The Revised Merger Guidelines: Did the Agencies Heed the Lessons of the Past?

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In the Fall 2009 issue of *Antitrust* magazine, I offered some views on issues the Agencies should consider in issuing new merger guidelines.[1] It is too early to assess to what degree the revisions addressed those considerations. The real test of how well the new 2010 Horizontal Merger Guidelines[2] will work will be seen in their implementation over time in individual cases. Nevertheless, I offer some preliminary views on the extent to which the Agencies addressed issues important to consider in promulgating new Guidelines.

Consider the Purpose of the 2010 Guidelines. The key purpose of the Guidelines is to provide practitioners and businesses with a view as to how the Agencies approach merger analysis. The 2010 Guidelines set forth several areas of departure from the 1992 Horizontal Merger Guidelines[3] and made clear how the Agencies intend to conduct their analysis. For instance, the 2010 Guidelines establish that:

- Market definition is no longer the requisite starting point for merger analysis;
- Where direct evidence of competitive effects is available, the Agencies will rely less on market definition in their analysis;
- "Critical loss" analysis may inform market definition;
- Geographic market definition considers the locations of both customers and suppliers; and
- Diversion ratios and merger simulation models, including use of the "upward pricing pressure" test, are tools the Agencies will use in analyzing the level of competition between differentiated products.

These are all concepts the Agencies have discussed for some time. They were, in many cases, foreshadowed by the Commentary on the 1992 Horizontal Merger Guidelines.[4] While there are areas of ambiguity and areas where there could be further clarity, the 2010 Guidelines cannot address the specifics of every merger investigation, which is by its nature fact-specific. The Guidelines also set forth some of the types of evidence and tools the Agencies use in conducting their analysis. In both of these ways, the 2010 Guidelines appear to have accomplished their goal of informing practitioners and the business community how their investigations are conducted.

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[1] Deborah L. Feinstein, *Enforcement Changes: Evolution or Revolution?*, ANTITRUST, Fall 2009, at 5.

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

[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997) [hereinafter 1992 Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg.htm.

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the 1992 Horizontal Merger Guidelines (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

The 2010 Guidelines can also help guide the courts on the Agencies' views as to the proper manner in which to analyze mergers. At times, this purpose can be in tension with the goal of providing guidance to parties as to how the Agencies will investigate mergers internally. In their effort to give the courts a roadmap, the Agencies may take more stark positions than they otherwise would in conducting their investigation. In some respects, the initial draft of the 2010 Guidelines suffered from that shortcoming. However, a number of more extreme positions were toned down in the revisions after public comment. For instance,

- The final Guidelines no longer refer to evidence of a high purchase price as evidence that the acquiring firm expects to be able to reduce competition. Instead, acknowledging that a premium may be justified by synergies and efficiencies, the 2010 Guidelines note that "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*."[5]
- The final version adds the notion that when the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[6]
- With respect to whether a merger may enhance the vulnerability of a market to coordinated conduct, the Guidelines make clear that rather than "a theory they deem plausible"—the language in the initial proposed Guidelines—the Agencies must have a "credible basis on which to conclude" that coordinated conduct might occur.[7]

In many respects, the 2010 Guidelines have maintained the basic structure of the 1992 Guidelines. The key analytical pieces—market definition, concentration, anticompetitive effects, entry, and efficiencies—remain in place.

While the substance of the 2010 Guidelines may make it easier to bring a challenge in court, their rhetoric and language appear less devised than the initial draft of the 2010 Guidelines to create a one-sided document for use in court challenges.

Consider What Worked Well in the 1992 Guidelines. A noteworthy aspect of the 1992 Guidelines is how long they endured, despite introducing a number of new concepts. In many respects, the 2010 Guidelines have maintained the basic structure of the 1992 Guidelines. The key analytical pieces—market definition, concentration, anticompetitive effects, entry, and efficiencies—remain in place. Yet within that framework, the Agencies have introduced new methods of conducting that analysis. Standing alone, the notion that the Agencies will use various economic tools, such as the "upward pricing pressure" (UPP) model, does not necessarily mean that the 2010 Guidelines will become obsolete as new economic tools develop and as additional thinking is done with respect to the economic tests in the Guidelines. There is a risk, however, that in practice, concepts like the UPP will become talismans, rather than one piece of evidence, and as such will be given inordinate importance. In that event, if new economic thought supersedes those concepts, the 2010 Guidelines may become obsolete far earlier than they should.

Consider What Did Not Work Well in the 1992 Guidelines and Base the Revisions on the Agencies' Experience. The criticisms of the 1992 Guidelines arising from the efforts to create bright lines and retain unfounded presumptions have been somewhat ameliorated by the 2010 Guidelines. The 2010 Guidelines have taken an important step forward in eliminating what was an arbitrary and baseless presumption that in certain circumstances in which the merging companies' combined share was 35 percent "the Agency would presume that a significant share of sales

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[5] 2010 Guidelines, *supra* note 2, § 2.2.1 (emphasis added).

[6] *Id.* § 6.1.

[7] *Id.* § 7.1.

in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices."[8]

The HHI thresholds have been increased to capture fewer transactions, but they still do not reflect the Agencies' experience over the years. For the most part, the HHIs in the 2010 Guidelines continue to be lower than the level at which most challenges typically take place. From FY 1998 through FY 2007, in industries other than chemicals, pharmaceuticals, oil, and supermarkets, the Federal Trade Commission brought a challenge in only one market out of 64 in which the post-merger HHI was under 2400.[9] This challenge involved a delta HHI far greater than the 100 points at which the revised Guidelines state that potentially significant competitive concerns can be raised in moderately concentrated markets (between 1500 and 2500).[10] Indeed, for the majority of markets in which the post-merger HHI was between 2400 and 2999 the FTC did not bring a challenge, even when the HHI change was above 100 points. Notably, not a single challenge occurred where the delta HHI was under 200, although the 2010 Guidelines hold to the notion that such mergers in highly concentrated markets "potentially raise significant competitive concerns and often warrant scrutiny."[11]

Make the Guidelines Practical. Whether the 2010 Guidelines are practical will depend on how they are implemented in practice. For example, the UPP model is not intuitive to business people, nor particularly easy to implement as an initial screen. If it becomes a necessary initial step involving a data-intensive, months-long process for every transaction that raises unilateral effects concerns, the 2010 Guidelines will not have offered practical guidance. Similarly, if the Agencies rarely challenge transactions within the new moderately concentrated range of the HHI, they risk unduly deterring transactions that raise no significant issues.

Consider the Relationship Between Substantive Analysis and the Review Process. The increased use of electronic communication has vastly increased the amount of documents and data available, and more sophisticated economic tools require more extensive data. There is significant risk that by identifying various economic tools that can be used, staff will feel compelled to employ them more often than is necessary, with attendant production burdens. Rather than requesting focused data that get at the heart of the matter, second requests too often contain broad specifications requesting all documents and data for a variety of topics and are not quickly and appropriately narrowed to the key issues. This can increase the burden substantially on parties and, in some cases, prevent parties from being able to complete their deals. For a small company, the costs of complying with a complex and detailed CID or second request may not be justified by the size of the transaction or the companies at issue.

It is one thing if there is information that is critically important to analyzing the substance of the case. Yet, there are still many aspects of the second request process that go beyond what is reasonably necessary to get to the core of an issue. To point to one example: Many second requests have a specification that requires a detailed description of—and the provision of—every database the companies use. Both as written and in the cumbersome negotiations that follow, this specification does not provide the Agencies with the information they really need. Often this request does

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[8] 1992 Guidelines, *supra* note 3, § 2.211.

[9] Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2007, Table 3.6 (Dec. 1, 2008), *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf.

[10] The Horizontal Merger Investigation Data lump together mergers with HHI concentration levels between 2400 and 2999 so it is not possible to examine the data only for what the Guidelines now consider moderately concentrated markets post-merger.

[11] 2010 Guidelines, *supra* note 2, § 5.3.

With the new Guidelines' increased focus on data, there is considerable potential that overly broad requests not only remain, but become more difficult to discuss in a practical way with staff.

not efficiently obtain relevant information and instead imposes undue burden and time delays on the parties. Too much back and forth is spent on technical characteristics of the database rather than figuring out what information the companies have, whether the Agencies need it, and how they might obtain it. With the new Guidelines' increased focus on data, there is considerable potential that overly broad requests not only remain, but become more difficult to discuss in a practical way with staff.

Consider the Need for Greater Transparency.

The Agencies continue to issue statements or other guidance, not only in matters where they have accepted settlements, which is quite routine, but also in closed investigations.[12] That practice is expected to continue under the 2010 Guidelines. Some of the statements have been quite detailed. Others have left open more questions. For instance, in the United Airlines/Continental matter, the Division explained its concern that the combination would lead to a high share of service in Newark, New Jersey.[13] It did not, however, explain why it did not require a consent decree to cover the transfer of slots at Newark to Southwest. Was this part of the Division's long-standing practice to accept "fix-it-first" solutions or simply an isolated acceptance of such a solution? More information on these sorts of issues is always welcome.

Don't Let the Perfect Be the Enemy of the Good.

There are welcome aspects of the revised Guidelines—elimination of unnecessary presumptions and discussions of the types of evidence the Agencies analyze—and also areas where experience is needed before judgments can be made. But the Agencies set out to provide revised guidance and did so quickly and with considerable clarity. Only time will tell whether they met their mark. ●

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[12] *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (Mar. 29, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm; Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/opa/2010/05/ggladmob.shtm.

[13] Press Release, U.S. Dep't of Justice, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/262002.htm.