February 3, 2026

House Judiciary Subcommittee on Administrative State, Regulatory Reform, and Antitrust

"Full Stream Ahead: Competition and Consumer Choice in Digital Streaming"
January 7, 2026

Questions for Dr. Jay Ezrielev from Chairman Scott Fitzgerald

Q1: Over the last few years, we've seen many streaming services raise prices. When that happens, consumers do not just accept it blindly. Some cancel their subscription. Some switch between services. Some go back to cable bundles. Others spend more time on free platforms like YouTube or Instagram. Isn't that price-driven switching exactly what economists look for when assessing whether products compete with one another?

Response:

The switching by customers between Netflix and other providers of video content following a Netflix price increase is not how economists assess whether products compete with one another. This kind of switching is suggestive of competition between Netflix and alternative provides of video content. However, the magnitude of switching would not accurately gauge the level of competition between Netflix and other alternative video content providers. Unfortunately, the correct way to measure competition between products is much more complicated, as I discuss below.

Competition is not just about price. Competition occurs along multiple dimensions. For example, firms also compete by investing in innovation, offering variety, providing high quality products and services, and investing in customer goodwill.

Competition has both static and dynamic elements. Static competition occurs through actions that affect consumer choices in the current period such as setting prices and offering service quality. Dynamic competition occurs through investments in innovation and future production capacity. While dynamic competition is critical for innovation and economic growth, it can be very difficult to measure. As a practical matter, economic assessment of competition often focuses on static dimensions such as prices.

To measure static competition between products, economists contemplate a hypothetical exercise in which the price of one product increases by an amount sufficient to cause a small but nontrivial decline in its sales. Call this the reference product. When consumers stop purchasing the reference product, where do they go for alternatives? The products

that gain sales because of a price increase in the reference product are exactly those that compete with it. After all, it is their presence that discourages the reference product from increasing its price.

A common gauge of competition between two products is the diversion ratio.[1] The diversion ratio measures the fraction of sales that divert from product A to product B after a price increase for product A. Consider the following example. Suppose product A sold 1,000 units before the price increase and only 950 units afterward. The sales loss for product A is 50 units. At the same time, product B's sales increase by 10 units after the price increase for product A. The 10 units are said to be diverted from product A to product B. The diversion ratio is the ratio of diverted sales to sales lost because of the price increase. In this example, the diversion ratio from product A to product B is 10/50, or 20%. The 20% diversion ratio is a measure of the competitive constraint that product B imposes on product A. Diversion ratios provide a relative ranking of the level of competition that a product faces from its competitors.

In the case of Netflix, one can calculate diversion ratios from Netflix to alternative content providers such as Amazon Prime Video, Disney+, YouTube, HBO Max, Apple TV, Paramount+, Peacock, linear TV (cable bundles), TikTok, and Instagram. One can then rank the diversion ratios for each of these products to gauge the relative level of competitive constraint they impose on Netflix.

It is important to understand that the starting point for the hypothetical price increases used in diversion ratio calculations is market equilibrium. Under market equilibrium, no firm has an incentive to change its prices given current demand, costs, and rivals' prices. Raising the price of the reference product is a hypothetical exercise precisely because price changes may be unprofitable. It is different from observing the effects of actual price increases, which typically occur alongside other events that may confound the assessment of diversion effects. An actual price increase may indicate that the market was not in equilibrium prior to the price increase.

In the case of a Netflix price increase, Netflix may be adjusting its price in response to a surge in demand for streaming, improvements in quality, the introduction of valuable new content, or price increases by competing services. Here, the price increase occurs at the same time as other events that may obscure the true diversion effects.

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[1] See Conlon, Christopher, and Julie Holland Mortimer. "Empirical Properties of Diversion Ratios." *The RAND Journal of Economics* 52, no. 4 (2021): 693–726. http://www.jstor.org/stable/45420136; and Farrell, Joseph and Carl Shapiro. "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition." *The B.E. Journal of Theoretical Economics* 10, no. 1 (2010), https://faculty.haas.berkeley.edu/shapiro/alternative.pdf.

How then do economists measure diversion ratios? Economists often look for natural experiments in which exogenous shocks, or events not driven by market interactions, affect the price or availability of a reference product while having no direct effect on competing products. An example of such an exogenous shock is a supply disruption for a reference product caused by a natural disaster (such as a flood or hurricane) that affects the reference product but not competing products.

In the case of Netflix, a diversion ratio analysis may examine the effects of an outage in Netflix service. An outage is effectively an infinite price increase (because consumers cannot use the service at any price). This is precisely the type of analysis that the court in *FTC v. Meta* found convincing in determining which services compete with Facebook.[2]

Q2: The presumption created by *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) was established at a time when markets were simpler, data was scarce, and agencies needed a rough screening tool to flag potentially problematic mergers. Today, enforcers have much better economic tools, and a much richer understanding of how competition actually works. Given those changes, has the presumption outlived its original purpose?

a. Follow-up: If the presumption does continue, wouldn't it make more sense for the strength of the presumption to scale with the level of concentration rather than snap on at full force the moment an arbitrary line is crossed?

Response:

Philadelphia National Bank is a 1963 Supreme Court decision in which the Court held that a proposed merger between two banks operating in the Philadelphia metropolitan area was forbidden by Section 7 of Clayton Act and "must be enjoined."[3] In reaching this conclusion, the Court explained:[4]

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

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[2] *FTC v. Meta Platforms, Inc*., No. 1:20-cv-03590 (D.D.C. Nov. 18, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/MemorandumofOpinion.pdf.
[3] *Phila. Nat'l Bank*, 374 U.S. at 321.
[4] *Id*. at 363.

The Court further found that:[5]

> Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.

Subsequent courts have applied a similar framework in merger review. Courts embraced the notion that "a significant increase in the concentration" in a relevant market resulting from a merger establishes a rebuttable presumption of illegality for the merger under Section 7 of the Clayton Act.[6] For example, a 2024 court ruling in *FTC v. Kroger* cited *Philadelphia National Bank* for the proposition that a merger resulting in "a significant increase in the concentration of firms in that market" establishes a presumption that the merger will substantially lessen competition.[7]

However, courts have not fully adopted the 30% market share threshold for what constitutes a threat of "undue concentration" under *Philadelphia National Bank*. Instead, courts frequently defer to merger guidelines to determine when an increase in market concentration triggers a presumption of illegality. For example, the district court in *FTC v. Kroger* cited the 2023 DOJ and FTC Merger Guidelines (2023 Merger Guidelines), adopted under the Biden administration, as the authority for when a merger "is presumed to substantially lessen competition."[8]

According to the 2023 Merger Guidelines, a "merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points."[9] HHI refers to the Herfindahl-Hirschman Index, which is a measure of market concentration.[10] The Guidelines cite *Philadelphia National Bank* as the authority for the 30% share threshold.[11]

Philadelphia National Bank continues to exert significant influence over merger enforcement policy. However, the *Philadelphia National Bank* presumptions no longer serve the interests of effective merger enforcement, for several reasons.

- There is no economic support for the 30% "undue concentration" presumption of substantial lessening of competition.

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[5] *Id*. at 364.
[6] *Id*. at 363.
[7] *Fed. Trade Comm'n v. Kroger Co.*, No. 3:24-cv-00347-AN, at 27 (D. Or. 2024).
[8] *Id*.
[9] *See* U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines* §2.1 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.
[10] *Id*.
[11] *Id*.

- There is no economic support for the market share and concentration thresholds for structural presumptions (or when market shares and concentration levels trigger a presumption of substantial lessening of competition) under the 2023 Merger Guidelines.
- Courts have not provided a workable or transparent mechanism for rebutting the presumption; merging parties are almost never successful in doing so.
- Courts have offered no reasonable or transparent mechanism for balancing procompetitive against anticompetitive economic effects of mergers, nor do they have the expertise to do so.
- The structural presumption approach does not distinguish mergers that barely cross the threshold from those that exceed it by a wide margin, increasing the risk of enforcement errors.
- Structural presumptions are highly sensitive to market definition. Yet courts and agencies do not apply consistent or robust methodologies for defining markets.
- There are many ways to measure market shares. Market shares may fluctuate over time. Applying static shares to dynamic markets often requires arbitrary choices.
- There is no convincing evidence that structural presumptions effectively identify problematic mergers or advance the interests of consumers.
- Rather than simplifying merger review, structural presumptions introduce uncertainty and complexity.
- The same thresholds apply across all markets, even though different markets present different competitive risks.
- The structural presumption approach is inherently static and does not effectively incorporate dynamic competition.
- The approach does not effectively incorporate more advanced economic methodologies for assessing merger effects.