simulations and Diversion Ratios. One of the most significant changes in the 2010 Guidelines affecting unilateral effects is the specific mention of various economic tools that can be used to predict the likelihood of a post-merger price increase.⁵⁶ As the 2010 Guidelines note: "In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by

estimating the diversion ratio from the first product to the second product.”⁵⁷ Higher diversion ratios suggest that a price increase post-merger would be profitable; conversely, “if the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.”⁵⁸

The *H&R Block* decision relied upon the outcome of the DOJ’s diversion ratio and other econometric modeling surveys. These studies showed that the merging parties would be able to recapture a significant amount of revenue from lost sales following a price increase. This post-merger simulation gave the court comfort that it would be profitable for H&R Block to raise prices with impunity following the merger.⁵⁹ In contrast, the *Oracle* court rejected the expert merger simulation study results because they relied upon an incorrect analysis of market share statistics, which had the effect of polluting the simulation results.⁶⁰

Technology mergers present very serious obstacles when it comes to providing a merger simulation as either a reason to block a transaction or a reason to clear it. As the *Oracle* court noted, the validity of merger simulation predictions rests on a correct interpretation of the relevant market, and in many technology markets, the relevant market is difficult to prove, at best, and often is impossible to define given the changing nature of technology in many of these industries. What was competitive in the market two years ago could be irrelevant today, and what was irrelevant even six months ago could become the most significant competitive force in the future. Merger simulations, no matter how sophisticated, cannot take into account these rapid changes, and as a result, could have very limited value. Merger simulations can, however, add some value in technology markets where the technology is mature and where the industry is not on the cusp of a major technological disruption.

Such was the case in *H&R Block*, where the do-it-yourself tax preparation software industry, while exhibiting some evidence of technological change and disruption, had the same number of players offering the same basic software for an extended period of time. Even so, the court noted that “the merger simulation model used by the government’s expert is an imprecise tool.”⁶¹ What was important about the merger simulation in that case was that it confirmed what the court already had concluded through the use of win/loss data, documents, testimony, and other evidence. Merger simulations, particularly in technology industries, often are the result of assumptions about the market which are difficult to predict, and as a result, often have less probative value than other evidence available to the parties.

Innovation Evidence. The 2010 Guidelines assign increased relevance to the importance of innovation competition between the merging parties.⁶² The Agencies evaluate whether the innovation paths of the two firms are similar, leading to a prediction that the products—even if not close now—will become closer in the future, or, conversely, whether the innovation paths of the merging firms suggest that their respective products will diverge and become less

close over time. Moreover, the 2010 Guidelines also query whether the parties represent two such significant innovators in the market that their merger will eliminate an important source of R&D and innovation going forward, even where there are a number of other present-day competitors.⁶³ This analysis also requires the Agencies to determine whether one of the merging parties is, on a going-forward basis, less important because it does not have the resources to sustain the innovation efforts that previously allowed it to reach a position of relative prominence in the market.

Innovation evidence can be challenging to quantify, making the loss of innovation even more difficult to prove than the loss of pricing competition between two firms. And important factor in this analysis is the status of R&D efforts of the parties. Engineer headcounts, product roadmaps, and R&D investments all provide evidence of whether a firm will be successful in a market going forward.

In examining innovation evidence, it is vital to determine a firm’s R&D investment plan prior to a proposed merger. For instance, even a large, multi-national firm with significant resources could be competitively constrained if, prior to a merger, it had stopped investing in its development efforts in the relevant product markets. Notwithstanding its present position in the market, its failure to make necessary investments in R&D could compromise its ability to compete in the market going forward. Such a disinvestment could result in that firm missing out on the development of next-generation, critical technology, even if it was large and currently had a commanding reputation in the market. In other words, that failure to invest in R&D could, in effect, strand its product roadmap such that it would be unlikely to be able to catch up to tomorrow’s product releases by its competitors. Hence, *even if* a party has a significant present-day market share, its failure to invest may render its present-market position useless in tomorrow’s competition for new sales.

It is also possible for firms seeking to merge to have a significant present-day market share but individually not to have the resources to compete against far larger firms that were making significant investments in the relevant technologies. Thus, notwithstanding their first-mover advantage in the market, the merging firms would be leapfrogged by these new competitors, rendering their present-day products irrelevant in a rapidly advancing market. In such a situation, without combining their R&D efforts, it is far less likely that the merging firms would be able to compete with new, larger players going forward.

If such a situation were presented to the Agencies, it would be important to demonstrate, for example, that the parties’ own internal documents illustrated that the merging firms’ individual product roadmaps contained significant holes because they did not have sufficient resources to hire qualified engineers to develop next-generation products quickly enough to compete against these newer competitors. Here again, present-day market shares alone do not predict the going forward competitive positions of parties to a merger.

Conclusion

While it is impossible to predict how the next court in the next case will rule, what is clear is that examining unilateral effects theories in high technology transactions presents unique burdens and opportunities for the government and private parties. Understanding the evolution of these theories and the accompanying evidence necessary to establish the presence or absence of significant unilateral effects presents the best opportunity to advocate the most persuasive positions, while successfully navigating the pitfalls created by past merger reviews. ■

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.2 (1992, rev. 1997) [hereinafter 1992 Guidelines], available at <http://www.ftc.gov/bc/docs/horizmer.shtm>.

² U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.1 (2010) [hereinafter 2010 Guidelines], available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

³ United States v. H&R Block, Inc., No. 11-00948 (BAH), 2011 WL 5438955 (D.D.C. Nov. 10, 2011).

⁴ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

⁵ See U.S. Dep't of Justice, 1982 Merger Guidelines (1982) [hereinafter 1982 Guidelines], available at <http://www.justice.gov/atr/hmerger/11248.htm>.

⁶ Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, ANTITRUST, Spring 1997, at 21.

⁷ See 1982 Guidelines, *supra* note 5, § III-A.2. This is consistent with the DOJ's revisions via the 1984 Merger Guidelines, as well as the 1982 FTC Statement Concerning Horizontal Merger Guidelines.

⁸ See Baker, *supra* note 6, at 21.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See 1992 Guidelines, *supra* note 1, § 2.2.

¹² *Id.*

¹³ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

¹⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) [hereinafter Commentary], <http://www.justice.gov/atr/public/guidelines/215247.htm>.

¹⁵ Steve C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 188 (2000).

¹⁶ 2010 Guidelines, *supra* note 2, § 6.1. See generally Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 61–81 (2010).

¹⁷ The complete DOJ record in *Oracle* is available at <http://www.justice.gov/atr/cases/oracle.htm>.

¹⁸ See, e.g., Complaint ¶ 40, United States v. Oracle Corp., No. C-04-0807 (N.D. Cal. filed Feb. 26, 2004).

¹⁹ *Id.* ¶ 31.

²⁰ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

²¹ Judge Walker himself noted there were “[f]ew published decisions” addressing unilateral effects. *Id.* at 1113 (citing *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 168 (D.D.C. 2000), and *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 333–35 (S.D.N.Y. 1995)).

²² See *Oracle*, 331 F. Supp. 2d at 1123–73; see generally Jonathan B. Baker, George Cary, Carl Shapiro, Michael Vita, Paul Yde, *Roundtable Discussion of Unilateral Effects Analysis after Oracle*, ANTITRUST, Spring 2005, at 8; Mary Coleman, *Key Issues in Proving Unilateral Effects After Oracle*, ANTITRUST, Spring 2005, at 26.

²³ *Oracle*, 331 F. Supp. 2d at 1172.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009).

²⁷ *Id.* at 67.

²⁸ *Id.* at 67–73.

²⁹ *Id.* at 69.

³⁰ *Id.*

³¹ *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

³² *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

³³ *H&R Block*, 2011 WL 5438955.

³⁴ *Id.* at *1. The judge in *H&R Block* need not have reached the issue of unilateral effects because she had already found coordinated effects likely. *Id.* at *38. Nevertheless, the court discussed unilateral effects in order to bolster its conclusion regarding the overall Section 7 violation. The complete DOJ record in *H&R Block* is available at <http://www.justice.gov/atr/cases/handrblock.html>.

³⁵ *Id.* at *37 (quoting *CCC Holdings*, 605 F. Supp. 2d 26, 68 (D.D.C. 2009)).

³⁶ *H&R Block*, 2011 WL 5438955 at *28.

³⁷ For an exposition on the types of evidence the *H&R Block* court found most compelling, see James A. Keyte, *United States v. H&R Block: The DOJ Invokes Brown Shoe to Shed the Oracle Albatross*, ANTITRUST, Spring 2012, at 2.

³⁸ *H&R Block*, 2011 WL 5438955 at *28–33.

³⁹ *Id.* at *38–44. The defendants' use of a flawed merger simulation also played a role in the court's conclusion, as it noted the diversion ratios proffered were not credibly determined. *Id.* at *43.

⁴⁰ For a recent analysis of the *H&R Block* decision, see Deborah Feinstein, *The Significance of H&R Block: Brown Shoe Meets Merger Simulation*, ANTITRUST, Spring 2012, at 5.

⁴¹ *Oracle*, 331 F. Supp. 2d at 1123.

⁴² *H&R Block*, 2011 WL 5438955 at *40 (internal citations omitted).

⁴³ *Id.* (internal citations omitted).

⁴⁴ For an excellent discussion of the evolution of the unilateral effects doctrine, and the types and quantum of evidence necessary to sustain such a claim, see Shapiro, *supra* note 16, at 65 (“This reflects experience gained over the years: while market shares are often a useful starting point for assessing diversion ratios, and can indeed be used as proxies for diversion ratios, the DOJ will normally look as well for more direct evidence of diversion ratios.”).

⁴⁵ See Michael I. Katz & Carl Shapiro, *Antitrust in Software Markets, in COMPETITION, INNOVATION, AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE* 29, 32–34 (Jeffrey A. Eisenach & Thomas M. Lenard eds., 1999).

⁴⁶ See, e.g., *United States v. 3D Systems Corp.* No. 1:01CV01237 (D.D.C. 2002) (challenging 3D Systems Corp.'s acquisition of DTM Corp. on the basis that the acquisition would reduce the number of competitors in the relevant product market from three to two, and would result in the combined company having market share of approximately 80 percent), available at <http://www.justice.gov/atr/cases/indx303a.htm>. The Complaint, certain pleadings, Consent Decree, and Final Judgment are available on the DOJ's website. Ultimately, the DOJ settled with the parties, permitting the merger so long as the parties licensed certain patents to a Japanese company to facilitate its ability to compete in the U.S. market.

⁴⁷ Statement of the FTC Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), available at <http://www.ftc.gov/os/closings/100521/google-admobstmt.pdf>. The authors and Wilson Sonsini Goodrich & Rosati represent Google, Inc. in antitrust matters.

⁴⁸ *Oracle*, 331 F. Supp. 2d at 1166–67.

⁴⁹ *H&R Block*, 2011 WL 5438955 at *40.

⁵⁰ *Id.* at *39–40; see also 2010 Guidelines, *supra* note 2, § 4.1.1 (“Example 5: Products A and B are being tested as a candidate market. Each sells for \$100, has an incremental cost of \$60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate mar-

ket and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to \$110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.”).

⁵¹ *H&R Block*, 2011 WL 5438955 at *39–40.

⁵² Press Release, European Comm’n, Commission Clears Oracle’s Proposed Acquisition of Sun Microsystems (Jan. 21, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/40>.

⁵³ See 2010 Guidelines, *supra* note 2, § 6.1.

⁵⁴ *Oracle*, 331 F. Supp. 2d at 1167–69.

⁵⁵ *Id.*

⁵⁶ Shapiro, *supra* note 16, at 75 (“The value of diverted sales, taken alone, does not purport to quantify the magnitude of any post-merger price increase. Rather, as the Guidelines state, it ‘can serve as an indicator of the upward pricing pressure on the first product resulting from the merger.’”). But some have criticized the Agencies’ formulation of the diversion ratio in

the 2010 Guidelines. See, e.g., Jerry Hausman, *2010 Merger Guidelines: Empirical Analysis*, ANTITRUST SOURCE, Oct. 2010, at 3, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Hausman10_21f.authcheckdam.pdf. (“The diversion ration is the key empirical factor needed in the 2010 Guidelines approach. I have significant concerns how this factor will be estimated by the Agencies. A risk exists that the Agencies’ estimate will be ‘guesstimated’ from a few of the merging firm’s documents or customer interviews.”).

⁵⁷ 2010 Guidelines, *supra* note 2, § 6.1.

⁵⁸ *Id.*

⁵⁹ *H&R Block*, 2011 WL 5438955 at *41–43.

⁶⁰ *Oracle*, 331 F. Supp. 2d at 1172–73.

⁶¹ *H&R Block*, 2011 WL 5438955 at *43; see also David Scheffman & Joseph Simons, *Unilateral Effects for Differentiated Products: Theory, Assumptions, and Research*, ANTITRUST SOURCE, Apr. 2010, at 1, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug10_Scheffman_8_2f.authcheckdam.pdf.

⁶² See 2010 Guidelines, *supra* note 2, § 6.4.

⁶³ *Id.*