Horizontal Merger Guidelines

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and the

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横向合并指南

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和

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Table of Contents

1. Overview 1

2. Evidence of Adverse Competitive Effects 2
2.1 Types of Evidence 3
2.1.1 Actual Effects Observed in Consummated Mergers 3
2.1.2 Direct Comparisons Based on Experience 3
2.1.3 Market Shares and Concentration in a Relevant Market 3
2.1.4 Substantial Head-to-Head Competition 3
2.1.5 Disruptive Role of a Merging Party 3
2.2 Sources of Evidence 4
2.2.1 Merging Parties 4
2.2.2 Customers 5
2.2.3 Other Industry Participants and Observers 5

3. Targeted Customers and Price Discrimination 6

4. Market Definition 7
4.1 Product Market Definition 8
4.1.1 The Hypothetical Monopolist Test 8
4.1.2 Benchmark Prices and SSNIP Size 10
4.1.3 Implementing the Hypothetical Monopolist Test 11
4.1.4 Product Market Definition with Targeted Customers 12
4.2 Geographic Market Definition 13
4.2.1 Geographic Markets Based on the Locations of Suppliers 13
4.2.2 Geographic Markets Based on the Locations of Customers 14

5. Market Participants, Market Shares, and Market Concentration 15
5.1 Market Participants 15
5.2 Market Shares 16
5.3 Market Concentration 18

6. Unilateral Effects 20
6.1 Pricing of Differentiated Products 20
6.2 Bargaining and Auctions 22
6.3 Capacity and Output for Homogeneous Products 22
6.4 Innovation and Product Variety 23

7. Coordinated Effects 24
7.1 Impact of Merger on Coordinated Interaction 25
7.2 Evidence a Market is Vulnerable to Coordinated Conduct 25

8. Powerful Buyers 27

目录

1. 概述 1

2. 不利竞争效果的证据 2
2.1 证据类型 3
2.1.1 已完成合并中观察到的实际效果 3
2.1.2 基于经验的直接比较 3
2.1.3 相关市场的市场份额与集中度 3
2.1.4 实质性正面竞争 3
2.1.5 合并方的破坏性作用 3
2.2 证据来源 4
2.2.1 合并方 4
2.2.2 客户 5
2.2.3 其他行业参与者和观察员 5

3. 目标客户与价格歧视 6

4. 市场界定 7
4.1 产品市场界定 8
4.1.1 假设垄断者检验 8
4.1.2 基准价格与SSNIP规模 10
4.1.3 实施假想垄断者检验 11
4.1.4 以目标客户界定产品市场 12
4.2 地理市场界定 13
4.2.1 基于供应商所在地的地理市场 13
4.2.2 基于客户所在地的地理市场 14

5. 市场参与者、市场份额与市场集中度 15
5.1 市场参与者 15
5.2 市场份额 16
5.3 市场集中度 18

6. 单边效应 20
6.1 差异化产品的定价 20
6.2 谈判与拍卖 22
6.3 同质产品的产能与产量 22
6.4 创新与产品多样性 23

7. 协同效应 24
7.1 合并对协同互动的影响 25
7.2 有证据表明市场易受协同行为影响 25

8. 强势买方 27

9. Entry 27
9.1 Timeliness 29
9.2 Likelihood 29
9.3 Sufficiency 29

10. Efficiencies 29

11. Failure and Exiting Assets 32

12. Mergers of Competing Buyers 32

13. Partial Acquisitions 33

9. 市场进入 27
9.1 及时性 29
9.2 可能性 29
9.3 充分性 29

10. 效率 29

11. 失败与退出资产 32

12. 竞争性买方之间的合并 32

13. 部分收购 33

1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

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1 These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

2 These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

1. 概述

本指南概述了司法部和联邦贸易委员会("两机构")根据联邦反垄断法对涉及实际或潜在竞争者的合并与收购("横向合并")所采用的主要分析技术、实践和执法政策。[1]相关的法定条款包括《克莱顿法》第7条，15 U.S.C.45。最为重要的是，《克莱顿法》第7条禁止合并，如果"在任何商业领域或在全国任何地区的任何影响商业的活动中，该收购的效果可能实质性减少竞争，或倾向于形成垄断。"

两机构致力于识别和挑战具有竞争危害的合并，同时避免对具有竞争利益或竞争中性的合并进行不必要的干预。大多数合并分析必然是预测性的，需要评估如果合并继续进行可能发生的情况，与如果不进行合并可能发生的情况相比较。鉴于这种固有的预测需求，本指南反映了国会的意图，即合并执法应在竞争问题初现端倪时予以制止，而关于反竞争效果的确切性很少可能实现，且并非认定合并违法的必要条件。

本指南描述了两机构通常依赖的主要分析技术和主要证据类型，用以预测横向合并是否可能实质性减少竞争。本指南不旨在描述两机构如何分析横向合并以外的案件。本指南旨在通过提高两机构执法决策所依据的分析过程的透明度，为商界和反垄断从业者提供帮助。本指南还可协助法院在横向合并背景下发展解释和适用反垄断法的适当框架。

阅读本指南时应认识到，合并分析并非由单一方法的统一适用所构成。相反，它是一个基于具体事实的过程，两机构在其丰富经验的指导下，运用一系列分析工具，对合理可获得的可靠证据进行评估，在有限的时间内评价竞争关切。本指南提供的示例仅为说明性的，并不穷尽相关原则的适用情形。[2]

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1 本指南取代1992年发布、1997年修订的《横向合并指南》。本指南反映了执法机构不断积累的经验。执法机构于2006年发布的《横向合并指南评注》仍然是本指南的宝贵补充。本指南可能不时修订，以反映执法政策的重大变化、澄清现有政策或反映新的认识。本指南不涵盖纵向或其他类型的非横向收购。

2 本指南无意描述各机构将如何对其决定提起的案件进行诉讼。尽管在此背景下具有相关性，但本指南既不规定也不穷尽各机构在诉讼中可能提出的证据范围。

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. This section discusses several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers. The list provided here is not exhaustive. In any given case, reliable evidence may be available in only some categories or from some sources. For each category of evidence, the Agencies consider evidence indicating that the merger may enhance competition as well as evidence indicating that it may lessen competition.

本指南的统一主题是，不应允许合并创造、增强或巩固市场力量，或促进其行使。为表述简便，本指南通常将所有这些效果统称为增强市场力量。如果合并可能因竞争约束或激励的减弱而鼓励一个或多个企业提高价格、减少产出、削弱创新或以其他方式损害客户，则该合并增强了市场力量。在评估合并将如何可能改变企业行为时，两机构主要关注合并如何影响对企业最为有利可图的行为。

合并仅通过消除合并各方之间的竞争即可增强市场势力。即使合并未导致其他企业行为方式发生变化，这种效应也可能产生。以这种方式产生的不利竞争效应被称为"单边效应"。合并还可能通过增加竞争对手之间协同、配合或相互依存行为的风险来增强市场势力。以这种方式产生的不利竞争效应被称为"协同效应"。在任何特定案件中，两种效应中的一种或两种可能同时存在，且二者之间的区分可能模糊不清。

本指南主要描述各机构如何分析竞争对手供应商之间的合并，此类合并可能增强其作为卖方的市场势力。卖方市场势力的增强往往抬高向客户收取的价格。为便于阐述，本指南一般以此类价格效应为框架讨论相关分析。增强的市场势力还可表现为对客户产生不利影响的非价格条款和条件，包括产品质量下降、产品种类减少、服务减少或创新减弱。此类非价格效应可能与价格效应并存，也可能在不存在价格效应的情况下产生。当各机构调查合并是否可能导致非价格竞争的大幅减损时，其采用的方法类似于评估价格竞争时所使用的方法。增强的市场势力还可能使合并后实体更有可能以有利可图且有效的方式从事排他性行为。无论增强的市场势力可能以何种方式表现，各机构通常基于合并对客户的影响来评估合并。各机构审查对直接客户和最终消费者中一方或双方的影响。在缺乏令人信服的反证的情况下，各机构推定对直接客户的不利影响也会对最终消费者造成不利影响。

买方市场势力的增强，有时称为"买方垄断势力"，其不利影响与卖方市场势力的增强相当。各机构采用类似的框架来分析可能增强其作为买方市场势力的相互竞争买方之间的合并。见第 12 条。

2. 不利竞争效果的证据

各机构考虑任何合理可获得且可靠的证据，以解决合并是否可能大幅减损竞争这一核心问题。本节讨论各机构根据其经验认为在预测合并可能的竞争效应方面最具信息价值的几类证据和证据来源。此处提供的清单并非穷尽性的。在任何特定案件中，可靠证据可能仅存在于某些类别或某些来源中。对于每一类证据，各机构既考虑表明合并可能增强竞争的证据，也考虑表明合并可能减损竞争的证据。

2.1 Types of Evidence

2.1.1 Actual Effects Observed in Consummated Mergers

When evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future. Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight. The Agencies evaluate whether such changes are anticompetitive effects resulting from the merger, in which case they can be dispositive. However, a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers.

2.1.2 Direct Comparisons Based on Experience

The Agencies look for historical events, or "natural experiments," that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.

The Agencies also look for reliable evidence based on variations among similar markets. For example, if the merging firms compete in some locales but not others, comparisons of prices charged in regions where they do and do not compete may be informative regarding post-merger prices. In some cases, however, prices are set on such a broad geographic basis that such comparisons are not informative. The Agencies also may examine how prices in similar markets vary with the number of significant competitors in those markets.

2.1.3 Market Shares and Concentration in a Relevant Market

The Agencies give weight to the merging parties' market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger. See Sections 4 and 5. Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

2.1.4 Substantial Head-to-Head Competition

The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. Such evidence can be especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition. See Section 6. This evidence can also inform market definition. See Section 4.

2.1.5 Disruptive Role of a Merging Party

The Agencies consider whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to

2.1 证据类型

2.1.1 已完成合并中观察到的实际效果

在评估已完成的合并时，最终问题不仅是合并是否已经产生了不利竞争效应，还包括此类效应是否可能在将来产生。观察到合并后价格上涨或其他对客户不利变化的证据被赋予重大权重。各机构评估此类变化是否属于合并产生的反竞争效应，若属此类，则可具有决定性。然而，即使尚未观察到此类效应，已完成的合并仍可能具有反竞争性，原因或许在于合并后企业可能意识到合并后反垄断审查的可能性并收敛其行为。因此，各机构还考虑其在评估未完成合并时所考虑的同类证据。

2.1.2 基于经验的直接比较

各机构寻找能够提供有关合并竞争效果信息的历史事件或"自然实验"。例如，各机构可能考察相关市场中近期合并、市场进入、扩张或退出所产生的影响。类似市场中类似事件的影响也可能提供有用信息。

各机构还寻找基于相似市场之间差异的可靠证据。例如，如果合并各方在某些地区存在竞争而在其他地区不存在竞争，则比较其存在竞争和不存在竞争的地区所收取的价格，可能对合并后价格具有信息价值。然而，在某些情况下，价格是在如此广泛的地域基础上设定的，以至于此类比较不具有信息价值。各机构还可能审查相似市场中的价格如何随这些市场中重要竞争对手的数量而变化。

2.1.3 相关市场中的市场份额与集中度

各机构重视合并各方在相关市场中的市场份额、集中度水平以及合并导致的集中度变化。见第 4 条和第 5 条。导致集中度显著提高并形成高度集中市场的合并，被推定可能增强市场势力，但该推定可被有说服力的证据所推翻，该证据表明合并不太可能增强市场势力。

2.1.4 实质性头对头竞争

各机构考虑合并企业是否曾经是或若无合并则可能成为实质性的直接竞争对手。此类证据对于评估不利的单边效应尤其相关，该效应直接源于该竞争的丧失。见第 6 条。该证据也可为市场界定提供信息。见第 4 条。

2.1.5 合并方的破坏性作用

执法机构在合并分析中考虑多种证据来源。最常用的可合理获得且可靠的证据来源是合并各方、客户、其他行业参与者和行业观察者。

disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition. Likewise, one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

2.2 Sources of Evidence

The Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.

2.2.1 Merging Parties

The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review. Documents describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions. The business decisions taken by the merging firms also can be informative about industry conditions. For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, see Section 4.1.3[3]) or that the firm and its rivals are engaged in coordinated interaction (see Section 7). Incremental cost depends on the relevant increment in output as well as on the time period involved, and in the case of large increments and sustained changes in output it may include some costs that would be fixed for smaller increments of output or shorter time periods.

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger. Likewise, the Agencies look for reliable evidence that the merger is likely to result in efficiencies. The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability. The financial terms of the transaction may also be informative regarding competitive effects. For example, a purchase price in excess of the acquired firm's stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition or to achieve efficiencies.

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[3] High margins commonly arise for products that are significantly differentiated. Products involving substantial fixed costs typically will be developed only if suppliers expect there to be enough differentiation to support margins sufficient to cover those fixed costs. High margins can be consistent with incumbent firms earning competitive returns.

以新技术或新商业模式扰乱市场条件，其合并可能涉及实际或潜在竞争的丧失。同样，合并各方之一可能有动机率先降价或其他竞争行为，或抵制行业价格上涨。一家可能基于其能力和动机利用可用产能迅速扩大生产从而约束价格的企业，也可能是一个特立独行者，一家经常抵制原本盛行的行业规范、拒绝在定价或其他竞争条件上合作的企业同样如此。

2.2 证据来源

各机构在合并分析中考虑多种证据来源。最常见的合理可得且可靠的证据来源是合并各方、客户、其他行业参与者和行业观察者。

2.2.1 合并各方

执法机构通常从合并各方获取大量信息。这些信息可以采取文件、证言或数据的形式，可以包括对竞争相关条件的描述，或反映实际企业行为和决策。在正常业务过程中创建的文件比在合并审查中作为辩护材料创建的文件更具证明力。描述行业条件的文件可以提供关于市场运作以及企业如何识别和评估其竞争对手的信息，特别是当企业决策依赖于这些描述的准确性时。合并各方做出的企业决策也可以提供关于行业条件的信息。例如，如果一家企业将价格设定在远高于增量成本的水平，这通常表明该企业认为其消费者对价格不高度敏感(本身不构成反垄断关切，见第 4.1.3 节[3])，或者该企业及其竞争对手正在进行协同互动(见第 7 节)。增量成本取决于相关的产出增量和所涉时间段，在增量较大且产出持续变化的情况下，增量成本可能包括在较小产出增量或较短时间段内属于固定成本的某些成本。

合并各方意图在合并后提高价格、减少产出或产能、降低产品质量或多样性、撤回产品或延迟其推出、或削减研发投入的明示或默示证据，或者从事此类行为的能力促使了该合并的明示或默示证据，在评估合并的可能效果时可能极具参考价值。同样，执法机构寻找合并可能带来效率的可靠证据。执法机构仔细考虑其职责、专业知识和经验与所涉问题相关、从而提供特别可靠性指标的人士的意见。交易的财务条款也可以提供关于竞争效果的信息。例如，超过被收购企业独立市场价值的购买价格可能表明收购方正在支付溢价，因为它预期能够减少竞争或实现效率。

3 高利润率通常出现在显著差异化的产品上。涉及大量固定成本的产品通常只有在供应商预期存在足够的差异化以支撑足以覆盖这些固定成本的利润率时才会被开发。高利润率可能与现有企业赚取竞争性回报相一致。

2.2.2 Customers

Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself.

Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence such as historical purchasing patterns and practices. Customers also can provide valuable information about the impact of historical events such as entry by a new supplier.

The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers. In evaluating such evidence, the Agencies are mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.

When some customers express concerns about the competitive effects of a merger while others view the merger as beneficial or neutral, the Agencies take account of this divergence in using the information provided by customers and consider the likely reasons for such divergence of views. For example, if for regulatory reasons some customers cannot buy imported products, while others can, a merger between domestic suppliers may harm the former customers even if it leaves the more flexible customers unharmed. See Section 3.

When direct customers of the merging firms compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers, especially if the direct customers expect to pass on any anticompetitive price increase. A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.

> *Example 1:* As a result of the merger, Customer C will experience a price increase for an input used in producing its final product, raising its costs. Customer C's rivals use this input more intensively than Customer C, and the same price increase applied to them will raise their costs more than it raises Customer C's costs. On balance, Customer C may benefit from the merger even though the merger involves a substantial lessening of competition.

2.2.3 Other Industry Participants and Observers

Suppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry. The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable.

Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the

2.2.2 客户

客户提供的关于其可能如何应对价格上涨以及不同产品或供应商相对吸引力的信息可能高度相关，尤其是当有其他证据(如历史购买模式和做法)佐证时。客户还可以提供关于历史事件(如新供应商进入)影响的有价值信息。

信息充分且成熟的客户对合并本身可能影响的结论也可以帮助执法机构调查竞争效应，因为客户通常会感受到竞争上有利和竞争上有害的合并所带来的后果。在评估此类证据时，执法机构注意到客户可能出于与合并所引发的反垄断问题无关的原因而反对或支持合并。

消息灵通且成熟的客户对合并本身可能影响的结论，也可以帮助各机构调查竞争效果，因为客户通常会感受到竞争上有利和竞争上有害的合并所带来的后果。在评估此类证据时，各机构注意到客户可能出于与该合并所引发的反垄断问题无关的原因而反对或支持合并。

当一些消费者对合并的竞争效果表示担忧而另一些消费者认为合并有益或中性时，执法机构在利用消费者提供的信息时考虑这种分歧，并考虑这种观点分歧的可能原因。例如，如果由于监管原因一些消费者无法购买进口产品而另一些可以，国内供应商之间的合并可能损害前一类消费者，即使它使更灵活的消费者不受损害。见第 3 节。

当合并各方的直接消费者在下游市场中相互竞争时，他们的利益可能与最终消费者的利益不一致，特别是如果直接消费者预期将任何反竞争性价格上涨转嫁出去。因长期合同而免受不利竞争效果影响、或在其他方面相对不受合并有害效果影响的消费者，甚至可能欢迎一项为其提供相对于下游竞争对手竞争优势的反竞争性合并。

> 示例 *1:*由于该合并，客户 C 将经历其用于生产最终产品的某一投入品的价格上涨，从而使其成本上升。客户 C 的竞争对手比客户 C 更密集地使用该投入品，同样的价格上涨对其造成的成本上升将大于对客户 C 成本的上升。总体而言，即使该合并涉及实质性减少竞争，客户 C 仍可能从该合并中受益。

2.2.3 其他行业参与者和观察员

来自合并各方竞争对手的企业信息有助于阐明市场的运作方式。竞争对手企业的利益往往与客户的利益不一致，因为如果合并实体提高价格，客户通常会受损，而竞争对手企业则会获益。因此，执法机构不会例行依赖竞争对手企业对

来自合并各方竞争对手的信息有助于揭示市场的运作方式。竞争对手的利益往往与客户的利益不一致，因为如果合并实体提高价格，客户通常会受损，而竞争对手则会获益。因此，各机构不会例行依赖竞争对手对合并竞争效果的整体看法。

merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

> *Example 2:* Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.

3. Targeted Customers and Price Discrimination

When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer. The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.

For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.

First, the suppliers engaging in price discrimination must be able to price differently to targeted customers than to other customers. This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.

> *Example 3:* Suppliers can distinguish large buyers from small buyers. Large buyers are more likely than small buyers to self-supply in response to a significant price increase. The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed. Such discrimination can occur even if there is no discrete gap in size between the classes of large and small buyers.

In other cases, suppliers may be unable to distinguish among different types of customers but can offer multiple products that sort customers based on their purchase decisions.

Second, the targeted customers must not be able to defeat the price increase of concern by arbitrage, e.g., by purchasing indirectly from or through other customers. Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers. Arbitrage is inherently impossible for many services. Arbitrage between customers at different geographic locations may be

然而，竞争对手可能提供相关事实，甚至其整体看法也可能具有启发意义，尤其是在各机构担心合并实体可能从事排他性行为的情况下。

> 示例*2:*合并企业A和B在一个网络效应显著的市场中经营，这意味着任何企业的产品如果占据较大的市场份额，或与其他合计占据该份额的企业相互连接，其价值就会显著提高。在合并之前，它们与其竞争对手自愿相互连接。该合并将创建一个份额足够大的实体，以至于终止自愿互联的策略将具有在该市场中产生垄断力量的危险可能性。竞争对手和消费者的利益在阻止此类合并方面将大体一致。

3. 目标客户与价格歧视

在审查合并可能产生的不利竞争影响时，执法机构会考虑这些影响对于购买相同或类似产品的不同客户是否存在显著差异。当卖方能够进行歧视时，例如通过有利可图地向某些目标客户提价而不向其他客户提价，这种差异化影响就有可能发生。价格歧视的可能性影响市场界定(见第4节)、市场份额的衡量(见第5节)以及竞争影响的评估(见第6节和第7节)。

当价格歧视可行时，即使对其他客户不会产生此类影响，也可能对目标客户产生不利竞争影响。对目标客户提价可能是有利可图的，即使对所有客户提价不会有利可图，因为过多的其他客户会转向替代品。当歧视具有合理可能性时，执法机构可以按客户类型分别评估竞争影响。执法机构可能掌握客户无法获得的信息，这些信息与评估歧视是否具有合理可能性相关。

第一，实施价格歧视的供应商必须能够对目标客户与其他客户实行不同的定价。这可能涉及识别向其提供不同价格的个别客户，或根据可观察特征向不同类型的客户提供不同的价格。

首先，实施价格歧视的供应商必须能够对目标客户与其他客户实行不同的定价。这可能涉及识别向其提供不同价格的个别客户，或基于可观察特征向不同类型的客户提供不同的价格。

> 示例 *3:*供应商能够区分大买家和小买家。面对显著的价格上涨，大买家比小买家更有可能进行自供应。该合并可能导致对小买家的价格歧视，损害其利益，即使大买家未受损害。即使大买家和小买家类别之间不存在明显的规模差距，此类歧视也可能发生。

第二，目标客户必须无法通过套利(例如通过间接从其他客户处或通过其他客户购买)来挫败所关注的价格上涨。如果套利会使保修失效或使客户的服务更加困难或昂贵，则套利可能难以实现。对于许多服务而言，套利本质上是不可能的。不同地理位置客户之间的套利可能

其次，目标客户必须无法通过套利来挫败所关注的价格上涨，例如通过从其他客户间接购买或通过其他客户购买。如果套利会使保证失效或使客户的服务更加困难或成本更高，则套利可能难以实现。对于许多服务而言，套利本质上是不可能的。不同地理位置的客户之间的套利可能

impractical due to transportation costs. Arbitrage on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

由于运输成本而不可行。小规模的套利可能是可能的，但其成本足够高或受到足够限制，以至于不会阻止或挫败价格歧视策略。

4. 市场界定

当执法机构识别出横向合并的潜在竞争关切时，市场界定发挥两个作用。第一，市场界定有助于明确竞争关切所产生的商业领域和国家区域。在任何合并执法行动中，执法机构通常会识别一个或多个相关市场，在该市场中合并可能实质性减少竞争。第二，市场界定使执法机构能够识别市场参与者并衡量市场份额和市场集中度。见第5节。市场份额和市场集中度的衡量本身并非目的，但只要有助于阐明合并可能的竞争影响，就是有用的。

机构的分析不必从市场界定开始。机构用于评估竞争效应的某些分析工具并不依赖于市场界定，尽管在分析的某个阶段，对客户可获得的竞争性替代方案的评估始终是必要的。

竞争影响的证据可以为市场界定提供信息，正如市场界定可以为竞争影响提供信息一样。例如，有证据表明，提供一组产品的重要竞争对手数量减少导致这些产品的价格显著上涨，这本身就可以证明这些产品构成一个相关市场。此类证据还可以更直接地预测合并的竞争影响，减少从市场界定和市场份额进行推断的作用。

当分析表明存在替代性的且合理可信的候选市场，且由此产生的市场份额导致关于竞争效应的截然不同的推断时，审查有关这些效应的更直接形式的证据尤为有价值。

市场界定仅关注需求替代因素，即客户在面对价格上涨或相应的非价格变化(如产品质量或服务下降)时，转向其他产品的替代能力和意愿。供应商的响应行为在竞争分析中同样重要。本指南在涉及市场参与者识别、市场份额衡量、竞争效应分析和市场进入的章节中对此予以考虑。

客户往往面临一系列可替代合并企业产品的可能选择。有些替代品可能更接近，另一些则在地理上或产品属性和认知上更为遥远。此外，客户对不同产品接近程度的评估可能各不相同。当不同地理区域的产品或供应商在不同程度上互为替代品时，界定一个包含某些替代品而排除另一些替代品的市场，不可避免地是一种简化，无法捕捉不同产品之间竞争程度的全部差异。下文概述的市场界定原则力求使这种不可避免的简化在实践上尽可能有用和信息丰富。相关市场不必具有精确的边界。

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

> *Example 4:* Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the

将市场宽泛地界定为包含相对遥远的产品或地理替代品，可能导致误导性的市场份额。这是因为遥远替代品的竞争意义不太可能与其在宽泛市场中的份额相称。尽管将更遥远的替代品排除在市场之外不可避免地会在某种程度上低估其竞争意义，但这样做往往比将其纳入并按其在一个扩大市场中的份额成比例地高估其竞争意义，能更准确地反映合并的竞争效应。

> 例*4*:企业A和企业B是两个领先摩托车品牌的销售商，拟议合并。如果品牌A摩托车价格上涨，一些买家会转向品牌B，另一些则会转向汽车。然而，摩托车买家认为品牌B摩托车与品牌A摩托车的相似程度远高于汽车。汽车的销量远大于摩托车。在包含汽车的市场中评估份额，将大大低估品牌B摩托车在约束品牌A价格方面的竞争意义，并大大高估汽车的意义。

在狭窄界定的市场中，不同产品的市场份额更有可能反映这些产品的相对竞争意义，并且往往更准确地反映相近替代品之间的竞争。因此，适当界定的反垄断市场往往排除某些替代品--即使这些替代品为某些客户提供了替代选择，这些客户在面临价格上涨时可能会转向它们。然而，如果来自该产品组之外的产品竞争如此充分，以至于即使完全消除该组内的竞争也不会对直接客户或下游消费者造成重大损害，那么一组产品就过于狭窄，不足以构成相关市场。假定垄断者测试(见第4.1.1节)旨在确保候选市场在这方面不会过于狭窄。

机构在评估不同的可能候选市场时灵活地实施这些市场界定原则。根据假想垄断者检验界定的相关反垄断市场并不总是直观的，且可能与行业成员使用"市场"一词的方式不一致。

第4.1节描述了适用于产品市场界定的原则，并就执法机构最常如何适用这些原则提供了指引。第4.2节描述了同样的原则如何适用于地理市场界定。尽管为阐述简便而分别讨论，第4.1节和第4.2节所述原则是结合起来界定相关市场的，相关市场同时具有产品维度和地理维度。特别是，假定垄断者测试是针对一组产品连同某一地理区域共同适用的，以确定相关市场。

4.1 产品市场界定

当一个合并方销售的产品(产品A)与另一个合并方销售的一个或多个产品竞争时，机构围绕产品A界定一个相关产品市场，以评估该竞争的重要性。这样一个相关产品市场由包括产品A在内的一组替代产品组成。因此可能识别出多个相关产品市场。

4.1.1 假定垄断者测试

机构采用假想垄断者检验来评估候选市场中的产品组合是否足够广泛，以构成相关反垄断市场。机构使用

hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.[4] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

> *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 market 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.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

> *Example 6:* In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market

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4 If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

假想垄断者检验来识别一组与其中一个合并方销售的产品具有合理可替代性的产品。

假定垄断者测试要求，一个产品市场须包含足够多的替代产品，以至于合并后对该市场行使市场力量的程度能够显著超过合并前既有的水平。具体而言，该测试要求，一个不受价格监管、作为这些产品当前和未来唯一销售者的假定利润最大化企业("假定垄断者")很可能对该市场中的至少一种产品--包括至少一种由合并一方销售的产品--施加至少幅度虽小但显著且非暂时性的价格上涨("SSNIP")。[4]为分析此问题之目的，候选市场之外产品的销售条件保持不变。SSNIP仅作为执行假定垄断者测试的方法论工具使用；它不是对合并所导致价格上涨的容忍水平。

产品组合可能在不包括客户所选择的全部替代品范围的情况下满足假想垄断者检验。假想垄断者检验可能将一组产品识别为相关市场，即使客户在面临价格上涨时会大幅转向该组之外的产品作为替代。

> 示例*5:*产品A和产品B正作为候选市场接受测试。每种产品售价为$100, has an incremental cost of $60，销售量为1200单位。对于产品A价格每上涨一美元，在产品B价格给定的情况下，产品A会损失二十单位销售量转向候选市场之外的产品，并损失十单位销售量转向产品B，产品B亦同。在这些条件下，经济分析表明，控制产品A和产品B的假定利润最大化垄断者会将两种产品的价格均提高百分之十，至110美元。因此，产品A和产品B在使用百分之五SSNIP的情况下满足假定垄断者测试，事实上对于直至百分之十的任何SSNIP幅度均满足。即使一种产品提价时所损失销售量的三分之二转向了相关市场之外的产品，情况依然如此。

当应用假想垄断者检验围绕其中一个合并方提供的产品界定市场时，如果市场包括第二产品，机构通常也会包括第三产品，如果该第三产品比第二产品是更接近的替代品。如果在对第一产品实施SSNIP时，更多的收入转移到第三产品而非第二产品，则第三产品是更接近的替代品。

> 例*6:*在例5中，假设产品A提价时失去的单位销售中有一半转移到产品C(产品C的价格也是100美元)，而三分之一转移到产品B。产品C比产品B是产品A更接近的替代品。因此，产品C通常会被纳入相关市场，即使产品A和产品B共同满足假想垄断者检验。

假想垄断者检验确保市场不会被界定得过窄，但它不会导致单一的相关市场。机构可以在任何相关市场中评估合并

4 如果候选市场中供应产品的企业的定价激励与假设垄断者的定价激励存在重大差异，且差异原因并非后者对更大范围替代品的控制，则执法机构可转而采用由在候选市场销售产品的企业(及其全部产品)组成的假设利润最大化卡特尔的概念。如果合并企业在候选市场之外销售的产品显著影响其对候选市场产品的定价激励，则这种方法最可能适用。例如，如果候选市场是耐用设备市场，且销售该设备的企业从销售该设备的备件和服务中获得大量净收入，就可能出现这种情况。

satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

> *Example 7:* In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.[5] If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The SSNIP is intended to represent a "small but significant" increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify "small but significant" adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."

[5] Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

满足检验的企业存在重大差异，则以界定市场和衡量市场份额的目的是阐明对竞争效应的评估这一总体原则为指导。由于较远替代品的相对竞争重要性容易被其销售份额所夸大，当机构依赖市场份额和集中度时，它们通常是在满足假想垄断者检验的最小相关市场中这样做。

> 例*7*:在例4中，将汽车纳入市场将导致摩托车生产商的市场份额被误导性地缩小。除非摩托车未通过假想垄断者检验，机构在分析此摩托车合并时不会将汽车纳入市场。

4.1.2 基准价格与*SSNIP*规模

执法机构从合并前很可能 prevailing 的价格出发适用SSNIP。如果合并前价格很可能不会变化，这些基准价格可以合理地取为合并前 prevailing 的价格。[5]如果合并前价格很可能发生变化，例如由于创新或市场进入，执法机构可以使用预期的未来价格作为测试的基准。如果合并前价格可能因合并前协调的破裂而下降，执法机构可以使用这些较低价格作为测试的基准。在某些情况下，执法机构实施假定垄断者测试所采用的技术侧重于合并前企业与假定垄断者之间激励的差异，而不要求指定基准价格。

SSNIP 旨在代表候选市场中的企业对客户所使用的产品或服务所贡献的价值而收取的价格的"小幅但显著"上涨。这恰当地将注意力引向与合并导致的竞争显著减弱可能产生的价格变化相称的价格变化的影响。使用这一方法是因为通常可以量化对客户的"小幅但显著"的不利价格影响并分析其可能的反应，而不是因为价格影响比非价格影响更重要。

机构最常使用合并各方贡献价值的产品或服务客户所支付价格的百分之五作为 SSNIP。然而，与合并导致的竞争显著丧失相称的"小幅但显著"的价格上涨取决于行业性质及合并各方在其中的地位，因此机构可能相应使用大于或小于百分之五的价格上涨。如果能够以合理的清晰度识别企业特定价值贡献的明示或隐含价格，机构可以基于这些价格设定 SSNIP。

> 例 *8*:在两家石油管道的合并中，SSNIP 将基于运输石油所收取的价格，而非石油本身的价格。如果管道在一端购买石油并在另一端出售，则运输石油所收取的价格是隐含的，等于在输入端购买石油的价格与在输出端出售石油的价格之间的差额。管道所出售的相关产品更宜描述为"从 A 点到 B 点的管道石油运输"，而非"B 点的石油"。

5 对于评估非合并类反垄断关切(如垄断化或便利性做法)的市场界定，如果所关切行为产生的效果在评估时已经发生，则在此方面将有所不同。

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants, notably:
  - sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;
  - industry participants' behavior in tracking and responding to price changes by some or all rivals;
- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;
- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;
- evidence from other industry participants, such as sellers of complementary products;

例*9*:在两个安装从第三方购买的计算机的企业的合并中，SSNIP将基于它们的费用，而非所安装计算机的价格。如果这些企业购买计算机并向客户收取一个打包价格，则隐含的安装费等于向客户收取的打包费用减去计算机的价格。

例 *10*:在例 9 中，假设合并各方购买计算机所支付的价格不透明，但至少占其安装计算机所收取价格的百分之九十五，利润或隐含费用最多占这些价格的百分之五。对客户支付的总价格适用百分之五的 SSNIP 将至少使这些费用或利润翻倍。即使这对假设的垄断者无利可图，费用的显著增加也很可能有利可图。如果 SSNIP 基于客户支付的总价格，则将使用较低的百分比。

4.1.3 实施假想垄断者检验

假设垄断者提高价格的激励既取决于客户可能因该等价格上涨而从候选市场产品转向替代品的程度，也取决于这些产品所赚取的利润率。增量单位的利润率是这些单位的价格与增量成本之间的差额。机构通常估算增量成本，例如使用合并各方的文件或合并各方用于做出企业决策的数据。增量成本按所考虑的价格上涨将导致的产出变化来衡量。

在考虑客户对更高价格的可能反应时，机构考虑任何合理可获得且可靠的证据，包括但不限于：

客户过去如何因价格或其他条款和条件的相对变化而转移购买；

来自买方的信息，包括调查，关于他们将如何应对价格变化；

行业参与者的行为，尤其是：

o 卖方的企业决策或企业文件，表明卖方关于客户将如何因价格的相对变化而在产品之间进行替代的知情信念；

o 行业参与者跟踪和应对某些或所有竞争对手价格变化的行为；

关于产品特性以及转换产品的成本和延迟的客观信息，特别是从候选市场中的产品转换到候选市场之外的产品；

当候选市场中某一产品单独提价时失去的销售中被候选市场中其他产品重新捕获的百分比，较高的重新捕获百分比使提价对假想垄断者更有利可图；

来自其他行业参与者的证据，如互补产品的卖方；

- legal or regulatory requirements; and

- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this "breakeven" analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.[6] Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition. The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

Example 11: Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a

6 While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

法律或法规要求；以及

客户在其产出市场上面临的下游竞争的影响。

在具备必要数据时，机构还可考虑"临界损失分析"，以评估其在多大程度上印证从上述证据中得出的推论。临界损失分析询问的是，在候选市场中对一个或多个产品施加至少一个SSNIP(小幅但显著且非暂时的价格上涨)会提高还是降低假设垄断者的利润。尽管这种"盈亏平衡"分析与第4.1.1条中假设垄断者检验所要求的利润最大化分析不同，合并各方有时会向机构提交此类分析。价格上涨会提高以较高价格完成的销售的利润，但如果客户转向候选市场之外的产品，这一利润增长将在相应程度上被抵消。临界损失分析比较价格上涨所产生的这两种抵消效应的幅度。"临界损失"被定义为使利润保持不变的销售单位损失数量。"预测损失"被定义为假设垄断者因价格上涨而被预测将损失的销售单位数量。如果预测损失小于临界损失，则价格上涨会提高假设垄断者的利润。

机构在评估预测损失时考虑上述所有客户替代证据。机构要求预测损失的估计值与这些证据一致，包括用于计算临界损失的候选市场中产品的合并前利润率。除非企业从事协同互动(见第7条)，否则较高的合并前利润率通常表明各企业的产品各自面临的需求对价格并不高度敏感。[6]因此，较高的合并前利润率既表明较小的预测损失，也表明较小的临界损失。合并前利润率越高，候选市场满足假设垄断者检验所需的回收率就越小。

即使不具备定量执行假设垄断者检验所需的证据，该检验的概念框架也为收集和分析与客户替代和市场界定相关的证据提供了有用的方法工具。机构在现有证据允许的范围内遵循假设垄断者检验，同时铭记市场界定的最终目标是帮助确定合并是否可能大幅削弱竞争。

4.1.4 针对特定客户的产品市场界定

如果假设垄断者能够以盈利方式针对一部分客户实施价格上涨，机构可界定以这些目标客户为中心的相关市场，假设垄断者将能够以盈利方式并单独对这些客户施加至少一个SSNIP。服务于目标客户的市场也称为价格歧视市场。在实践中，机构仅在认为存在对一组目标客户产生不利竞争影响的现实可能性时，才界定价格歧视市场。

例*11:*玻璃容器有许多用途。面对玻璃容器的价格上涨，一些用户会大幅转向塑料或金属容器作为替代，但婴儿食品制造商不会。如果一个

6 尽管利润率对于实施假定垄断者测试很重要，但高利润率本身并不构成反垄断关切。

hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

假设的垄断者可以分别定价并限制套利，婴儿食品制造商将容易受到玻璃容器价格定向上涨的影响。机构可以界定一个用于包装婴儿食品的玻璃容器的独立市场。

当价格是单独协商的，且供应商掌握关于客户的信息，使假设垄断者能够识别出可能为相关产品支付更高价格的客户时，机构也经常考虑针对目标客户的市场。如果价格是与客户单独协商的，假设垄断者检验可能表明相关市场可以窄至单个客户(另见第6.2条关于议价和拍卖的内容)。尽管如此，机构通常界定针对客户群体的市场，即按客户类型而非按单个客户界定市场。通过这样做，机构能够依赖汇总的市场份额，而这些份额在预测合并的竞争影响方面可能更有帮助。

4.2 地理市场界定

如果地理因素限制了某些客户替代某些产品的意愿或能力，或某些供应商服务某些客户的意愿或能力，则受合并影响的竞争领域可能在地理上受到限定。供应商和客户的位置均可能对此产生影响。机构适用本文件及第 4.1 条所述的市场界定原则，界定同时具有地理维度和产品维度的相关市场。

地理市场的范围往往取决于运输成本。语言、法规、关税和非关税贸易壁垒、习俗和熟悉程度、声誉以及服务可得性等其他因素可能阻碍远距离或国际交易。外国企业的竞争意义可能按不同汇率进行评估，尤其是如果汇率在近期发生过波动。

在不存在基于客户位置的价格歧视的情况下，机构通常根据供应商的位置界定地理市场，如第 4.2.1 小节所述。在其他情况下，特别是如果基于客户位置的价格歧视是可行的--当行业内普遍使用交货定价时往往如此--机构可能根据客户的位置界定地理市场，如第 4.2.2 小节所述。

4.2.1 基于供应商所在地的地理市场

基于供应商位置的地理市场涵盖进行销售的区域。此类地理市场往往适用于客户在供应商所在地接收商品或服务的情形。该市场中的竞争者是位于该区域内拥有相关生产、销售或服务设施的企业。从这些企业购买商品的某些客户可能位于该地理市场的边界之外。

假设垄断者测试要求：一个假设的利润最大化企业，如果是位于该区域的相关产品的唯一现有或未来生产者，将至少从一个位置--包括至少一个合并各方之一的位置--实施至少一个 SSNIP。在此项分析中，在其他地方生产的所有产品的销售条件保持不变。单一企业可能在一个以上的不同地理市场中经营，即使对于单一产品也是如此。

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

示例 *12*:合并各方均在 X 市设有生产工厂。相关产品运输成本高昂，供应商按在其所在地自提的方式为产品定价。竞争工厂位于有一定距离的 Y 市。一个控制 X 市所有工厂的假设垄断者可以在这些工厂有利可图地实施 SSNIP。来自更远工厂的竞争不会挫败该涨价，因为来自更远工厂的供应需要昂贵的运输。相关市场界定为围绕 X 市工厂的地理区域。

当相关地理市场基于供应商所在地界定，则位于该地理市场内的供应商所作销售均计入，无论购买客户位于何处。

在考虑客户对候选地理市场内相关产品可能施加的价格上涨的合理反应时，执法机构考虑任何合理可得且可靠的证据，包括：

客户过去如何因价格或其他交易条件的相对变化而在不同地理位置之间转移购买；

运输产品的成本与难度(或客户前往卖方所在地的成本与难度)相对于产品价格的比例；

供应商是否需要在客户附近设立机构以提供服务或支持；

关于卖方是否基于客户因价格或其他竞争变量的相对变化而在不同地理位置之间转换的预期作出企业决策的证据；

从候选地理市场内的供应商转向候选地理市场外的供应商的成本与延迟；以及

客户在其产出市场上面临的下游竞争的影响。

4.2.2 基于客户所在地的地理市场

当假设垄断者能够基于客户所在地进行歧视时，执法机构可以基于目标客户所在地界定地理市场。[7]此类地理市场通常适用于供应商将产品或服务交付至客户所在地的情形。此类地理市场涵盖销售所指向的区域。市场中的竞争者是向特定区域内客户销售的企业。向相关市场销售的部分供应商可能位于该地理市场边界之外。

假定垄断者检验要求：一个假设的利润最大化企业，作为该区域内相关产品当前或未来的唯一卖方，会对该区域内某些客户施加至少一个SSNIP。如果该价格上涨不会被相关产品的替代或套利所抵消，则该区域构成相关地理市场，

7 对于在多个地点经营的客户，只有位于目标区域内的客户地点才被纳入市场。

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.
>
> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring

例如，该区域内的客户前往区域外购买相关产品。在此分析中，向区域外所有客户销售产品的交易条件保持不变。

> 例*13:*客户需要本地销售与支持。供应商在许多地理区域设有销售和服务机构，并能够基于客户所在地进行歧视。地理市场可以围绕客户所在地界定。
>
> 示例 *14:*每个合并企业拥有一家单一生产工厂，并向 X 市和 Y 市的客户交付相关产品。相关产品运输成本高昂。合并各方的工厂是距离 X 市最近的工厂，但在距离 Y 市方面并不比众多竞争工厂更近。这一事实模式表明，即使 Y 市客户未受损害，X 市客户也可能因该合并而受到损害。因此，执法机构考虑界定一个围绕 X 市客户的相关地理市场。即使围绕合并各方工厂的区域基于卖方所在地不会构成相关地理市场，仍可界定此类市场，因为一个控制该区域所有工厂的假设垄断者会发现，由于向 Y 市客户的销售损失，对其所有客户实施 SSNIP 无利可图。

当地理市场基于客户所在地界定，则向这些客户所作的销售均计入，无论进行这些销售的供应商位于何处。

> 例*15:*美国客户必须使用经美国监管机构批准的产品。外国客户使用未经美国监管机构批准的产品。相关产品市场由经美国监管机构批准的产品构成。地理市场围绕美国客户界定。外国供应商向美国客户所作的任何销售均计入该市场，且这些外国供应商即使位于该市场之外，仍为该美国市场的参与者。

5. 市场参与者、市场份额与市场集中度

执法机构通常将市场份额和市场集中度的衡量作为其竞争效果评估的一部分。执法机构结合其他合理可得且可靠的证据评估市场份额和集中度，最终目的是确定合并是否可能实质性减少竞争。

市场份额可以直接影响企业的竞争激励。例如，如果为赢得新客户而降价也将适用于企业现有客户，那么拥有较大市场份额的企业可能比拥有较小市场份额的企业更不愿意实施降价。同样，即使较小的竞争对手降价，拥有较大市场份额的企业也可能感受不到降价压力。市场份额还可以反映企业的能力。例如，拥有较大市场份额的企业可能能够以比小企业更大的绝对数量迅速扩大产出。类似地，较大的市场份额往往表明低成本、有吸引力的产品，或两者兼有。

5.1 市场参与者

所有当前在相关市场中获得收入的企业均被视为市场参与者。纵向一体化企业亦被纳入，前提是其纳入准确反映其竞争重要性。当前未在相关市场中获得收入、但已承诺在近期进入市场的企业，亦被视为市场参与者。

当前并非相关市场生产者的企业，若在SSNIP发生时极有可能提供具有直接竞争影响的快速供应反应，且无需承担

significant sunk costs, are also considered market participants. These firms are termed “rapid entrants.” Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

> *Example 16:* Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.

> *Example 17:* Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier’s ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available “swing” capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.[8] However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm’s possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm’s future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm’s historical market share

[8] If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

重大沉没成本，亦被视为市场参与者。这些企业被称为“快速进入者”。沉没成本是指在相关市场之外无法收回的进入或退出成本。对不利竞争效果反应较慢的进入，或要求企业承担重大沉没成本的进入，在第9节中考虑。

生产相关产品但不在相关地理市场销售的企业可能成为快速进入者。其他条件相同的情况下，若此类企业靠近该地理市场，则最有可能成为快速进入者。

> 例*16:*农场A在X市和Y市之间的中点种植番茄。目前，其将番茄运往X市，因为当地价格高出百分之二。此前，其曾因小幅价格变化而改变运输目的地。农场A很可能成为Y市番茄市场的快速进入参与者。

> 例*17:*企业B曾多次投标向S学区供应牛奶，且实际向一些邻近地区的学校供应牛奶。其从未在S学区中标，但完全有资格服务该学区，且经常以微弱差距落标。企业B将被计为S学区学校牛奶市场的快速进入者。

更一般而言，若相关市场围绕目标客户界定，生产相关产品但不向这些客户销售的企业，若能够轻松且迅速地开始向目标客户销售，则可能成为快速进入者。

明显拥有必要资产以迅速向相关市场供应的企业也可能是快速进入者。在相对同质商品的市场中，供应商的竞争能力主要取决于其成本和产能，而非相关市场中的经验或声誉等其他因素，拥有高效闲置产能或现成可用“摆动”产能(目前用于相邻市场但可以容易且有利可图地转移以服务相关市场)的供应商可能是快速进入者。[8]然而，闲置产能可能效率低下，相邻市场使用的产能可能无法获得，因此企业仅拥有闲置或摆动产能并不使其成为快速进入者。

5.2 市场份额

执法机构通常为当前在相关市场生产产品的所有企业计算市场份额，但以数据可得性为限。执法机构亦为其他市场参与者计算市场份额，前提是这样做能够可靠反映其竞争重要性。

市场集中度和市场份额数据通常基于历史证据。然而，近期或正在进行的市场条件变化可能表明，特定企业当前的市场份额要么低估、要么高估了该企业未来的竞争重要性。在计算和解释市场份额数据时，执法机构会考虑近期或正在进行的市场条件变化中可合理预测的影响。例如，如果一项对长期竞争可行性至关重要的新技术可为市场上的其他企业所获得，但特定企业无法获得，则执法机构可能认定该企业的历史市场份额

8 如果这种类型的供给侧替代在销售一组产品中一种或多种产品的企业中几乎普遍存在，则机构可以出于便利对相关产品的市场作总体描述。

overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

> *Example 18:* The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

高估其未来竞争重要性。执法机构可在能够可靠进行的情况下将历史市场份额预测至可预见的未来。

执法机构基于企业未来在相关市场中竞争重要性的最佳可得指标衡量市场份额。这可能取决于所考虑的竞争效果类型以及数据可得性。通常使用年度数据，但若单笔交易金额大且频率低，以致年度数据可能不具代表性，执法机构可在更长时间段内衡量市场份额。

在大多数情形下，执法机构基于各企业在相关市场上的实际或预计收入来衡量其市场份额。相关市场上的收入往往是衡量对客户吸引力的最佳指标，因为它反映了企业在现实世界中克服一切必要障碍、以对客户具有吸引力的条款和条件提供产品的能力。在低价产品的一个单位可以替代高价产品的一个单位的情形下，单位销售量可能比收入更能衡量竞争重要性。例如，一种新的、价格低得多的产品如果大幅侵蚀了较旧、价格较高产品所获得的收入，即使其本身获得的收入相对较少，也可能具有重大的竞争重要性。在客户签订长期合同、面临转换成本或倾向于仅偶尔重新评估其供应商的情形下，从近期获得的客户所赚取的收入可能比总收入更能反映供应商的竞争重要性。

在同质产品市场中，企业的竞争重要性可能主要源于其能力和激励，即针对该市场中其他方的提价或减产而迅速扩大相关市场中的产量。因此，企业的竞争重要性可能取决于其在相关市场供应的可随时获得产能的水平，前提是该产能效率足够高，能使此种扩张有利可图。在此类市场中，产能或储备可能比收入更能反映供应商未来的竞争重要性，执法机构可能使用这些指标计算市场份额。非当前生产者的市场参与者随后可能被赋予正的市场份额，但仅限于存在可与其竞争重要性进行适当比较的、与当前生产者相当的衡量指标时。当市场份额基于企业可随时获得的产能衡量时，执法机构不包含以下产能：已承诺用于或在相关市场之外以如此有利可图的方式使用、或成本如此之高以至于不太可能用于应对相关市场中 SSNIP 的产能。

> 例 *18:*地理市场围绕美国境内的客户界定。企业 X 在美国境外生产相关产品，其大部分销售面向美国境外的客户。在大多数情形下，企业 X 的市场份额将基于其向美国客户的销售，而非其总销售额或总产能。然而，如果相关产品是同质的，且企业 X 会针对 SSNIP 迅速且不产生重大沉没成本地大幅扩大对美国的销售，则执法机构可能基于企业 X 向美国客户供应的可随时获得产能来确定其市场份额。

当执法机构界定服务于目标客户的市场时，衡量市场份额适用同样的原则，因为这些原则适用于这些客户。在大多数情形下，各企业的市场份额基于其来自目标客户的实际或预计收入。然而，如果基于更广泛客户群体的收入衡量市场份额能更准确地反映相关市场中不同供应商的竞争重要性，执法机构也可能转而采用此种方法。当由此可获得更好的数据时，也可使用从更广泛客户群体赚取的收入。

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,[9] and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

[9] For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

5.3 市场集中度

市场集中度通常是合并可能产生的竞争效果的一项有用指标。在评估市场集中度时，执法机构同时考虑合并后的市场集中度水平以及合并导致的集中度变化。市场份额可能无法完全反映企业在市场中的竞争重要性或合并的影响。市场份额与其他竞争效果证据结合使用。参见第6节和第7节。

在分析现有企业与近期或潜在进入者之间的合并时，只要各机构使用集中度变化来评估竞争效果，它们将使用预测的市场份额来进行。现有企业与潜在进入者之间的合并可能引发重大的竞争关切。此类合并导致的竞争减弱更可能是实质性的，现有企业的市场份额越大，潜在进入者的竞争意义越大，且该潜在进入者相对于其他进入者构成的竞争威胁越大，则竞争减弱越可能是实质性的。

当市场份额在一段时间内保持稳定时，尤其是在面对相对价格或成本的历史变化时，各机构会给予市场集中度更大的权重。如果一家企业在价格上涨相对于其竞争对手之后仍保持了其市场份额，则该企业已经面临有限的竞争约束，这使得其剩余竞争对手在该企业的一个重要竞争对手因合并而被消除后替代失去的竞争的可能性较小。相比之下，即使是一个高度集中的市场，如果市场份额在短期内因竞争性供给的变化而大幅波动，该市场也可能非常有竞争性。然而，如果合并一方企业的竞争显著促成了这些波动--也许是因为它充当了特立独行者--各机构将考虑该合并是否将通过将该企业与其中一个重要竞争对手结合而增强市场力量。

各机构可以使用市场中重要竞争对手的数量来衡量市场集中度。当重要竞争对手与较小竞争对手之间存在市场份额差距时，或当难以衡量相关市场中的收入时，这一衡量方法最为有用。各机构还可以考虑合并各方的合计市场份额，作为衡量市场中其他方在多大程度上可能无法轻易替代因合并而失去的合并各方之间竞争的指标。

执法机构通常计算市场集中度的赫芬达尔-赫希曼指数("HHI")。HHI通过将各企业市场份额的平方相加计算得出，[9]因而对较大市场份额赋予成比例的更大权重。使用HHI时，执法机构

9 例如，一个由四家企业组成的市场，其市场份额分别为百分之三十、百分之三十、百分之二十和百分之二十，则其 HHI 为 $2600(30^2 + 30^2 + 20^2 + 20^2 = 2600)$。HHI 的范围从 10,000(在纯粹垄断的情况下)到接近于零的数字(在原子化市场的情况下)。尽管将所有企业纳入计算是可取的，但缺乏关于小份额企业的信息并不关键，因为此类企业对 HHI 的影响不显著。

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.[10]

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

[10] For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 (5 × 10 × 2 = 100).

同时考虑合并后赫芬达尔-赫希曼指数的水平以及合并导致的赫芬达尔-赫希曼指数的增量。赫芬达尔-赫希曼指数的增量等于合并企业市场份额乘积的两倍。[10]

根据其经验，执法机关通常将市场分为三类：

非集中市场：HHI低于1500

中度集中市场：赫芬达尔-赫希曼指数在1500至2500之间高度集中市场：赫芬达尔-赫希曼指数高于2500

执法机关对其界定的相关市场适用以下一般标准：

集中度的小变化：涉及HHI增加少于100点的合并不太可能产生不利的竞争影响，通常不需要进一步分析。

非集中市场：导致非集中市场的合并不太可能产生不利的竞争效果，通常无需进一步分析。

中度集中市场：导致中度集中市场的合并，如果涉及HHI增加超过100点，可能引发重大竞争担忧，并往往需要审查。

高度集中的市场：导致高度集中市场且HHI增幅在100点至200点之间的合并，可能引发重大竞争关切，且往往需要审查。导致高度集中市场且HHI增幅超过200点的合并，将被推定可能增强市场势力。该推定可由表明合并不太可能增强市场势力的有说服力的证据予以反驳。

这些门槛的目的不是提供一个僵化的筛选标准来区分竞争性良性的合并与反竞争的合并，尽管高水平的集中度确实引发关切。相反，它们提供了一种方法来识别一些不太可能引发竞争关切的合并，以及另一些特别需要审查其他竞争因素是否确认、强化或抵消集中度增加潜在有害效果的合并。合并后HHI越高且HHI增幅越大，各机构潜在的竞争关切就越大，且各机构请求额外信息以进行分析的可能性就越大。

10 例如，市场份额分别为百分之五和百分之十的企业合并，将使 HHI 增加 100(5 × 10 × 2 = 100)。

6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view

6. 单边效应

因合并而消除两家企业之间的竞争，其本身即可能构成实质性地减少竞争。此类单边效应在相关市场内合并至垄断的情形中最为明显，但绝不限于该情形。合并所产生的可认知效率是否可能减少或逆转不利的单边效应，在第10条中论述。

本节讨论了几种常见的单边效应类型。第 6.1 节讨论差异化产品市场中的单边价格效应。第 6.2 节讨论卖方与买方谈判或价格通过拍卖确定的市场中的单边效应。第 6.3 节讨论相对同质产品市场中与产量或产能减少相关的单边效应。第 6.4 节讨论因创新减少或产品多样性降低而产生的单边效应。这些效应并未穷尽可能的单边效应类型；例如，排他性单边效应也可能产生。

合并在竞争的不同维度上可能产生不同的单边效应。例如，合并可能在短期内提高价格，但不会引发对创新的长期关切，原因可能是竞争对手将提供足够的创新竞争，或者合并将产生可认知的研发效率。见第10条。

6.1 差异化产品的定价

在差异化产品行业中，某些产品可能是非常接近的替代品并彼此激烈竞争，而其他产品则是较为疏远的替代品且竞争较弱。例如，一款高端产品与另一款高端产品的竞争可能远比与任何低端产品的竞争更为直接。

销售差异化产品的企业之间的合并可能削弱竞争，其方式是使合并后的企业能够通过单方面将一种或两种产品的价格提高至合并前水平以上而获利。因价格上涨而损失的部分销售仅仅被转移至合并伙伴的产品，且取决于相对利润率，通过合并获取此类销售损失可能使价格上涨变得有利可图，即使其在合并前本无利可图。

合并各方所售产品之间直接竞争的程度对于评估单边价格效应至关重要。一家合并企业所售产品的买方越是把另一家合并企业所售产品视为其次优选择，单边价格效应就越大。机构考虑任何合理可得且可靠的信息来评估合并各方所售产品之间直接竞争的程度。这包括书面和证言证据、赢单/输单报告以及来自折扣审批流程的证据、客户转换模式和客户调查。所依赖的证据类型往往与与假想垄断者检验相关的客户替代证据类型在很大程度上重叠。见第 4.1.1 节。

合并后，对于原由合并一方企业销售的产品而言，要出现实质性的单边涨价，通常需要购买该产品的相当一部分客户认为

products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. 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.

> *Example 19:* In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

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. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[11]

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

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[11] For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

原先由另一合并企业销售的产品作为其次优选择。然而，除非合并前价格与增量成本之间的利润率较低，否则该显著比例不必接近多数。为此目的，增量成本是就所考虑的价格变动将引起的产量变化来衡量的。即使转向非合并企业所售产品的销售量远多于转向合并伙伴原先所售产品的销售量，一项合并仍可能对某一给定产品产生显著的单边效应。

> 示例*19*:在示例5中，控制产品A和产品B的合并实体将在其他企业的产品供应和价格给定的情况下将价格提高百分之十。在该示例中，当仅产品A提价时，其损失的销售中有三分之一被转移至产品B。需要进一步分析以考虑重新定位、市场进入和效率。

在某些情况下，机构可能通过估算从第一产品到第二产品的转移比率，来量化一家合并企业所售产品与另一家合并企业所售第二产品之间直接竞争的程度。转移比率是指因第一产品价格上涨而损失的单位销售量中会转向第二产品的比例。一家合并企业所售产品与另一家合并企业所售产品之间的转移比率对于评估单边价格效应可能极具参考价值，转移比率越高表明此类效应出现的可能性越大。合并企业所售产品与非合并企业所售产品之间的转移比率至多具有次要的预测价值。

当合并使合并后实体有动机提高原先由一家合并企业销售的产品的价格，从而将销售转向原先由另一家合并企业销售的产品、提升后者的利润时，就可能产生不利的单边价格效应。在其他价格和产品供应给定的情况下，该利润提升等于转向这些产品的销售对合并后企业的价值。转向某一产品的销售价值等于转向该产品的单位数量乘以该产品价格与增量成本之间的利润率。在某些情况下，在可获得充分信息时，机构评估转向销售的价值，该价值可作为合并对第一产品产生的价格上涨压力的指标。基于转向销售价值来诊断单边价格效应不必依赖市场界定或市场份额与集中度的计算。在诊断差异化产品市场中的单边价格效应时，机构对转向销售价值的依赖远多于对 HHI 水平的依赖。如果转向销售的价值按比例而言较小，则不太可能产生显著的单边价格效应。[11]

在有充分数据可用的情况下，机构可以构建经济模型，以量化合并所产生的单边价格效应。这些模型通常包含非合并企业的独立价格反应。它们也可以纳入合并特有的效率。这些合并模拟方法无需依赖市场界定。机构不将合并模拟证据本身视为结论性的，并且他们更看重其合并模拟是否一致地预测出大幅价格上涨，而不是任何单一模拟的精确预测。

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11 为此目的，转移销售额的价值按因价格上涨导致单位销量减少而损失的收入比例衡量。该损失收入等于该产品售出单位数量的减少量乘以该产品的价格。

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

如果非合并方对合并各方所提供的产品提供非常接近的替代品，则合并不太可能产生实质性的单边价格上涨。在某些情况下，非合并企业可能能够重新定位其产品，以对合并各方所提供的产品提供接近的替代品。重新定位是一种供给侧反应，其评估方式与市场进入非常相似，并考虑及时性、可能性与充分性。见第9节。机构会考虑重新定位是否足以阻止或抵消差异化产品合并原本会产生的重大反竞争单边效应。

6.2 谈判与拍卖

在许多行业中，尤其是涉及中间商品和服务的行业，买方和卖方通过谈判来确定价格和其他交易条件。在该过程中，买方通常与不止一个卖方进行谈判，并可能使卖方相互竞争。此类竞争的一些高度结构化形式被称为拍卖。谈判通常结合了拍卖的某些方面与一对一谈判的某些方面，尽管纯拍卖有时被用于政府采购和其他场合。

两个相互竞争的卖方之间的合并使买方无法在谈判中让这些卖方相互压价。仅此一点即可显著增强合并实体获得对其更有利、对买方更不利的结果的能力和动机，而这是合并企业在没有合并的情况下各自分别不会提供的结果。执法机关使用与第6.1条所述类似的方法分析此类单边效应。

在这些情形下，反竞争单边效应的可能性与以下频率或概率成比例：在合并之前，当合并卖方之一赢得业务时，另一合并卖方曾是次优竞标者的频率或概率。次优的合并企业相对于其他供应商在满足客户需求方面优势越大，这些效应也可能越大。合并前中标报价越有利可图，这些效应也往往越大。如果存在许多地位相当的竞标者，所有这些因素可能都很小。

这些反竞争单边效应的机制及其可能性的指标，会因所使用的谈判做法、拍卖形式以及卖方对彼此成本和买方偏好的了解程度而有所不同。例如，当合并卖方可能知道他们最适合和第二适合服务哪些买方时，任何反竞争单边效应往往都会针对这些买方；当卖方信息不那么充分时，此类效应更可能分布于更广泛的买方群体。

6.3 同质产品的产能与产量

在涉及相对无差异化产品的市场中，执法机关可能评估合并后的企业是否会认为单方面抑制产出并抬高市场价格是有利可图的。企业可能闲置产能，放弃建设或获取在不存在合并的情况下本会获取的产能，或消除原有的生产能力。企业还可能将产能的使用从一个相关市场转移到另一个相关市场，以抬高前一市场的价格。对这些替代性产出抑制模式的竞争分析可能有所不同。

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

> *Example 20:* Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.[12] This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together

[12] Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

单边产量抑制策略在以下情况下更可能有利可图：(1) 合并企业的市场份额相对较高；(2) 合并企业已按不受产量抑制影响的价格承诺销售的产品占其产量的比例相对较低；(3) 被抑制产量的利润率相对较低；(4) 竞争对手的供应反应相对较小；以及 (5) 市场需求弹性相对较低。

合并可能为合并企业提供更大的销售基础以从由此产生的价格上涨中获益，或者可能消除一个原本可以扩大产量以应对价格上涨的竞争对手。

> 例*20:*企业A和企业B均生产一种工业商品，并拟议合并。该商品的需求对价格不敏感。企业A是市场领导者。企业B产量可观，但其营业利润率较低，因为其运营的是高成本工厂。其他供应商的运营接近满负荷。合并后的企业有动机减少高成本工厂的产出，或许关闭部分产能，从而抬高其剩余产出所获得的价格。尽管合并后的企业将部分产出从高成本工厂转移到低成本工厂，该合并仍损害客户。

在某些情况下，一家在市场销售中占有相当份额的企业与一家拥有大量过剩产能以服务该市场的企业之间的合并，可以使产量抑制策略变得有利可图。[12]即使拥有过剩产能的企业销售份额相对较小，如果该企业扩大产能、从而阻止价格上涨的能力一直使产量抑制策略对拥有较大市场份额的企业无利可图，这种情况也可能发生。

6.4 创新与产品多样性

竞争往往促使企业创新。执法机关可能考虑合并是否可能通过鼓励合并企业将其创新努力削减至低于在没有合并的情况下本会达到的水平，从而削弱创新竞争。这种对创新的削减可能表现为继续现有产品开发努力的动机减少，或启动新产品开发的动机减少。

第一种效应最有可能发生在至少一个合并方正在努力推出新产品、而该产品将从另一合并方夺取可观收入的情况下。第二种较长期的效应最有可能发生在至少一个合并方具备使其在未来开发新产品的能力、而该产品将从另一合并方夺取可观收入的情况下。因此，执法机关还会考虑合并是否会将极少数拥有最强能力在特定方向上成功创新的企业中的两家结合在一起，从而削弱创新竞争。

执法机关评估一家合并企业的成功创新在多大程度上可能夺取另一家的销售，以及合并后未来创新的动机在多大程度上将低于在没有合并的情况下本会具有的动机。执法机关还考虑合并是否可能通过整合

12 此类合并还可能造成不利的协同效应，尤其是当被收购的拥有过剩产能的企业原本正在扰乱有效协调时。

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

> *Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by

无法以其他方式结合的互补能力，或出于某种其他合并特有的原因，促成原本不会发生的创新。见第10条。

执法机关还会考虑合并是否可能使合并后的企业有动机停止提供合并各方所销售的某一相关产品。合并后产品种类的减少可能具有反竞争性，也可能不具有。当产品种类对客户价值甚微时，合并可以带来产品的有效整合。在其他情况下，合并可能通过鼓励合并后的企业重新定位其产品、使产品之间更加差异化，从而增加产品种类。

如果合并后的企业将撤回某一产品，而大量客户强烈偏好该产品而非将继续可供选择的产品，这可能构成对客户的损害，且该损害超出对任何特定产品价格或质量的任何影响。如果有证据表明存在此种效应，执法机关可调查产品种类的减少是否在很大程度上归因于合并所导致的竞争激励的丧失。因合并而消除某一产品的反竞争激励越大、越有可能，该产品利润中来自牺牲合并伙伴所销售产品利润的比例就越大。当合并通过将两个紧密替代产品置于共同所有权之下而大幅减少竞争，且其中某一产品被消除时，合并往往也会导致剩余产品的价格上涨，但这不是产生反竞争效应的必要条件。

> 示例 *21:*企业 A 以高价销售高端产品。企业 B 以较低价格销售中端产品，服务于价格敏感度较高的客户。另有数家企业销售低端产品。企业 A 与企业 B 合计在相关市场占有较大份额。企业 A 提议收购企业 B 并停止销售企业 B 的产品。企业 A 预期能够留住企业 B 的大部分客户。合并后，企业 A 可能发现提高其高端产品价格无利可图，因为这样做会削弱其留住企业 B 价格敏感度较高客户的能力。执法机构可能认定，企业 B 产品的退出系竞争丧失所致，并对客户造成实质性损害。

7. 协同效应

合并可能通过促成或鼓励合并后相关市场内企业之间的协同互动而削弱竞争，从而损害客户。协同互动涉及多家企业的行为，这些行为只有在其他企业作出配合性反应的情况下才对每一家企业有利可图。此类反应会削弱企业通过低价争夺对手业务来向客户提供更优交易的动机，因为它降低了此类举措从竞争对手处赢得业务的程度。此类反应还会增强企业提价的动机，因为它缓解了此类举措会将客户流失给竞争对手的担忧。

协同互动包含一系列行为。协同互动可能涉及就企业将如何竞争或不竞争达成明确谈判的共同谅解。此类行为本身通常即违反反垄断法。协同互动还可能涉及类似的共同谅解，该谅解未经明确谈判，但将通过发现和惩罚会破坏协同互动的偏离行为来加以执行。协同互动亦可涉及并非依据事先谅解的平行配合行为。平行配合行为包括以下情形：每一竞争对手对其他方所采取的竞争性举措的反应在个体层面是理性的，且并非出于

retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

既非报复或威慑，也非旨在维持约定的市场结果，但仍然助长价格上涨并削弱降价或向客户提供更优条件的竞争动机。协同互动包括反垄断法未另行谴责的行为。

竞争对手企业参与协同行为的能力取决于竞争对手对价格变化或其他竞争举措的反应的强度和可预测性。在某些情况下，合并可能导致市场集中度足以强化此类反应，或使市场中的多家企业能够更有信心地预测这些反应，从而影响市场中多家企业(而不仅仅是合并企业)的竞争动机。

7.1 合并对协调互动的影响

执法机构审查合并是否可能改变市场参与者互动的方式，从而诱发实质更多的协同互动。执法机构力求查明合并如何可能通过增强协同行为的强度、范围或可能性而显著削弱竞争激励。然而，协同的形式多种多样，合并诱发不利协同效应的风险可能难以量化或详细证明。因此，执法机构结合对市场是否易受协同行为影响的评估，运用市场集中度指标(见第 5 条)来评估协同效应的风险。见第 7.2 条。第 7.2 条的分析适用于中度集中和高集中度市场，因为非集中市场不太可能易受协同行为影响。

依据《克莱顿法》的萌芽标准，执法机构可对其判定构成协同效应损害真实危险的合并提出质疑，即使没有具体证据精确表明协同可能如何发生。如果以下三项条件全部满足，执法机构很可能对合并提出质疑：(1) 合并将显著提高集中度并导致中度或高度集中的市场；(2) 该市场显示出易受协同行为影响的迹象(见第 7.2 条)；以及 (3) 执法机构有可信依据认定合并可能增强该脆弱性。在易受协同行为影响的市场中消除一家特立独行企业(见第 2.1.5 条)的收购很可能造成不利的协同效应。

7.2 市场易受协同行为影响的证据

如果代表相关市场重大份额的企业似乎此前曾参与影响相关市场的明示共谋，则各机构推定市场条件有利于协同互动，除非此后市场中的竞争条件已发生重大变化。如果另一地理市场在共谋时的显著特征与相关市场相当，则先前在另一地理市场的明示共谋具有同等权重。先前在相关市场失败的共谋尝试表明，成功共谋在合并前较为困难，但并非困难到足以阻止尝试，而合并可能倾向于使成功更有可能。如果另一产品市场在共谋时的显著特征与相关市场高度相当，则先前在另一产品市场的共谋或共谋尝试也可被赋予重大权重。

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

如果每一具有竞争重要性的企业的重大竞争举措能够被该企业的竞争对手迅速且确信地观察到，则市场通常更容易受到协同行为的影响。如果向客户提供的条款相对透明，则更可能是这种情况。对于相对同质的产品，价格透明度可能更高。即使交易条款不透明，关于服务于特定客户的企业身份的透明度也可能引发协调，例如通过客户或地域分配。供应商定期监测彼此的价格或客户可以表明，向客户提供的条款相对透明。

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

如果企业从吸引客户离开其竞争对手中预期获得的竞争回报将因这些竞争对手的可能反应而显著减少，则市场通常更容易受到协同行为的影响。企业预期从其竞争对手处得到的反应越强烈、越迅速，就越可能是这种情况。如果重要竞争对手很少、相关市场中的产品相对同质、客户发现更换供应商相对容易，或供应商使用符合竞争条款，则企业更可能预期强烈反应。

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

如果销售规模小且频繁，而非通过偶尔的大额长期合同进行，或者如果在竞争对手能够反应之前愿意转向该企业的客户相对较少，则企业更可能因所发生的任何反应而被阻止作出竞争举措。如果企业在现状中的利益很小，则企业不太可能因所发生的任何反应而被阻止。例如，一家市场份额较小但能够迅速且大幅扩张的企业，既不受生产限制的约束，也不受客户不愿更换供应商或不愿将业务委托给历史上规模较小的供应商的约束，则不太可能被阻止。如果相关市场中的竞争以跳跃式技术创新为特征，从而使竞争对手的反应使成功创新的收益基本保持完整，则企业也不太可能因所发生的任何反应而被阻止。

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

如果发起提价的企业在竞争对手对该提价作出反应后失去的客户相对较少，市场就更易于受到协同行为的影响。同样，如果首先向客户提供较低价格或改进产品的企业在竞争对手作出反应后，从竞争对手处吸引走的客户中保留的相对较少，市场也更易于受到协同行为的影响。

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

各机构认为，参与者从成功协调中获益越多，协同互动就越可能发生。一般而言，市场需求弹性越低，协调就越有利可图。

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

即使并非相关市场中的所有企业都参与协调，协同行为也可能损害客户，但通常只有在市场的重大部分受此类行为约束时才可能产生重大损害。损害的可能性取决于相关市场中那些竞争激励因协同行为而被大幅削弱的企业的集体市场力量。市场需求弹性越低，这种集体市场力量就越大。如果其他市场份额小且在协同行为所产生结果中利益很小的市场参与者能够迅速扩大其在相关市场中的销售，则这种集体市场力量会被削弱。

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares, if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

> *Example 22:* Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

> *Example 23:* In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

买方特征和采购流程的性质可能影响协同效应。例如，即使卖方预期竞争对手会做出强烈反应，他们仍可能有动机为一份大合同积极投标。对于市场份额较小的卖方而言尤其如此，前提是他们确实有可能赢得此类大合同。在某些情况下，大型买方可能通过选择将少数几份大合同而非许多小合同拿出来招标，并使其采购决策对供应商不透明，从而在战略上削弱协同行为--至少就满足该买方自身需求而言。

8. 强势买方

强势买方往往能够与其供应商谈判获得有利条件。此类条件可能反映服务这些买方的较低成本，但也可能反映对其有利的价格歧视。

执法机构会考虑强势买方可能限制合并各方提价能力的可能性。例如，如果强势买方有能力且有动机向上游纵向整合或资助市场进入，或者如果大型买方的行为或存在削弱了协同效应，就可能出现这种情况。然而，执法机构并不推定仅凭强势买方的存在就能阻止合并带来的不利竞争影响。即使是能够谈判获得有利条件的买方，也可能因市场力量的增强而受到损害。执法机构会审查强势买方所拥有的选择，以及这些选择可能因合并而发生的变化。通常情况下，如果一项合并消除了一家对某买方的谈判筹码有重大贡献的供应商，该买方将受到损害。

> 例*22:*客户C通过威胁将其大量采购量从一家合并企业转移到另一家合并企业，得以在合并前谈成比其他客户更低的价格。没有其他供应商在满足客户C对采购量和可靠性的需求方面处于同等有利地位。该合并很可能损害客户C。在这种情况下，执法机构可以界定一个由客户C及处境类似的客户组成的价格歧视市场。该合并有可能终结此前有利于他们的价格歧视。

此外，即使某些强势买方能够保护自身，各机构也会考虑市场势力是否可针对其他买方行使。

> 示例 *23:*在示例 22 中，如果客户 C 转而基于可信的自行供应其需求或资助新市场进入的威胁而获得较低的合并前价格，客户 C 可能不会受到损害。然而，即使在这种情况下，其他客户仍可能受到损害。

9. 进入

第6节和第7节对竞争影响的分析侧重于相关市场的当前参与者。该分析也可能包括某些形式的市场进入。对于SSNIP会迅速且容易地进入市场的企业属于市场参与者，可能被分配市场份额。见第5.1节和第5.2节。在合并之前已承诺进入市场的企业通常也将被视为市场参与者。见第5.1节。本节涉及由合并所诱发的市场进入或对既有进入计划的调整。

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

作为对竞争效应全面评估的一部分，各机构会考虑相关市场的市场进入。只有当此类市场进入能够阻止或抵消任何令人担忧的竞争效应，从而使合并不会对客户造成实质性损害时，相关市场的市场进入前景才会减轻对不利竞争效应的担忧。

执法机构会考虑相关市场进入的实际历史，并对此类证据给予实质性权重。如果在相关市场产品利润率出现非暂时性增长的情况下仍缺乏成功且有效的市场进入，这往往表明成功的市场进入是缓慢或困难的。现有企业的市场价值大大超过其有形资产的重置成本，可能表明这些企业拥有有价值的无形资产，而进入者可能难以复制或需要耗费大量时间才能复制。

如果市场进入如此容易，以至于合并后企业及其市场中剩余竞争对手(无论是单边还是集体)与不存在合并时本应达到的水平相比，无法有利可图地提价或以其他方式减少竞争，则合并不太可能增强市场势力。如果市场进入在及时性、可能性以及在规模、性质和范围上的充分性方面足以阻止或抵消令人担忧的竞争效应，则市场进入就是如此容易。

执法机关审查进入者实际可能采取的进入努力是否及时、是否可能以及是否充分。进入努力的定义是企业在市场中生产和销售所必须采取的行动。进入努力的各项要素将被纳入考量。这些要素可以包括：规划、设计和管理；许可、执照或其他批准；生产设施的建造、调试和运营；以及促销(包括必要的 introductory discounts)、营销、分销，以及满足客户测试和资格要求。近期的进入实例，无论成功与否，通常为识别实际进入努力的要素提供起点。这些实例还可为以下方面提供信息：进入者取得成功所需的规模、进入壁垒的存在与否、影响进入时机的因素、与进入相关的成本和风险，以及进入者现实可获得的销售机会。

如果有效且有利可图的进入努力所需的资产广泛可得，执法机关不一定会试图确定哪些企业可能进入。如果可识别的一组企业似乎拥有其他企业所缺乏的必要资产，或具有特别强烈的进入激励，执法机关将把进入分析集中于这些企业。在相邻或互补市场中经营的企业，或大型客户本身，可能处于最有利的进入地位。然而，除非有可靠证据支持该结论，执法机关不会推定相邻市场中的强大企业或大型客户将进入相关市场。

在评估市场进入是否及时、可能且充分时，各机构认识到精确和详细的信息可能难以或无法获得。各机构会考虑与市场进入是否满足及时性、可能性和充分性条件相关的合理可得且可靠的证据。

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a

9.1 及时性

为了阻止令人担忧的竞争效应，市场进入必须足够迅速，使导致这些效应并进而引发市场进入的行为总体上无利可图，即使这些行为在市场进入生效之前是有利可图的。

即使市场进入的前景不能阻止令人担忧的竞争效应，合并后的市场进入也可能抵消这些效应。这要求相关市场中进入者的影响足够迅速，以至于尽管在市场进入之前发生了任何反竞争损害，客户也不会因合并而受到显著损害。

各机构不会推定进入者在其准备好向客户提供相关产品之前就能对价格产生显著影响，除非有可靠证据表明预期的未来市场进入会对价格产生此类影响。

9.2 可能性

如果进入有利可图，则进入是可能的，考量因素包括所需的资产、能力和资本以及所涉风险，包括进入者需要承担在日后退出时无法收回的成本。盈利能力取决于：(a) 进入者可能获得的产出水平，考量新进入者面临的障碍；(b) 进入者在合并后市场中可能获得的价格，考量该进入本身对价格的影响；以及(c) 进入者可能承担的每单位成本，这可能取决于进入者经营的规模。

9.3 充分性

即使进入及时且可能，进入也可能不足以阻止或抵消所关注的竞争效果。例如，在差异化产品行业中，进入可能不充分，因为进入者提供的产品与合并企业提供的产品之间的替代性不够接近，不足以使合并企业提高价格变得无利可图。由于限制进入者竞争有效性的约束，例如最有利进入地位的企业能力受限或新进入者快速扩张面临声誉壁垒，进入也可能不充分。单一企业的进入若能至少复制合并企业之一的规模和实力，即为充分。一个或多个以较小规模经营的企业进入，如果此类企业不处于显著的竞争劣势，则可能充分。

10. 效率

竞争通常促使企业实现内部效率。然而，合并对经济的一项主要益处是其产生显著效率的潜力，从而增强合并企业的竞争能力和激励，这可能带来更低的价格、改善的质量、增强的服务或新产品。例如，合并产生的效率可以通过使两个低效竞争者组成一个更有效的竞争者来增强竞争，例如通过合并互补资产。在单边效应情境下，增量成本降低可能减少或逆转合并企业提高价格激励的任何增加。效率也可能带来新的或改进的产品，即使它们不会立即直接地影响价格。在

coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.[13] Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.[14] To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

[13] The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

[14] The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

在协同效应背景下，增量成本降低可能通过增强"独行侠"企业降价的激励或通过创造新的"独行侠"企业，使协同更不可能发生或更缺乏效力。然而，即使合并产生的效率增强了企业的竞争能力，合并仍可能产生其他可能削弱竞争并使合并具有反竞争性的效果。

机构仅认可那些可能通过拟议合并实现、且在缺乏拟议合并或具有可比反竞争效果的其他手段的情况下不太可能实现的效率。这些被称为合并特有的效率。[13]在作出这一认定时，仅考虑在合并双方面临的企业情境中切实可行的替代方案。机构不坚持仅停留在理论层面的限制性较小的替代方案。

效率难以核实和量化，部分原因是与效率相关的许多信息为合并方所独有。此外，合并方合理且善意预测的效率可能无法实现。因此，合并方有责任证实效率主张，以便机构能够通过合理手段核实每项所主张效率的可能性和幅度、每项效率将如何以及何时实现(以及实现的任何成本)、每项效率将如何增强合并后企业进行竞争的能力和激励，以及每项效率为何具有合并特异性。

如果效率主张含糊不清、具有推测性，或无法通过合理手段加以核实，则不予考虑。对效率的预测可能会受到怀疑，尤其是当这些预测是在通常的企业规划流程之外产生时。相比之下，有类似过往经验佐证的效率主张最有可能被采信。

可认知效率是指已经过核实且并非源于反竞争性地产量或服务减少的、合并特有的效率。可认知效率是在扣除合并产生的成本或为实现这些效率而发生的成本后进行净评估的。

如果可认知效率的性质和程度使得合并在任何相关市场都不太可能具有反竞争性，则机构不会对合并提出质疑。[14]为作出必要的认定，机构会考虑可认知效率是否可能足以扭转合并在相关市场损害客户的潜力，例如通过防止价格

13 如果通过剥离或许可等能够缓解竞争关切的实际替代方案即可获得效率，则机构不会将效率认定为并购特有的效率。如果并购影响的不是效率能否实现，而只是效率实现的时间，则只有时间上的优势属于并购特有的效率。

14 执法机构通常独立评估受合并影响的每个相关市场中的竞争，并且如果合并在任何相关市场中可能具有反竞争性，通常将提出质疑。然而，在某些情况下，执法机构在行使起诉裁量权时，会考虑并非严格属于相关市场、但与相关市场联系如此紧密的效率，以至于部分剥离或其他救济措施无法在不牺牲其他市场效率的情况下切实消除相关市场中的反竞争效果。联系紧密的效率最有可能在以下情况下产生影响：效率巨大且相关市场中可能产生的反竞争效果较小，从而使合并总体上可能有利于消费者。

increases in that market.[15] In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

[15] The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

该市场的增长。[15]在进行这一分析时，机构不会简单地将可认知效率的幅度与缺乏效率时可能对竞争造成的损害的幅度进行比较。合并潜在的不利竞争效果越大，可认知效率就必须越大，且必须越多地传递给客户，机构才能认定合并不具有相关市场的反竞争效果。当合并潜在的不利竞争效果可能特别重大时，需要异常巨大的可认知效率才能防止合并具有反竞争性。在坚持这一方法时，机构注意到，反垄断法在保护客户方面赋予竞争而非内部运营效率以优先地位。

根据机构的经验，当缺乏效率时可能的不利竞争效果不大时，效率最有可能在合并分析中产生影响。效率几乎从不能使合并至垄断或接近垄断正当化。正如不利竞争效果可能出现在定价和新产品开发等多个行为维度上，效率也可能在多个维度上发挥作用。同样，基于较低价格的所谓效率主张，如果依赖于降低客户所看重的产品质量或多样性，则可能受到削弱。

执法机构发现，某些类型的效率比其他效率更有可能被认定且具有实质性。例如，将生产在原先分别拥有的设施之间转移所产生的效率，使合并企业能够降低生产的增量成本，这类效率更易于核实，且不太可能是反竞争性产出减少的结果。其他效率，例如与研发相关的效率，可能具有实质性，但通常较难以核实，且可能是反竞争性产出减少的结果。还有一些效率，例如与采购、管理或资本成本相关的效率，不太可能是合并特有的或具有实质性，或者可能因其他原因而无法被认定。

在评估合并对创新的影响时，执法机构考虑合并后的企业是否能够更有效地进行研究或开发。此类效率可能促进创新，但不影响短期定价。执法机构还考虑合并后的企业是否能够占有其创新所产生的更大比例的收益。许可和知识产权条件可能对此项审查很重要，因为它们影响企业占有其创新收益的能力。研发成本节约可能具有实质性，但却不能被视为可认定的效率，因为它们难以核实，或者是反竞争性创新活动减少的结果。

15 执法机构通常最重视短期内该分析的结果。执法机构也可以考虑可认知效率对相关市场价格没有短期直接影响的效果。因效率带来的延迟收益(由于效率实现或消费者从效率中获益的延迟)将被赋予较小的权重，因为这些收益更不直接且更难以预测。与短期内固定的成本相关的效率不太可能在短期内使消费者受益，但可以在长期使消费者受益，例如，如果它们使新产品引入的成本降低。

11. Failure and Exiting Assets

Notwithstanding the analysis above, a merger is not likely to enhance market power if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. This is an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero. If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined.

The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.[16]

Similarly, a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division. The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both of the following conditions are met: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill;[17] and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.

12. Mergers of Competing Buyers

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called “monopsony power.”

To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market. In defining relevant markets, the Agencies

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16 Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.

17 Because the parent firm can allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Agencies require evidence on these two points that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

11. 失败与退出资产

尽管有上述分析，如果合并一方即将发生的破产(定义见下文)会导致该企业的资产退出相关市场，则合并不太可能增强市场势力。这是一方合并企业竞争重要性下降这一更一般情况的极端情形：退出企业的预计市场份额和重要性为零。如果相关资产本来会退出市场，那么合并后的客户状况不会比合并被禁止时更差。

执法机构通常不认可破产企业的资产将退出相关市场的主张，除非满足以下所有情形：(1) 被指称的破产企业将无法在近期内履行其财务义务；(2) 它将无法根据《破产法》第11章成功重组；以及(3) 它已做出善意努力以寻求合理的替代报价，该报价将使其有形和无形资产留在相关市场，并且对竞争构成的危险比拟议合并更小，但这些努力未获成功。[16]

同样，如果竞争风险源于对一家失败部门的收购，合并也不太可能造成竞争损害。机构通常不认可关于某部门的资产将在不久的将来退出相关市场的主张，除非同时满足以下两个条件：(1) 适用反映真实经济成本的成本分摊规则，该部门在经营基础上持续存在负现金流，且此种负现金流对于该企业而言并非由诸如互补市场中增加的销售额或增强的客户商誉等利益在经济上予以正当化；[17]且(2) 失败部门的所有者已作出真诚努力以寻求合理的替代报价，该报价将使其有形和无形资产保留在相关市场中，并且对竞争构成的危险不如拟议收购那样严重，但该等努力未获成功。

12. 竞争性买方的合并

相互竞争的买方之间的合并可以增强市场买方一侧的市场力量，正如相互竞争的卖方之间的合并可以增强市场卖方一侧的市场力量一样。买方市场力量有时被称为“买方垄断力量”。

为评估合并是否可能增强市场买方一侧的市场力量，机构基本上采用上文所述的框架来评估合并是否可能增强市场卖方一侧的市场力量。在界定相关市场时，机构

16 任何以高于破产企业资产清算价值的价格购买该等资产的要约，均将被视为合理的替代要约。清算价值是该等资产在相关市场之外使用所能获得的最高价值。

17 由于母公司可以在其自身及其子公司和部门之间分配成本、收入和公司内部交易，机构要求就这两点提供的证据不得仅基于管理层计划，因为此类计划可能是为证明负现金流或退出相关市场的前景而编制的。

focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

The Agencies distinguish between effects on sellers arising from a lessening of competition and effects arising in other ways. A merger that does not enhance market power on the buying side of the market can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts. Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger, as discussed in Section 10.

The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.

> *Example 24:* Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

13. Partial Acquisitions

In most horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them. This elimination of competition is a basic element of merger analysis. However, the statutory provisions referenced in Section 1 also apply to one firm's partial acquisition of a competitor. The Agencies therefore also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction.

When the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger. Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects.

First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such

关注卖方在面临假设性买方垄断者降低支付价格时可获得的替代选择。

如果供应商对其商品或服务拥有众多有吸引力的销售渠道，则市场买方一侧的市场力量不构成重大关切。然而，当情况并非如此时，机构可能认定相互竞争的买方之间的合并可能以损害卖方的方式削弱竞争。

机构区分因竞争减弱而对卖方产生的影响与以其他方式产生的影响。一项未增强市场买方市场势力的合并仍可能导致合并后企业支付的价格降低，例如通过减少交易成本或使合并后企业能够利用基于数量的折扣。合并企业支付价格的降低若非源于市场势力的增强，在评估合并产生的效率时可能具有重要意义，如第10节所述。

机构不将短期内购买量的减少视为合并是否增强买方市场力量的唯一或最佳指标。机构也不严格地、甚至不主要地基于合并企业在其中销售的下游市场的影响来评估相互竞争的买方之间合并的竞争效果。

> 示例 *24:*合并企业 A 和 B 是某种农产品相关地理市场中仅有的两个买方。它们的合并将增强买方力量并压低向农民支付的该产品价格，导致财富从农民向合并后企业转移，并低效率地减少供应。即使合并不导致合并后企业对其产出收取的任何价格上涨，这些效果也可能产生。

13. 部分收购

在大多数横向合并中，两个竞争者归于共同所有权和控制之下，完全且永久地消除了它们之间的竞争。这种竞争的消除是合并分析的基本要素。然而，第1节所引用的法定条款也适用于一家企业对一家竞争者的部分收购。因此，机构还审查涉及竞争企业的少数股权收购，即使此类少数股权不一定或不完全消除交易各方之间的竞争。

当机构认定一项部分收购导致对目标企业的有效控制，或涉及目标企业的几乎全部相关资产时，它们对该交易的analyses方式与对合并的分析大致相同。未导致有效控制的部分收购仍可能引起重大竞争关切，并可能需要与适用于完全合并或涉及有效控制的收购有所不同的分析。交易各方收购后关系的细节以及这些细节可能如何影响竞争，可能很重要。虽然机构会考虑部分收购可能影响竞争的任何方式，但它们通常侧重于三个主要效应。

第一，部分收购可以通过赋予收购企业影响目标企业竞争行为的能力来削弱竞争。在目标企业中的投票权益或特定治理权利，例如任命董事会成员的权利，可以允许这种影响。这种

influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.

Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the Agencies consider whether a partial acquisition is likely to create cognizable efficiencies.

影响可以削弱竞争，因为收购企业可以利用其影响诱使目标企业减少激进的竞争或将其行为与收购企业的行为相协调。

第二，部分收购可能通过降低收购企业参与竞争的激励而减弱竞争。收购竞争对手的少数股权可能显著削弱收购企业积极竞争的激励，因为它分担了由此对该竞争对手造成的损失。即使收购企业无法影响目标企业的行为，收购企业竞争激励的这种降低也会产生。与完全合并的单边竞争效应相比，这种效应可能因所有权仅为部分而有所减弱。

第三，部分收购可能通过使收购方获得目标公司的非公开、竞争敏感信息而削弱竞争。即使没有任何影响目标公司行为的能力，获取竞争敏感信息也可能导致不利的单边效应或协同效应。例如，它可以增强两家公司协调其行为的能力，并使其他配合性反应更快、更有针对性。如果该交易还促进了竞争敏感信息从收购方向目标公司的流动，则协同效应的风险更大。

部分收购与合并一样，其产生反竞争效果的可能性差异很大。因此，必须审查每个案件的具体事实，以评估损害竞争的可能性。虽然部分收购通常无法实现许多与合并相关的效率类型，但机构会考虑部分收购是否可能创造可认知效率。

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