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Inside the Competitor Collaboration Guidelines: The Forest Among the Trees

William E. Cohen and Gary P. Zanfagna†

I. OVERVIEW: THE COMPETITOR COLLABORATION GUIDELINES

In April 2000, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice (collectively, "the Agencies") issued the Antitrust Guidelines for Collaborations Among Competitors ("Competitor Collaboration Guidelines").¹ The Competitor Collaboration Guidelines present a framework for antitrust analysis of horizontal agreements short of mergers. They seek to add clarity to a difficult area of the law, where a century of jurisprudence has not always been consistent or precise but where business activities have proliferated in recent years.²

The Competitor Collaboration Guidelines are the fruit of the FTC's Joint Venture Project, which was an outgrowth of the Commission's Hearings on Global and Innovation-Based Competition held in 1995. As summarized in the ensuing FTC staff re-

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2 The governing statutes are very broad. Section 1 of the Sherman Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal." 15 USC § 1 (1994). Section 5 of the Federal Trade Commission Act empowers the Commission to prohibit "unfair methods of competition." 15 USC § 45 (1994). The National Cooperative Research and Production Act of 1993, 15 USC §§ 4301–06 (1994), provides more detailed legislative standards for certain research and development and production joint ventures, but does not provide a complete framework for conducting either per se or rule-of-reason analysis.
port, participants at the hearings agreed overwhelmingly on the need for greater clarity and guidance in the area of joint venture analysis. The report proposed that the Commission authorize an effort to "rationalize, simplify, and articulate" the pertinent antitrust standards, directed at "drafting and promulgating 'competitor collaboration guidelines' that would be applicable to a wide variety of industry settings and flexible enough to apply sensibly as industries continue rapidly to innovate and evolve."  

The Joint Venture Project began with a series of public hearings that solicited testimony regarding the potential anticompetitive harms and procompetitive benefits of competitor collaborations. These hearings were followed by a series of roundtable discussions, designed to elicit state-of-the-art legal and economic thinking from the academic community, consulting economists, businesses, and the antitrust bar. Together, the hearings and roundtable discussions resulted in the Agencies' joint issuance of a draft of the Competitor Collaboration Guidelines on October 1, 1999, followed by a public comment period and joint issuance of the Competitor Collaboration Guidelines on April 7, 2000.

The Competitor Collaboration Guidelines are the first comprehensive set of guidelines issued jointly by the Agencies that address horizontal agreements among competitors. They apply broadly across many industries and to many different types of arrangements among competitors. Because the Competitor Collaboration Guidelines are comprehensive, and in many respects detailed, it may be helpful to step back and view the overall structure of the analysis and the fundamental themes that run throughout—the forest among the trees.

This Article examines three key aspects of the Competitor Collaboration Guidelines. It identifies as the cornerstone of the analysis a focus on the "relevant agreement," potentially as narrow as a single component of a complex collaboration, provided that the individual restraint's competitive effects can be meaningfully evaluated in isolation. This focus has two important implications. First, it contemplates an analysis that looks beyond

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4 Id at 17.
traditional joint ventures conducted through distinct legal entities and applies broadly to the wide array of collaborative agreements that are increasingly common in the high-tech, global marketplace. Strategic alliances, minority equity investments, and joint research and development ("R&D") efforts, for example, all involve agreements but may not involve a distinct joint venture entity. Second, by focusing on the "relevant agreement," the Competitor Collaboration Guidelines present a restraint-by-restraint analysis. This analytic approach permits the Agencies to evaluate, and if need be to challenge, an individual restraint that may be part of a larger collaboration. Indeed, the Competitor Collaboration Guidelines take as their centerpiece of analysis a comparison of the state of competition with and without the "relevant agreement."

This Article next turns to a discussion of the Competitor Collaboration Guidelines' per se analysis. The Competitor Collaboration Guidelines present a framework for identifying agreements that are potentially per se illegal and an analysis for determining whether such agreements escape per se condemnation. The latter analysis focuses on whether an agreement is reasonably necessary for achieving the procompetitive benefits of an efficiency-enhancing integration of economic activity. The article explains that the integration concept is broad enough to shelter contractual integrations that are proliferating in network and high-technology contexts but narrow enough to screen out certain conduct that antitrust law historically has found likely to be anti-competitive.

Finally, the Article describes the Competitor Collaboration Guidelines' methodology for reviewing agreements under the rule of reason. Following Supreme Court precedent, the Competitor Competition Guidelines present a flexible analysis that varies in focus and detail depending on the nature of the agreement and the market circumstances. The Article explores application of this flexible analysis in various factual settings. It explains how the Competitor Collaboration Guidelines assess the relatively clear cases where conduct readily can be exculpated or condemned. Then it outlines the Competitor Collaboration Guidelines' handling of closer cases requiring more intense scrutiny. That approach roughly tracks merger analysis but makes adjustments to reflect differences between collaborations and mergers. In particular, the Article examines the mechanisms adopted to account
for the fact that collaborations may only limit, rather than elim-
ninate, competition among participants.

II. FOCUS AND SCOPE OF THE GUIDELINES: THE RELEVANT AGREEMENT

The cornerstone of analysis in the Competitor Collaboration
Guidelines is their focus on the “relevant agreement.”6 They start
from a definition of competitor collaborations as comprised of “a
set of one or more agreements, other than merger agreements
.....”7 Section 2.3 explains:

In general, the Agencies assess the competitive effects of
the overall collaboration and any individual agreement or
set of agreements within the collaboration that may harm
competition. For purposes of these Guidelines, the phrase
“relevant agreement” refers to whichever of these three—
the overall collaboration, an individual agreement, or a set
of agreements—the evaluating Agency is assessing. Two
or more agreements are assessed together if their procom-
petitive benefits or anticompetitive harms are so inter-
twined that they cannot meaningfully be isolated and at-
tributed to any individual agreement.8

The Competitor Collaboration Guidelines then cast their analysis
in terms of the relevant agreement. This has significant implica-
tions for the scope of the Competitor Collaboration Guidelines
and the content of their analysis.

A. Implications as to Scope

The focus on the relevant agreement enables the Competitor
Collaboration Guidelines to look beyond traditional joint ventures
conducted through distinct legal entities. One of the major con-
tributions of the Competitor Collaboration Guidelines is an analyti-
cal framework that applies broadly across many industries and to
a wide array of collaborative arrangements among competitors
that are increasingly common in today’s high-tech, global mar-
ketplace. For example, the Competitor Collaboration Guidelines
expressly address antitrust issues raised in the context of joint

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6 Competitor Collaboration Guidelines § 2.3 (cited in note 1).
7 Id § 1.1.
8 Id § 2.3.
R&D activities among competitors.\textsuperscript{9} Similarly, they address competitive effects of a firm's equity investment in a competitor.\textsuperscript{10} These and other types of strategic alliances among competitors do not necessarily involve the creation of a separate legal entity. By focusing on the relevant agreement—which can encompass the full range of contractual relationships among existing firms—the Competitor Collaboration Guidelines are able to provide antitrust guidance relevant to a much broader range of collaborative activity.\textsuperscript{11}

Take, for example, an R&D collaboration. Two competitors in the software industry choose to work together on the next generation product, thereby creating a better product more quickly than either could do separately. However, the collaborators do not form a separate entity. Indeed, the competitors conduct joint R&D by phone and e-mail, linking designated employees of each firm working at their existing facilities. Another example might be an agreement among magazine publishers to market jointly advertising space targeted to specific geographic regions. Without the strategic alliance, the publishers may lack sufficient scale to support such targeted advertising in their nationally distributed magazines. As with the R&D example, the publishers do not form a separate entity for their joint marketing. Because the Competitor Collaboration Guidelines focus on the "relevant agreement" and do not search for the creation of a joint venture entity, such R&D and marketing alliances are covered.

B. Agreement-by-Agreement Analysis

By focusing on the "relevant agreement," the Competitor Collaboration Guidelines permit evaluation of the competitive

\textsuperscript{9} Competitor Collaboration Guidelines § 3.31(a) (cited in note 1).
\textsuperscript{10} Id § 3.34(c).
consequences of individual components of a competitor collaboration. Indeed, the central question in the rule-of-reason inquiry asks whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. In essence, the collaboration is viewed as a package of agreements. If the package as a whole is anticompetitive, the Agencies may challenge the package. However, even if the package is not anticompetitive, the Competitor Collaboration Guidelines permit a challenge to one or more of its components that may be anticompetitive.

For example, if a trade association were to impose rules governing all bidding arrangements involving its members, the fact that the association also provides centralized administrative services, educational programs, and life insurance plans for its members would not be likely to factor into the Agencies’ analysis. The administrative, educational, and insurance programs may yield substantial procompetitive benefits, so that taken as a whole, the association might be procompetitive. The Agencies, nonetheless, are likely to look inside the package by asking whether price is higher than it would be in the absence of the bidding agreements, not whether price is higher than it would be in the absence of the trade association.

The Competitor Collaboration Guidelines’ approach has long been endorsed by case law. The preceding example recalls the facts of National Society of Professional Engineers v United States, where the Supreme Court evaluated a specific ethical canon prohibiting competitive bidding rather than the overall effects of the existence of an engineers’ association on the bidding process. Similarly, in NCAA v Board of Regents of the University of Oklahoma, the Court’s inquiry focused solely on the competi-

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12 Competitor Collaboration Guidelines §§ 1.2, 3.3 (cited in note 1).
13 Of course, where the effects of two or more agreements are so intertwined that they defy separation, the agreements must be analyzed together. To illustrate, the Competitor Collaboration Guidelines present an example where two firms that independently market a jointly developed product agree (i) to divide markets and (ii) to establish maximum prices. Because the two agreements operate together to achieve a particular blend of incentives for successful commercialization of the product, with the maximum price potentially mitigating price effects of the market division, the two agreements may need to be analyzed as a whole. See id at Appendix, Example 2.
14 435 US 679, 699 (1978) (holding that the ban on competitive bidding implemented by a professional association is illegal under the Sherman Act).
tive effects of an agreement to set output levels (and effectively to fix price) of college football telecasts, not on whether the NCAA was anticompetitive taken as a whole. In *Northwest Wholesale Stationers, Inc v Pacific Stationery & Printing Co*, the Court recognized the potential procompetitive benefits of buying collaborations, but directed its analysis to the expulsion from membership that was the relevant agreement at hand. Most recently, the Court's substantive analysis in *California Dental Association v FTC* dealt solely with a trade association's advertising rules, without consideration of any procompetitive benefits that might have derived from the "advantageous access to various sorts of insurance" and to preferential financing arrangements that the association facilitated, or the lobbying, litigation, marketing, and public relations that were conducted for the association's members.

This agreement-by-agreement approach permits a finer, more precise assessment of competitive effects than an analysis directed only at the collaboration as a whole. Where effects can be meaningfully separated, the Competitor Collaboration Guidelines permit the Agencies to hone in on individual agreements to determine whether their anticompetitive harm is offset by their procompetitive benefits. In contrast, an approach directed to the collaboration as a whole runs the risk of condoning the anticompetitive harm from one agreement on the basis of procompetitive benefits deriving from another.

An example may illustrate the chief consequences of the Competitor Collaboration Guidelines' approach. Consider a credit card joint venture with scores of card-issuing banks. Suppose that at the time of formation, the joint venture set up numerous rules as to membership, national advertising, and internal processing fees. The issuing banks, however, were free to compete on the

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16 Indeed, the Court started from the proposition that some of the agreements—such as those setting the rules of the game and the standards of amateurism—comprising the NCAA collaboration were necessary in order to provide the college football product at all. See NCAA, 468 US at 101-02. The benefits of those agreements, however, were not confounded with the effects of the telecast rules, which were required to pass antitrust muster on their own merits.

17 472 US 284, 295-96 (1985) (holding that the expulsion from membership in a purchasing cooperative was not per se illegal under the Sherman Act).

18 526 US 756, 769-81 (1999) (holding that an association's advertising rules are subject to a more thorough inquiry than was exercised in the court of appeals).

19 Id at 760, 767.

price of their credit card services to consumers, with each bank independently determining its own annual percentage rate on credit card loans. Now assume that after years of successful operation, the issuing banks meet and decide that greater profits are possible if they cease competing on interest rates. Suppose that the banks change their rules to provide for joint determination of a uniform interest rate to be charged by all joint venture participants.

The agreement-by-agreement approach of the Competitor Collaboration Guidelines has several implications for analysis of the new "uniform interest rate" rule. The banks might argue that the new rule causes no antitrust harm because the only competition being restrained is that which was created by the credit card collaboration in the first place. If the appropriate comparison were between the state of competition with and without the credit card collaboration as a whole, this argument might prevail, and the Agencies would not challenge the agreement to fix interest rates. However, the comparison articulated by the Competitor Collaboration Guidelines is between the state of competition with and without the relevant agreement, namely, the new agreement to jointly determine interest rates. Consequently, the agreement setting interest rates might be challenged notwithstanding the overall procompetitive effects of the credit card collaboration as a whole. In network industries, where demand-side economies of scale may sharply limit opportunities for inter-network competition, intra-network competition like that at issue in this example may be particularly significant, and the Agencies' ability to challenge agreements limiting such competition may be particularly important.

Similarly, the banks might argue that they are not truly competitors because, absent their collaboration, there would be no credit card competition. Under the Competitor Collaboration Guidelines, however, the banks are actual competitors who would independently determine the price of their credit card loans in the absence of the relevant agreement, namely, the agreement providing for joint determination of a uniform interest rate.

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21 The late addition of the interest rate agreement likely undermines any assertion that it was needed in order to derive the benefits of the credit card system and strongly suggests that the harms and benefits of jointly setting interest rates can be isolated from those of the collaboration as a whole.

22 Similarly, the Competitor Collaboration Guidelines expressly treat a firm as a potential competitor when there is evidence that entry by that firm "is reasonably prob-
The banks might even contend that the joint determination of interest rates is not subject to challenge under Section 1 of the Sherman Act, because their collaboration should cause them to be treated as a single entity, subject only to the proscriptions of Section 2. By looking at the relevant agreement, the Competitor Collaboration Guidelines, however, keep the focus on Section 1. At least under the facts presented, the Competitor Collaboration Guidelines would treat the credit card collaboration not as a single entity but as a set of agreements among competitors. The participants are actual or potential competitors who, in the course of collaborating, are constantly adding, modifying, and implementing agreements affecting the areas in which they continue to compete. Under the Competitor Collaboration Guidelines, when agreements among competitors cause anticompetitive effects, they may be challenged irrespective of whether a single firm acting in place of the collaboration would be guilty of monopolization.

C. Analytical Benchmark

Finally, focusing on the state of competition with and without the relevant agreement creates an analytical benchmark with important implications. Recall that the Competitor Collaboration Guidelines ask whether the relevant agreement increases the ability to raise price above, or to reduce output, quality, etc. below "what likely would prevail in the absence of the relevant agreement." This central point of comparison does not require, for example, that price actually rise, but, rather, that price be higher than it would be otherwise. The Competitor Collaboration Guidelines consequently cover agreements to stabilize or maintain price levels. For example, an agreement among personal computer manufacturers that halted the long decline in PC prices

able in the absence of the relevant agreement . . . ." Competitor Collaboration Guidelines § 1.1 n 6 (cited in note 1) (emphasis added).

23 See Chicago Professional Sports Ltd Partnership v National Basketball Association, 95 F3d 593, 596–600 (7th Cir 1996) (discussing possibility that the National Basketball Association might have acted as a single entity in limiting superstation telecasts by individual league members). Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . ." 15 USC § 2 (1994).

24 In contrast, if the participants actually merged, no actual or potential competition would remain. The merged entity would be a single firm, and its conduct would be governed by Section 2 of the Sherman Act. See 15 USC § 2 (1994).

25 Competitor Collaboration Guidelines §§ 1.2, 3.3 (cited in note 1).
and maintained price at current levels would be a matter of competitive concern.

Under this benchmark, even agreements that reduce price could be questioned if, absent the agreement, prices would have fallen farther. For example, suppose that in a market with twelve equal-sized producers, a telecommunications device sells at cost, say $100. Assume further that three of the producers come up with patented processes for reducing the cost of production to $90 and that no other producers can achieve comparable cost savings. If the three innovators separately implement their new processes, competition among them might force a substantial price reduction, perhaps to as low as $90. However, if the three firms decide instead to enter a joint venture to produce and market their product using the new processes, they can win all existing customers by agreeing to a price just slightly below $100. Although the nominal effect of the marketing agreement is to reduce price by a small amount, say from $100 to $99, the true effect of the agreement is to raise price significantly above what would have prevailed in its absence. Such an agreement restricts competition that otherwise would have been present and warrants antitrust scrutiny.

III. THE PER SE RULE

The Competitor Collaboration Guidelines articulate a two-step per se rule. Step one, which can be thought of as the “in box,” identifies agreements that are potentially per se illegal, and step two, the “out box,” identifies circumstances in which such agreements may escape per se condemnation. A two-step per se analysis is grounded in long-established Supreme Court case law.

At least since Broadcast Music, Inc v Columbia Broadcasting Systems, the Supreme Court has expressly considered proffered jus-

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26 This two-step per se analysis applies only in the civil context. Conduct prosecuted criminally, which is solely within the jurisdiction of the Department of Justice, is not covered by the analysis. The Competitor Collaboration Guidelines state: “[t]he courts conclusively presume such [conduct], once identified, illegal without inquiring into [its] claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects.” Id § 3.2.

27 441 US 1, 25 (1979) (holding that the issuance of blanket licenses is not per se unlawful). In Broadcast Music, the Supreme Court explained that proffered justifications are appropriately considered in order to determine whether an agreement is of a type that is per se illegal. In holding that an agreement to jointly price a blanket license for music compositions, while literally an instance of price fixing, should nonetheless be assessed under the rule of reason, the Court explained:
tifications in determining whether an agreement is per se illegal. The Agencies' current enforcement policy statements in health care and intellectual property licensing similarly follow a two-step per se rule. 28

Step one, the "in box" in the Competitor Collaboration Guidelines' per se analysis, identifies the types of agreements that are potentially per se unlawful. The Competitor Collaboration Guidelines provide: "Agreements of a type that always or

"[p]rice fixing" is a short-hand way of describing certain categories of business behavior to which the per se rule has been held applicable . . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

Id at 9 (citation omitted). Since Broadcast Music, the Supreme Court repeatedly has recognized the role of justifications in determining whether an agreement is of a type that is per se unlawful. See, for example, Northwest Wholesale Stationers, 472 US at 294 (1985) (noting that the per se approach generally has been applied to practices that are not justified by plausible efficiency arguments); NCAA, 468 US at 100–01 (declining to apply the per se rule in a context where horizontal restraints are essential if the product is to be available at all).

Antitrust scholars similarly find justifications appropriate in per se analysis. Professor Hovenkamp writes: "[E]ven under the per se rule some justifications can be considered. More importantly, the court must consider claimed justifications in determining whether the conduct falls inside or outside the per se rule." Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 5.6(b) at 230 (West 1994). See Herbert Hovenkamp, 11 Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1907a at 218 (Aspen 1998) (distinguishing justifications that are acceptable in per se analysis from those that are not). The late Professor Areeda viewed per se illegality as little more than stare decisis, so that courts will not hear justifications "previously considered and rejected as illegitimate in principle," but "[j]ustifications not previously thought about can be considered." Phillip E. Areeda, 7 Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶¶ 1510a–b at 410–21(Little, Brown 1986). Professor Thomas Krattenmaker carries the argument a step further, concluding that "there is no such thing as a per se offense" but rather only "defense or justifications that are per se inadmissible or impermissible." Thomas G. Krattenmaker, Per Se Violations in Antitrust Law: Confusing Offenses with Defenses, 77 Georgetown L J 165, 178 (1988).

28 The Intellectual Property Guidelines and the Health Care Statements both apply a two-step formula to identify conduct that warrants per se condemnation. Both define step one in terms of traditional per se categories. IP Guidelines, § 3.4 ¶ 3 (cited in note 11) ("if the type of restraint is one that has been accorded per se treatment"); HC Statements, 8.B.1 ¶ 1 (cited in note 11) ("any price agreements (or other agreements that would otherwise be per se illegal)\). Step two accords rule-of-reason treatment to conduct that would be condemned under the per se rule but for a procompetitive justification. The IP Guidelines state that a potentially per se illegal agreement will escape per se condemnation if it "can be expected to contribute to an efficiency-enhancing integration of economic activity." IP Guidelines, § 3.4, ¶ 3 (cited in note 11). The HC Statements accord rule-of-reason treatment to physician network joint ventures "if the physicians’ integration through the network is likely to produce significant efficiencies that benefit consumers, and [if] any price agreements (or other agreements that would otherwise be per se illegal) . . . are reasonably necessary to realize those efficiencies." HC Statements, 8.B.1 ¶ 1 (cited in note 11).
almost always tends to raise price or reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. The "once identified" language signals that there is a second step in the analysis before an agreement would be condemned as per se unlawful. The Competitor Collaboration Guidelines further explain that potentially per se illegal agreements "[t]ypically . . . are agreements not to compete on price or output." Example 4 in the Competitor Collaboration Guidelines' Appendix illustrates such an agreement "not to compete on price." In that example, two independent producers of network software agree to market jointly their separately manufactured software. Their arrangement provides that they will agree on the price at which each product will be sold. The agreement is one "not to compete on price," and therefore potentially per se illegal. The analysis, consequently, would proceed to step two.

Step two, the "out box" in the Competitor Collaboration Guidelines' per se analysis, identifies circumstances in which a potentially per se illegal agreement may escape per se treatment and be reviewed under the rule of reason. In short, the "out box" sets out the framework under which the Agencies will consider proffered justifications. The Competitor Collaboration Guidelines state that an agreement that is "reasonably related to [an efficiency-enhancing integration of economic activity] and reasonably necessary to achieve its procompetitive benefits" will escape per se challenge. The "out box" has several elements.

First and foremost, the "out box" requires an "efficiency-enhancing integration of economic activity." Although the concept of an efficiency-enhancing integration has long been applied in distinguishing per se illegal conduct from conduct subject to rule-of-reason analysis, it generally has eluded precise charac-

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29 Competitor Collaboration Guidelines § 3.2 (cited in note 1).
30 Id.
31 Id at Appendix, Example 4.
32 Id § 3.2.
33 Competitor Collaboration Guidelines § 3.2 (cited in note 1).
34 See, for example, Arizona v Maricopa County Medical Society, 457 US 322, 339 n 7, 356-57 (1982) (noting that the foundations found per se illegal in that case are not comparable to integrated partnerships); Broadcast Music, 441 US at 20 (finding an "integration of sales, monitoring, and enforcement against unauthorized copyright use"); Rothery Storage & Van Co v Atlas Van Lines, 792 F2d 210, 214, 217, 224 (DC Cir 1986) (finding an integration by contract among legally separate companies); Polk Bros v Forest City Enterprises, 776 F2d 185, 188-89 (7th Cir 1985) (holding that cooperation that "contributes to productivity through integration of efforts" is subject to rule of reason analysis); HC Statements 8.B.1, 9.A (cited in note 11); IP Guidelines § 3.4 (cited in note 11).
The Competitor Collaboration Guidelines look to a construct broad enough to apply to today's strategic alliances, yet narrow enough to screen out certain potentially cost-saving conduct that antitrust law historically has found likely to be anticompetitive.\textsuperscript{36}

The Competitor Collaboration Guidelines describe integration both in terms of what it is and what it is not. "In an efficiency-enhancing integration," they explain, "participants collaborate to perform or cause to be performed . . . one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation."\textsuperscript{37} "Typically," participants in an efficiency-enhancing integration "combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately."\textsuperscript{38}

This "integration" description encompasses virtually any form of productive cooperation with potential for benefiting consumers. Thus, participants in an integration may jointly perform business functions, such as when two firms build and operate a factory together or conduct a joint marketing campaign. Alternatively, they may collaborate to enable or assist one of them to perform a business function, such as when one firm licenses its intellectual property to another so that the latter can combine it with other assets and produce goods or services. The participants may create a distinct entity, such as a traditional joint venture partnership or corporation. In contrast, the participants instead may integrate by contract, combining assets in ways that enhance their individual business activities, such as through strategic alliances or network affiliations, without establishing a new legal entity.\textsuperscript{39}

\textsuperscript{35} See M. Laurence Popofsky, Integration, Market Power, and Necessity: Guideposts for the Practitioner, 54 Antitrust L J 1141, 1142 (1986) ("One looks in vain for a test of integration in the decided cases.").

\textsuperscript{36} Compare Continental TV v GTE Sylvania, Inc, 433 US 36, 50 n 16 (recognizing that per se rules depend on generalizations about overall competitive effects and may occasionally condemn beneficial or competitively neutral conduct, based on "the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them").

\textsuperscript{37} Competitor Collaboration Guidelines § 3.2 (cited in note 1).

\textsuperscript{38} Id.

\textsuperscript{39} Although "typically" the participants combine assets, the discussion leaves room for other forms of integration such as the sharing of substantial financial risk and clinical
To illustrate, Example 6 in the Competitor Collaboration Guidelines finds an efficiency-enhancing integration from a combination of research efforts to develop new word-processing software. Each participant is understood to have contributed the time and know-how of its word-processing software developers in a common endeavor to develop better software than either participant could have developed separately. Here, the firms actually form a separate entity to conduct the joint venture. However, the same integration analysis would have applied if the firms had strategically allied to conduct the research without forming a separate company, or even if one firm had licensed intellectual property to the other in order to permit the licensee to combine the intellectual property with its own expertise. In each case, the substance of the collaboration, not the formation of legal entities, is controlling.

The Competitor Collaboration Guidelines then approach integration from the opposite perspective, identifying collaborative activity that does not constitute efficiency-enhancing integration. First, the type of collaboration normally associated with naked cartel behavior is excluded: "[t]he mere coordination of decisions on price, output, customers, territories, and the like is not integration . . . ." Then, the Competitor Collaboration Guidelines make plain that even some cost-reducing activity will not qualify: "cost savings without integration are not a basis for avoiding per se condemnation." For example, a specialization agreement that merely allocates markets among participants and permits cost-savings by enabling each participant to concentrate on a single market is not integrative and will not survive per se scrutiny. Such agreements may save costs, but they eliminate rather than enhance competition, and the Competitor Collaboration Guidelines provide for challenging them under the per se rule.

Example 5 highlights these considerations. Under the facts presented, two of the three producers of automobile carburetors


40 Competitor Collaboration Guidelines at Appendix, Example 6 (cited in note 1).

41 See id.

42 Id § 3.2. At the same time, some integration is not "efficiency-enhancing." Id. For example, a combination of cartel members' pricing departments in order to more accurately identify the monopoly price might be integrative, but it would not be "efficiency-enhancing" in the sense of promoting procompetitive benefits.

43 Competitor Collaboration Guidelines § 3.2 (cited in note 1).

44 Id.

45 Id at Appendix, Example 5.
enter an agreement that saves costs by dividing markets. The collaborators agree that henceforth one of them will only design and produce carburetors for even-numbered model years, and the other will only design and produce carburetors for odd-numbered model years. This approach saves some re-design and re-tooling costs, but effectively reduces the number of competitors in any given model year from three to two. The Competitor Collaboration Guidelines conclude that these cost savings are not integrative and do not free the arrangement from per se scrutiny. Absent an integration, the Guidelines note the arrangement "is of a type so likely to harm competition and to have no significant benefits that particularized inquiry into its competitive effect is deemed by the antitrust laws not to be worth the time and expense that would be required."

The "out box" also requires that the relevant agreement be "reasonably necessary" to achieve the procompetitive benefits that the integration promotes. If equivalent or comparable procompetitive benefits could be achieved through practical, significantly less restrictive means, such an agreement is not considered reasonably necessary. The "reasonably necessary" requirement, though, is not intended to be insurmountable. As the Competitor Collaboration Guidelines state, "[a]n agreement may be 'reasonably necessary' without being essential," and the Agencies

46 See id.
47 See Competitor Collaboration Guidelines at Appendix, Example 5 (cited in note 1) ("[T]he evaluating agency likely would conclude that the agreement is per se illegal.").
48 Id.
49 Competitor Collaboration Guidelines § 3.2 (cited in note 1). See, for example, Maricopa, 457 US at 352–53 (holding it was not necessary for physicians to set maximum fee schedule for their own services when schedule set by insurers was a workable alternative); Broadcast Music, 441 US at 19–21 (holding a blanket license "necessary" for achieving integrative efficiencies and setting of price "necessary" for the blanket license); National Bancard Corp v VISA USA, Inc, 779 F2d 592, 601–02 (stating that a credit card joint venture's interchange fee was "necessary" for the system to function); Rothery, 792 F2d at 227 (holding that the restraints imposed by the defendant were "reasonably necessary to the business it is authorized to conduct"); General Leaseways, Inc v National Truck Leasing Assn, 744 F2d 588, 594–95 (7th Cir 1984) (holding market division among truck leasing companies is not necessary as it is not organically connected to the enterprise's cooperative needs). The focus on reasonable necessity and less restrictive alternatives can be traced to Judge Taft's explication of antecedent common law in United States v Addyston Pipe & Steel Co, 85 F 271, 281–82 (6th Cir 1898) ("Before such agreements are upheld . . . the court must find that the restraints attempted thereby are reasonably necessary" to legitimate ends; "if the restraint exceeds the necessity presented by the main purpose of the contract, it is void"), affd as modified, 175 US 211 (1899).
50 Competitor Collaboration Guidelines § 3.2 (cited in note 1).
will "not search for a theoretically less restrictive alternative that was not practical given the business realities."\textsuperscript{51}

An important aspect of the "reasonably necessary" requirement under the Competitor Collaboration Guidelines' per se analysis is that the Agencies consider whether practical, significantly less restrictive means were reasonably available "when the agreement was entered into."\textsuperscript{52} Thus, when considering an agreement already in operation, the Agencies will assess the reasonable necessity of the agreement at the time of formation rather than at the subsequent time of review. This provision is intended to provide businesses with assurance that an agreement found reasonably necessary when entered into will not later be found per se illegal because it is no longer reasonably necessary.

Finally, the Competitor Collaboration Guidelines state that the relevant agreement must be "reasonably related" to the efficiency-enhancing integration.\textsuperscript{53} Typically, the "reasonably necessary" test will be the tougher hurdle to clear and therefore the primary focus of concern. Indeed, it is likely that occasions in which an agreement is determined to be reasonably necessary to achieve procompetitive benefits and yet not reasonably related to the integration will prove rare. The inverse cannot be said.

Overall, in assessing whether an agreement is reasonably necessary to achieve an efficiency-enhancing integration of economic activity, the Agencies will perform a limited factual inquiry. This is largely a plausibility standard. The Agencies will look at whether "efficiencies from an agreement that are possible in theory are not plausible in the context of the particular collaboration" and otherwise screen out justifications that are plainly pretextual.\textsuperscript{54}

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Competitor Collaboration Guidelines § 3.2 (cited in note 1). Judge Posner employed a similar approach in General Leaseways. See 744 F2d at 595 (fashioning per se analysis to screen out implausible efficiency claims "without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name"); see also Transcript, Testimony of Professor Harvey Goldschmid, FTC Hearings on the Joint Venture Project 12–14 (June 2, 1997) (urging that per se inquiry permit just enough of a look at factual content to determine whether a practice, while perhaps not naked, is clothed with only a "gauzy cloak").
IV. RULE-OF-REASON ANALYSIS

A. Flexible Analysis

The Competitor Collaboration Guidelines present a flexible rule-of-reason analysis that "varies in focus and detail depending on the nature of the agreement and market circumstances." As the Supreme Court recently stated in *California Dental Association*, "what is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." Rule-of-reason analysis, thus, is properly understood as a continuum, requiring varying degrees and different emphases of scrutiny depending on the facts and circumstances at hand.

At one end of the continuum, the analysis sometimes may be performed quickly either to exculpate or condemn an agreement. The Competitor Collaboration Guidelines provide that "[i]f the nature of the agreement and the absence of market power together demonstrate the absence of anticompetitive harm," the Agencies will not challenge the agreement. Example 8 illustrates such a situation. Two firms agree to market jointly their separately produced network software products, with each firm independently setting the price for its respective products. As part of the arrangement, the firms agree to exchange certain limited customer-response data regarding network software in general. Based on the nature of the information and the firms' small market shares, the exchange of information is unlikely to raise competitive concern. Consequently, the Agencies would refrain from further investigation.

The Competitor Collaboration Guidelines alternatively provide: "where the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm,

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55 Competitor Collaboration Guidelines § 3.3 (cited in note 1).
56 526 US at 781 (remanding for a more particularized application of the rule of reason).
58 The Competitor Collaboration Guidelines note that the absence of market power may be determined without defining a relevant market. "For example, if no market power is likely under any plausible market definition, it does not matter which one is correct." Competitor Collaboration Guidelines § 3.3 n 26 (cited in note 1).
59 Id § 3.3.
60 Id at Appendix, Example 8.
the Agencies challenge such agreements without a detailed market analysis." Here, the Competitor Collaboration Guidelines attempt generally to articulate situations in which relevant factors would lead the Agencies to conclude quickly that an agreement is anticompetitive.

In some cases, an agreement already in operation may have caused anticompetitive harm. For example, in \textit{FTC v Indiana Federation of Dentists},\textsuperscript{62} the Supreme Court found an actual restriction on output from the dentists' refusal to provide patients' x-rays.\textsuperscript{63} Absent potential procompetitive justifications, the Agencies challenge such an agreement without a detailed market analysis.\textsuperscript{64} In other cases, the nature of an agreement may evidence the likelihood of anticompetitive harm. As the Supreme Court stated in \textit{California Dental Association}, sometimes an agreement "give[s] rise to an intuitively obvious inference of anticompetitive effect. . ."\textsuperscript{65} The Competitor Collaboration Guidelines provide that when procompetitive justifications that could offset the harm are absent, the Agencies challenge such an agreement without undertaking a detailed market analysis.\textsuperscript{66}

A more detailed market analysis is often necessary to assess accurately an agreement's competitive effect. The Competitor Collaboration Guidelines provide that the Agencies will focus "on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement."\textsuperscript{67} For example, in \textit{California Dental Association,}\textsuperscript{61} Id § 3.3.

\textsuperscript{62} 476 US 447, 460 (1986) (holding that under rule of reason analysis, the association's policy requiring members to withhold x-rays from insurers is a violation of § 1 of the Sherman Act).

\textsuperscript{63} Id at 460–61.

\textsuperscript{64} Competitor Collaboration Guidelines § 3.3 (cited in note 1). The Competitor Collaboration Guidelines note, however, that whether anticompetitive harm has resulted "may be informed by consideration of market power." Id § 3.31.

\textsuperscript{65} \textit{California Dental Association}, 526 US at 781 (requiring a "more sedulous" look at the professional advertising restraints at issue than had been accorded by the court of appeals). See also \textit{Indiana Federation of Dentists}, 476 US at 459 (finding "no great difficulty" in determining the anticompetitive character of an agreement among dentists to withhold a particular service that their customers desire); \textit{NCAA}, 468 US at 106–10 (finding anticompetitive consequences of the televising plan "apparent" without "a detailed market analysis").

\textsuperscript{66} Although a detailed market analysis may not be necessary to conclude that such an agreement is anticompetitive, some assessment of market power may be revealing. Indeed, the absence of market power may be evident under any possible market definition. In such a case where the absence of market power negates the potential for anticompetitive harm, the investigation should end without the need to consider procompetitive benefits.

\textsuperscript{67} Competitor Collaboration Guidelines § 3.3 (cited in note 1).
Dental Association, the Commission looked at a variety of factors in the detail necessary to assess whether the association’s restraints on price and non-price advertising caused anticompetitive harm. In looking at market power, for instance, the Commission did not dwell on defining precise metes and bounds. Rather, it found that the Association had sufficient power to prohibit its members from engaging in the proscribed advertising. The Commission observed that the Association had the ability both to police and discipline members who failed to follow the advertising restrictions, and identified examples where the association had done so. Moreover, the Commission noted that 75 percent of practicing dentists in California were members of the Association (including over 90 percent in at least one region), and that entry into the California dental market was difficult. As Justice Breyer’s dissent in California Dental Association explained, the market power inquiry amounts to whether “the [a]ssociation’s restraints would likely have made a real difference in the marketplace.

B. Structural Principles: Merger Analysis with Modifications

While stressing flexibility in application, the Competitor Collaboration Guidelines propose an overall structure that may be necessary to piece the various factors under consideration into a coherent whole. To a large degree, that structure adopts the pat-
tern of merger analysis.\textsuperscript{76} Under the Competitor Collaboration Guidelines, the Agencies typically define markets, identify market participants, and assign market shares to the market participants.\textsuperscript{76} They also consider ease of entry in determining whether market power is present.\textsuperscript{77} The Agencies direct this analysis toward determining whether the facts support an anticompetitive story through theories analogous to the Horizontal Merger Guidelines' "unilateral"\textsuperscript{78} and "coordinated interaction"\textsuperscript{79} theories. If anticompetitive harm is likely or has resulted from an agreement already in operation, the Agencies ask if there are offsetting procompetitive benefits.\textsuperscript{80} Each step is already familiar from the Agencies' framework for conducting merger analysis.

Despite the similarity to merger analysis, there are some important differences, and the Competitor Collaboration Guidelines present a framework for taking those differences into account. Chief among these is the possibility of "insider competition.\textsuperscript{81} Whereas mergers typically eliminate all competition in a relevant market among the participants, competitor collaborations often do not. The collaboration participants remain independent and may be actual or potential competitors in the relevant market in which the collaboration operates. To the extent that "insider competition" persists, there may be less potential for anticompetitive harm. At the same time, however, independent participants

\textsuperscript{75} See Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (rev 1997), reprinted in 4 Trade Reg Rep (CCH) ¶ 13,104, available online at <http://www.ftc.gov/be/docs/horizmer.htm> (visited Sept 18, 2000) ("Horizontal Merger Guidelines").

\textsuperscript{76} Id § 3.35.

\textsuperscript{77} Horizontal Merger Guidelines § 2.2 (cited in note 75) ("[a] merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.").

\textsuperscript{78} See id § 2.1 ("[A] merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others.").

\textsuperscript{79} See Competitor Collaboration Guidelines § 3.36 (cited in note 1).

can behave opportunistically, and some restraints on independent conduct may be necessary for achieving procompetitive benefits. The Competitor Collaboration Guidelines take account of both considerations.

Where the nature of the agreement and the combined market share of the participants suggest a possibility of anticompetitive harm, a mechanism for giving recognition to any remaining competition is desirable. The Competitor Collaboration Guidelines provide such a mechanism in assigning market share to the collaboration. As a first approximation, merging parties receive a combined market share that sums the shares of the individual participants. In the context of competitor collaborations, however, the possibility of "insider competition" suggests that the competitive significance of a collaboration might best be reflected by any of a range of market shares, depending on the degree to which its participants maintain the ability and incentive to compete in the relevant market. At one extreme, where the participants are likely to coordinate fully with the collaboration, there would be no such "insider" competition; the collaboration could be viewed as creating a single decision maker, effectively combining the market shares of the participants and of any joint venture entity. At the other extreme, where the participants are likely to compete freely outside of the collaboration and exercise no control over the collaboration's competitively significant decisions, the collaboration and the participants would be independent decision makers and separate competitive forces. In that case, the collaboration would be viewed as holding only its own market share, and the participants would continue to be assigned separate market shares.

82 See Oliver E. Williamson, Transaction Cost Economics, in Richard Schmalensee and Robert Willig, eds, 1 Handbook of Industrial Organization 135 (North-Holland 1989) (studying transaction cost economics, which focus on parties' individual transactions rather than a system-wide analysis).
83 Elsewhere, the Competitor Collaboration Guidelines provide safety zones for cases where the combined market share of the collaboration and the participants is so unlikely to raise competitive concern that the Agencies presume the arrangements to be lawful without inquiring into particular circumstances. See Competitor Collaboration Guidelines § 4 (cited in note 1).
84 See Horizontal Merger Guidelines at § 1.51 n 18 (cited in note 75).
85 The Competitor Collaboration Guidelines' general safety zone—applicable to joint production, joint marketing, and joint buying arrangements—shelters collaborations when the combined share of the collaboration and its participants is no more than 20 percent of each relevant market. The combined share is used for safety zone purposes in order to take account of spillover effects that might eliminate "insider competition" among the participants and their collaboration. Competitor Collaboration Guidelines § 4.2 (cited in note 1).
shares in their own right. A collaboration so assessed will be less likely to support an anticompetitive story.\textsuperscript{86}

The Competitor Collaboration Guidelines make no attempt to determine mathematically where a collaboration falls within this range of possible market shares. Rather, they present a qualitative analysis under which the range can be interpreted in a particular case.\textsuperscript{87} Section 3.34 of the Competitor Collaboration Guidelines identifies six primary factors relevant to the ability and incentive of the participants and the collaboration to compete.

First, competition by collaboration participants may be limited by exclusivity rules or de facto exclusivity arrangements.\textsuperscript{88} Exclusivity rules or arrangements prohibit participants from competing with their collaboration, either on their own or through other collaborations. According to the Competitor Collaboration Guidelines, "[i]n general, competitive concern is likely to be reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so."\textsuperscript{89} Consideration of exclusivity is particularly imperative in settings where the collaboration takes the form of a network. For example, physicians may be permitted to join more than one independent practice association or banks may be allowed to belong to competing ATM networks. This lack of exclusivity may add sources of competition with the network, effectively diminishing its ability to exercise market power.\textsuperscript{90}

Second, competition by collaboration participants may be limited by a loss of control over assets needed to remain effective independent competitors.\textsuperscript{91} For example, if participants in a production collaboration must contribute their productive capacity or if participants in an R&D collaboration must contribute their

\textsuperscript{86} See id § 3.33 (discussing the role of market share and market concentration).

\textsuperscript{87} See Competitor Collaboration Guidelines § 3.33 (cited in note 1) ("[T]he high end of that range is the sum of the market shares of the collaboration and its participants. The low end is the share of the collaboration in isolation.").

\textsuperscript{88} See id § 3.34(a).

\textsuperscript{89} Id.

\textsuperscript{90} Under HC Statements 8.A, the safety zone for physician networks involving substantial sharing of financial risk shelters exclusive networks when participants constitute no more than 20 percent of each physician specialty in the relevant geographic market. HC Statements (cited in note 11). A non-exclusive network may qualify for safety zone treatment with as much as 30 percent of each specialty. See id. The possibility that physicians might constrain an exercise of market power by competing with their own non-exclusive network renders the greater percentage less objectionable. See id.

\textsuperscript{91} Competitor Collaboration Guidelines § 3.34(b) (cited in note 1).
laboratory facilities, they may experience diminished ability to compete outside the collaboration if the contributed assets are difficult to replace. "In general, the greater the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition."\(^92\)

Third, competition by collaboration participants may be limited by a loss of financial incentive to compete with the collaboration.\(^93\) "In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration."\(^94\) The thinking here is that the participant's stake in the profits of the venture lowers its net return from aggressive independent competition. For example, if a collaboration participant cuts its own price by $1 in order to increase sales, some portion of the additional sales is diverted from the collaboration, reducing the collaboration's profits and the participant's share of those profits. After its reduced earnings through the collaboration are deducted from any gains through its independent activities, the participant will have less incentive to cut price in the first place.\(^95\)

Incentive effects of this nature arise in a variety of contexts. Some collaborations compete directly with their parents, such as in natural resource extraction markets, where a firm, either singly or in collaboration with others, may produce commodities like crude oil in competition with other joint ventures in which it participates. Other collaborations involve direct investments in competitors. For example, participants in strategic alliances sometimes solidify their relationships through minority equity investments in a competitor. The resulting shared financial interest

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\(^92\) Id.

\(^93\) See id § 3.34(c).

\(^94\) Id.

tends to diminish incentives to compete. Royalty interests arising through licensing arrangements may yield similar effects.

Fourth, competition by the collaboration may be affected by its organization and governance structure. The collaboration may be set up as an independent decision maker, or it may be subject to participant control. "In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions." Even assuming that the collaboration is controlled by its participants, the degree of competitive concern may depend on whether that control is exercised jointly or independently. For example, a competitive rules joint venture in which each parent independently exercises control over price and output for some portion of the capacity may be less likely to raise concerns than a collaboration whose price and output are set jointly by agreement of its parents.

Fifth, competition among the collaboration and its participants may be affected by the likelihood of anticompetitive information sharing. For example, if participants learn each other's planned price or output levels, anticompetitive harms might spill over from the collaboration to infect the participants' independent activities. "In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place."

Finally, all else being equal, competition by the collaboration's participants is more likely to remain strong the shorter the collaboration's likely duration. A collaboration likely to end in the near future may not significantly affect the incentives to compete of a participant whose interests in the long run lie with a strong market position for its ongoing operations. "In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.”

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96 Competitor Collaboration Guidelines § 3.34(d) (cited in note 1).
97 Id.
99 Competitor Collaboration Guidelines § 3.34(e) (cited in note 1).
100 Id.
101 See id § 3.34(f).
102 Id.
Having derived a rough sense of market shares and concentration that takes account of the likely extent of insider competition, the Competitor Collaboration Guidelines then feed into an analysis based on Horizontal Merger Guidelines principles. The Competitor Collaboration Guidelines ask whether, in light of the market structure resulting from the collaboration, a plausible story of likely anticompetitive harm can be told.\textsuperscript{103} Such harm may arise by fostering express or tacit collusion among firms in the relevant market in a manner akin to the Horizontal Merger Guidelines' coordinated interaction theories.\textsuperscript{104} Alternatively, anticompetitive harm may flow from a combination of control or financial interests that promotes unified action by the collaboration, or by the collaboration and its participants, analogous to the Horizontal Merger Guidelines' unilateral theories.\textsuperscript{105} Elucidation of the details of and qualifications to these competitive effects stories is left to Sections 2.1 and 2.2 of the Horizontal Merger Guidelines, respectively.\textsuperscript{106}

The Competitor Collaboration Guidelines also incorporate entry analysis from merger law, asking if entry will be timely, likely, and sufficient to deter or counteract anticompetitive harm.\textsuperscript{107} Again, however, there are qualifications: competitor collaborations may not provide the same inducements to enter or might not signal the presence of profit opportunities as clearly as mergers. Thus, the Competitor Collaboration Guidelines observe that the likelihood of entry may be affected by what potential entrants believe about the relevant agreement's probable duration. For example, if entry would take eighteen months and potential entrants think it likely that the collaboration will break down in roughly the same time frame, the potential entrants lack any incentive to incur the sunk costs associated with entering, and the anticompetitive harm would not be deterred or counteracted. The Competitor Collaboration Guidelines also note that sufficiency of

\textsuperscript{103} See Competitor Collaboration Guidelines § 3.33 (cited in note 1).

\textsuperscript{104} As used in the Competitor Collaboration Guidelines, "collusion" is not limited to conduct that involves an agreement under the antitrust laws. Id § 3.31 n 34.

\textsuperscript{105} See id § 3.33.

\textsuperscript{106} See id (referring to the Horizontal Merger Guidelines for factors pertinent to coordinated interaction and unilateral theories).

\textsuperscript{107} Competitor Collaboration Guidelines § 3.35 (cited in note 1). The Agencies inquire into the ease of entry where the nature of the agreement and market share and concentration data suggest a likelihood of anticompetitive harm that is not sufficiently mitigated by insider competition. See id. Of course, if ease of entry negates the market power necessary for an agreement to cause anticompetitive harm, the agreement may be quickly exculpated. See id § 3.3 n 26.
entry might be drawn into question when entrants join the anti-
competitive collaboration, such as where new market participants
join a trade association with restrictive rules.108

Finally, the Competitor Collaboration Guidelines' efficiencies
analysis employs principles familiar from the Horizontal Merger
Guidelines, with adjustments to account for the fact that the par-
ticipants have not merged. As with mergers, efficiencies must be
verifiable and potentially procompetitive, and the relevant
agreement must be reasonably necessary for achieving those effi-
ciences.109 The fact that collaboration participants remain inde-
pendent, however, introduces new considerations. The Competi-
tor Collaboration Guidelines recognize that independence some-
times gives rise to conflicting incentives that, unless checked, can
undermine the achievement of procompetitive benefits. Some re-
strictions on that independence may be reasonably necessary. As
the Competitor Collaboration Guidelines explain:

The reasonable necessity of an agreement also may de-
pend on whether it deters individual participants from
undertaking free riding or other opportunistic conduct
that could reduce significantly the ability of the collabora-
tion to achieve cognizable efficiencies. Collaborations
sometimes include agreements to discourage any one par-
ticipant from appropriating an undue share of the fruits of
the collaboration or to align participants’ incentives to en-

108 Id § 3.35.
109 Id §§ 3.36(a)-(b). In the rule of reason, reasonable necessity is evaluated in light of
practical, significantly less restrictive alternatives available as of the time of harm to
competition. Id § 3.36(b). As noted in Part III of this Article, the Agencies' per se analysis
usually considers only those alternatives that were reasonably available when the parties
entered into the relevant agreement. Id § 3.2. Compare Horizontal Merger Guidelines § 4
(cited in note 75) (stating that cognizable efficiencies are merger-specific efficiencies that
have been verified and do not arise from anticompetitive reductions in output or service).
For examples of recent cases applying Horizontal Merger Guidelines principles of effi-
ciency analysis, see FTC v H.J. Heinz, Co, No 00-1688, slip op at 18–21 (D DC Oct 18,
2000) (crediting evidence of efficiencies determined to be of the kind recognized by the
Horizontal Merger Guidelines); FTC v Cardinal Health, Inc, 12 F Supp 2d 34, 61–63 (D
DC 1998) (finding that projected savings were not merger specific because they "could also
be achieved through continued competition"); United States v Long Island Jewish Medical
Center, 983 F Supp 121, 146–49 (E D NY 1997) (finding a portion of the claimed efficien-
cies merger specific and determining that efficiencies gained through the merger would
benefit consumers); and FTC v Staples, Inc, 970 F Supp 1066, 1088–90 (D DC 1997)
(finding that projected savings had not been verified, were not merger specific and, in
large part, were unlikely to be passed on to consumers).
courage cooperation in achieving the efficiency goals of the collaboration.\textsuperscript{110}

Indeed, a single restriction may have opposing results, heightening competitive concerns by reducing insider competition but contributing to the achievement of procompetitive benefits by aligning the participants' incentives. The Competitor Collaboration Guidelines take account of both tendencies and seek an overall determination as to whether "cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market . . . ."\textsuperscript{111}

CONCLUSION

As the first comprehensive set of guidelines issued by both the Agencies that address horizontal agreements among competitors, the Competitor Collaboration Guidelines articulate a framework for antitrust review that applies broadly across many industries and to many different types of collaborations. That framework has an overall structure and some fundamental themes. The framework is built around the concept of the "relevant agreement," which gives the Competitor Collaboration Guidelines a scope broad enough to analyze today's strategic alliances and permits a substantive analysis focused enough to analyze collaborations agreement by agreement. Under the Competitor Collaboration Guidelines, the per se analysis involves two steps, one to identify the types of agreements that are potentially per se illegal and the other to identify circumstances under which the Agencies will consider proffered justifications. The rule of reason analysis is flexible, sometimes permitting quick exculpation or quick condemnation of the relevant agreement, sometimes requiring a more painstaking review, based on principles of merger analysis but modified to account for the differences between mergers and competitor collaborations. These key aspects of the analysis are the core contribution of the Competitor Collaboration Guidelines, the forest among the trees.

\textsuperscript{110} Competitor Collaboration Guidelines § 3.36(b).
\textsuperscript{111} Id § 3.37.