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The Draft Merger Guidelines: Interpretive Guidance or Ideological Advocacy?

BY JAMES KEYTE

FEW WOULD QUESTION THAT AGENCY merger guidelines have a threefold purpose: (1) to provide transparent explanations of how the agencies actually investigate and enforce Section 7;[1] (2) to introduce and explain any new analytical or economic frameworks they use to investigate; and, most fundamentally, (3) to ensure that the Agencies' law enforcement activity is consistent with current case law or principled extensions of it.[2] Opaqueness on both process and substance is counterproductive; moreover, as agencies are neither courts nor legislative bodies, any "guidelines" that attempt to make new law (or expand precedents beyond their reach or relevance) merely precipitate disputes and litigation rather than guide parties or preview emergent agency experience or new analyses for courts to consider.

This article assesses the proposed Draft Merger Guidelines (DMG) against current case law, the 2010 Horizontal Mergers Guidelines (2010 HMG), and the 2020 Vertical Merger Guidelines (2020 VMG). The DMG receives a relatively high score on transparency (there is no hiding the ball here); a medium score on new learning and analytical techniques (for example, for market definition and unilateral effects); and a disturbingly low score on keeping Section 7 guidance within current legal standards and principles, notwithstanding the Agencies' refrain that all of the Guidelines reflect "binding" Supreme Court authority. Last year I wrote an article in ANTITRUST asking whether the Agencies are likely on a collision course with case law in the new merger guidelines.[3] I can now confidently conclude they are. Indeed, the Agencies seem to have lost track of the fact that courts look to guidelines to reflect the Agencies' experience and demonstrable expertise, not to interpret the law.

Given page restraints, this review will be more of an overview of the breadth of topics covered in the DMG, as follows:

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First, what are the Agencies' overall objectives and strategies with the DMG?

Second, what subjects are useful explications of the 2010 HMG?

Third, which Guidelines attempt to break new (or revitalize old) ground? And

Finally, in what way are the DMG a transparent declaration of how the Agencies plan to take on Big Tech and other major platforms?

The Agencies New Long Game: More Presumptions and Avoiding the Ultimate Burden of Proof

As the DMG make clear, the new approach of the Agencies identify several "frameworks," each called a guideline. Guidelines 1-8 describe those mergers that, in the Agencies' view, can be presumed to be anticompetitive as a matter of law. The notion is that, where a Guideline applies, the burden of proof would shift to the parties, which would have to show in "rebuttal" or "defense" that the merger threatens "no substantial lessening of competition" under the usual (and narrow) doctrines—i.e., failing firms, entry and repositioning, procompetitive efficiencies, and structural barriers to coordination. These asserted presumptions are then followed by a list of areas in today's economy the Agencies plan to prioritize for enforcement (Guidelines 9-12), including industry roll ups, platforms, effects (defined broadly) on workers and sellers, and partial acquisitions and minority investments. Guideline 13 is a catchall, while all of the analytics—again, mostly from the 2010 HMG—are in a few appendixes.

The objective behind this new structure is neither new for Neo-Brandeisians, nor subtle. The Agencies want the courts to return to what they believe are the "core" structuralist premises of both the Section 7 text and several major Supreme Court cases from before the 1980s—and before the Agencies' and courts' adoption of the consumer-welfare standard (CWS) and the predominance of effects-oriented analyses. In the Agencies' view, past administrations made the mistake of focusing too much on case-by-case effects and efficiencies, forgetting that the whole idea behind Section 7

was to stop consolidation (whether to oligopoly or monopoly) in its incipiency.

Gaslighting on "Binding" Law is Not a Good Strategy

The fundamental problem with the Agencies' legal strategy, however, is that the DMG (i) ignore controlling authority on the incipiency standard, and (ii) vociferously argue that several old Supreme Court merger cases—primarily *Philadelphia National Bank (PNB),*[4] *Brown Shoe,*[5] and *Proctor & Gamble (P&G)*[6]—remain "binding" law and therefore can be relied on by the Agencies in crafting the DMG. In both instances, the DMG's presumptions are too clever by half and, without question, will face major hurdles getting any court's support, especially for challenges that involve non-horizontal mergers.

Ignoring the Causal Standard. As a threshold matter, the DMG get off on the wrong foot when they blithely recite Section 7's "*may* be to lessen competition" language without qualification, obviously attempting to leave the impression that the statutory text should be read as reflecting the dictionary meaning of expressing "possibility." Yet, *Brown Shoe* itself (and dozens of court decisions since) have held that the incipiency language in Section 7 must be read to mean *probable*.[7] Indeed, several of the Agencies' recent court losses, as well as many past governmental Section 7 actions, have failed in part for relying on theories of market definition or harm that are too speculative, or on evidence that is insufficient, to demonstrate *probable* anticompetitive effects.[8] It is unclear what the Agencies believe they will gain by ignoring important Supreme Court precedent over this simple but fundamental concept from *Brown Shoe*.

The DMG Do Not Reflect "Binding" Presumptions from Cases. By far, however, the most provocative use of law in the DMG is the assertion that there are several presumptions of anticompetitive harm under Section 7 case law that more recent courts and agencies simply forgot about or have been overtly ignoring. As will be discussed in more detail below, this fundamental premise of the DMG must be assessed from three perspectives: Are all of the asserted presumptions actually holdings of the cited cases? For those that arguably are, was the court setting forth presumptions for all future mergers, industries, and contexts? And, most critically, can developments in antitrust jurisprudence since those late 1970s be ignored, particularly the Court's adoption of the CWS for all antitrust cases it has addressed, as well as the myriad binding Circuit court decisions applying the CWS to Section 7 (separate and apart from the fact that the 2010 HMG were expressly based on a CWS)?

To start, if one asked most any antitrust practitioner (or court) what presumptions of anticompetitive harm exist under Section 7, the likely uniform response would be "one"—for a horizontal merger in a well-defined market that unduly increases concentration under current guidelines—plus high entry barriers. There would be no structural or other presumption for unilateral effects, mergers involving potential competitors, acquisitions that raise rivals' costs (RRC), vertical mergers that might foreclose competition, mergers that "entrench" or extend a "dominant" position, or transactions that appear to be part of a trend toward concentration. Any of these might well be *proven* to have anticompetitive effects, but not *presumed.* In the DMG, however, the Agencies are taking the position—and presumably will do so in court—that if there is any language in a non-reversed Supreme Court case to support one of its proposed "guidelines," a reviewing court should treat the guideline as a presumption of a Section 7 violation that, as a matter of law, shifts the burden of proof to the parties to come forward with clear rebuttal or defense evidence.

Further, the DMG often conflate the factual setting of a case with an articulated Section 7 principle or limitation for future cases.[9] And it is a step further, of course, to convert that principle into a *presumption* for today's complex economy and industries, including for Big Tech and platform ecosystems. Nor, as one might have hoped, do the Agencies bolster their proposed presumptions with detailed explanations of agency experience, judicial outcomes over time, or extensive industry study. Instead, the Guidelines read more like a Neo-Brandesian wish list of what its proponents would want in a statute or current case law. To be sure, there is nothing wrong with having a more prophylactic, structuralist view of Section 7, but achieving that objective must be earned in the courts or Congress rather than merely declaring, administratively, a new set of presumptions that would erase over 50 years of Section 7 jurisprudence.

Finally, the DMG simply avoid the subject of the CWS, as if it has not been incorporated into the analytics of every substantive Supreme Court case since the late 1970s, including for example *GTE Sylvania*[10] (territorial restraints), *Brunswick*[11] (standing), *Brook Group*[12] (predatory pricing), *Illinois Tool Works*[13] (patent and defining market power), *Leegin*[14] (resale price maintenance) and *AMEX*[15] (monopolization). The Agencies cannot seriously assert that the CWS should be ignored when considering the application of old Section 7 cases to today's economy simply because the Court has yet to have the opportunity to apply the CWS to a Section 7 case. In any event, *General Dynamics*[16] essentially reflects a turn away from presumptions (and toward the CWS)—or at least the rejection of a simple structural presumption for Section 7. And, of course, Circuit courts—whose decisions are binding on District courts—have long followed the Court's lead in adopting the CWS. Beginning with the D.C. Circuit's opinion in *Baker Hughes,*[17] all courts routinely apply a CWS when assessing the effects of challenged mergers under Section 7.[18] These same circuit cases make clear that, as a practical matter, any presumption is quite easily defeated with rebuttal evidence (e.g., market share trends, recent entry or repositioning, and efficiencies).

Useful Clarifications on Coordinated Effects and Market Definition (With a Caveat)

One thing to highlight here is that the DMG do contain several relatively non-controversial clarifications or explications that should be useful for practitioners and courts. For example, Guideline 3 addresses the risk of coordination, listing and detailing what are fairly characterized as standard inquiries and factors that may affect the risks of successful coordination. The only observation is that the lower HHI level at which a market is considered "highly concentrated" under the DMG means that the market may include *more* rivals (under Guideline 1) and thus be less conducive to successful coordination under the same factors that are used today.

The DMG also offer some useful new details on market definition in Section III and Appendix 3. Regardless of whether one agrees with the scope or not, the DMG make it clear that the Agencies can find multiple markets at one time and that they may rely on the *Brown Shoe* factors as a market definition tool. The DMG also include a useful explanation of the hypothetical monopolist test and its application to settings we are all familiar with—targeted customers (by product or location), cluster markets, bundled products, "one-stop shops," innovation, and input (including labor) markets. One can anticipate the Agencies using these multi-product markets where appropriate, as this will create more horizontal effects to work with under the DMG's lower concentration thresholds.

Where the market definition discussion gets suspicious, however, is in suggesting that the complexity and "fuzziness" sometimes inherent in the market definition exercise might relieve the Agencies of having to *prove* a relevant market; it does not, and here the Supreme Court case law is crystal clear.[19] Indeed, requiring proof of a defined "line of commerce" makes great sense from the "structural" point of view that forms the underlying premise of the DMG; the whole point of the DMG presumptions is to rely on market structure and market shares—any contrary assertion would be self-serving at best. As discussed later below, however, this is precisely what the DMG do with Big Tech and the ecosystems in which they operate and make acquisitions. For platforms, the DMG assert that mergers often involve transactions that are "not strictly horizontal or vertical." And while there is a reference to defining markets (and a note limiting *AMEX),* an implicit agenda in the Guideline for platforms is that the Agencies will look for problem areas first (under all the Guidelines) and deal with market definition only when it is required.

Guidelines 1 and 2: Some Questionable Tweaks on Concentration Thresholds and Unilateral Effects

Guidelines 1 (HHI's changes in concentration) and 2 (essentially, unilateral effects from the 2010 HMG) cover the asserted usefulness of HHI analyses as well as what is now well-worn unilateral effects analyses. And, no doubt, practitioners can (and will) debate the advisability of lowering HHI thresholds to pick up more deals. The academic bases for the change is seriously contested;[20] moreover, deals in the low range of "concentrated" will inevitably produce more arguments about the number and vigor of current competitors, "rapid" entrants, and so on. This, however, is not where the main controversy lies.

An Asserted Structural Presumption if the Merged Firm's Market Share Exceeds 30 Percent is Aggressive. The more provocative aspect of Guideline 1 is the assertion of a structural presumption—essentially independent of HHIs (requiring only a delta of 100)—when the combined share is greater than 30 percent, even if the market is not highly concentrated under the HHI screen. This is the first place (of many) in the DMG where practitioners and courts are likely to take issue with the notion that the Guideline is based on *binding* authority. To be sure, the Court in *PNB* observed that a 30 percent market share can threaten undue concentration, but that is a far cry from demonstrating, as the Agencies suggest they have, that courts should have treated this as a binding threshold for *all* horizontal Section 7 analysis. Moreover, the leading modern Section 7 case, *Baker Hughes,* questions the viability of the *PNB* presumption itself (as do several academics from divergent perspectives[21]), and other appellate courts treat *PNB* more as a starting point that is passed through rather quickly.[22] In the face of this extensive Section 7 case law since 1963 (even if primarily in the appellate courts), the 30 percent threshold seems arbitrary and dubious as a presumption for markets that are not otherwise highly concentrated.

A Unilateral Effects Analysis Fully Untethered to Market Definition. A more subtle extension of now-standard analyses of anticompetitive effects is found in Guideline 2, which asserts a presumption for any reduction in "substantial" competition between the merging parties. But even the 2010 HMG, which expanded on unilateral effects and upward pricing pressure, did not have the audacity to claim such a presumption, and with good reason. Courts (including most notably *Oracle*[23]) have lambasted the government's myopic focus on direct competition between the parties without reference to the current and potential competition faced by the parties, and Congress long ago rejected this kind of presumption as well.[24]

Guideline 2 nevertheless marches on, detailing a highly flexible list of qualitative evidence that may reflect direct and substantial competition between just the two merging parties (e.g., as reflected in competitive decisions and customer substitution), and Appendix 2 is referenced to incorporate the economic analyses (slightly expanded) from the 2010 HMG.[25] It is seriously doubtful, however, that the Agencies can use Guideline 2 to bypass the "line of commerce" market definition requirement, which is there to capture *all* of the competition that might constrain the merged firm.

Flexing the Potential Competition Doctrine, But Perhaps Too Much

In many ways, the DMG's treatment of potential competition (Guideline 4) reads like a useful discussion of actual

controlling cases, *Marine Bancorporation*[26] and *Falstaff Brewing.*[27] It distinguishes between "actual" and "perceived" potential entry, and it explains the Agencies' planned application of those principles. The push back, however, will be on the Agencies' view as to how broadly the doctrine can be applied and what can be inferred from different types of evidence. With regard to scope, for example, Guideline 4 (note 36) declares, without citation, that "[h]arm from elimination of a potential entrant can occur in markets that do not yet consist of commercial products, even if the market concentration of the future market cannot be measured using traditional means." Guideline 4 then states that unless one or both of the merging parties' entry would have anything other than a *de minimis* "deconcentrating" effect, the merger may substantially lessen competition. Taken together, the agencies arguably could merely assert that the target is engaged in some form of innovation that may someday be commercialized and may have more than a *de minimis* effect on market concentration. But treating a bald assertion of potential commercializable innovation as sufficient to defeat a merger is a highly questionable extension of Supreme Court authority and likely an inherent violation of the causal limitations of Section 7 to "probabilities."

Further, Guideline 4 purports to give the Agencies enormous flexibility on the evidence required to presume harm from potential competition. First, the Agencies can conclude, based on "objective" evidence, that actual potential entry by either party is reasonably likely; it does not require any existing plans to enter. Second, and somewhat perplexing, the concept of "perceived" potential entry does not require that any current market participants actually perceive any potential entry or evidence of any firm reacting to such perceived entry. It is sufficient that, in the Agencies' view, there is "objective evidence" that a current market participant *could* reasonably consider a merging party to be a potential entrant into that market. Again, even though the FTC touts its "success" in having the court accept such a notion (which is debatable), casting this interpretation as binding law is highly questionable.

An Open-Ended Raising Rivals' Costs Presumption

Probably the most novel, if not mind-bogglingly broad, Guideline is 5: "Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services that Its Rivals May Use to Compete*."* Unlike other Guidelines, this one does not even attempt to cite controlling Supreme Court case law—there are no words to pluck for a theory that, in essence, is a an infinitely flexible raising rivals' cost theory that, on its face, is untethered to market structure or a firm's asserted dominance. Hence, the Guideline itself highlights that its raising rivals cost theory need not involve "traditional vertical supply and distribution relationships." In other words, it would capture not just vertical mergers, but conglomerate mergers or asset acquisitions as well; the scope of this RRC Guideline is truly breathtaking.

Nor, likewise, is there any suggestion that the Agencies would have to prove likely anticompetitive effects in a well-defined antitrust market. Instead, the Agencies are looking for situations where a transaction may potentially increase a firm's ability and incentive to weaken or exclude its rivals, including having an adverse effect on a rival's bargaining position. This could range from a merged firm's ability to control access to related products, services, or customers or, alternatively, to gain access to a rival's competitively sensitive information, which could undermine competition from that rival.

Conspicuously, Guideline 5 does not explain what the Agencies must prove to meet their burden for a presumption of anticompetitive effects, and again no merits-oriented case law is cited for this particular framework; indeed, the cite (in the DMG preamble) to *U.S. v. AT&T*[28] only highlights how much the Agencies are stretching here, because that court rejected any notion of a presumption. Yet, clearly, the Agencies have in mind shifting the burden to the parties in a distinctly European style—i.e., proving a negative, to wit: "The merging parties may put forward evidence that there are no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder to compete, or that the merged firm will be more competitive as a result of the merger." It is tempting, and not likely inaccurate, to conclude that a primary purpose of Guideline 5 is to add another theory for addressing the perceived evils of Big Tech as "gatekeepers" of their alleged ecosystems.

A Vertical "Structural" Presumption at 50 percent?

One odd aspect of the DMG is to have discarded the 2020 VMG (at least the FTC) and declare that these horizontal/vertical distinctions (and presumably conglomerate) are not really useful anymore, yet then have a Guideline dedicated to "vertical mergers"—Guideline 6 states that "Vertical Mergers Should Not Create Market Structures That Foreclose Competition." The title of Guideline itself presumes that vertical mergers can "create" market structures that inherently harm competition through foreclosure. But any such presumption is inconsistent with binding legal precedent. For example, the *AT&T* decision makes clear that vertical mergers are not inherently anticompetitive and that the government must *prove* that there is a likelihood of foreclosure that will harm competition.[29] We also know from economic literature and case law that assessing the incentive and ability to foreclose competition itself, let alone in a way that has demonstrable market-wide effects, is incredibly complex and cannot flow from simple share analysis to presumptive harm, even if it may be a useful starting point for assessing incentives and potential effects. And, of course, in the modern era, there is that pesky question of procompetitive efficiencies from vertical mergers, including those that may eliminate double marginalization or incentivize innovation or other dynamic efficiencies: these are essentially ignored

in the DMG. Again, one would think the Agencies would want to avoid the *AT&T* decision for these reasons, because it is not helpful to them either in establishing any presumptions or in asserting any application of "binding" Supreme Court authority.

Guideline 6 also boldly declares that any potential foreclosure above 50% is itself presumptive evidence of harm to competition and that below 50% the Agencies will look to certain "plus factors," such as any trend toward vertical integration; the nature and purpose of the merger; whether the relevant market (where the foreclosure might occur) is already concentrated; and whether the acquiring firm has a dominant position or the vertical merger might raise entry barriers. But with such a departure from recent guidelines and case law, one might have expected the Agencies to present economic literature or industry studies supporting why a 50 percent *potential* foreclosure share should be *presumed* to translate into (i) *actual* likely foreclosure, and (ii) a substantial lessening of competition in a relevant market.

What we find instead are a few dicta references to *Brown Shoe,*[30] *Fruehauf,*[31] and *DuPont*[32] concerning the general risk of vertical foreclosure, all of which has to be measured against a body of law and literature since then that confirms why anticompetitive effects cannot be presumed in a vertical setting.[33] Because of the lack of legal and economic support, it is highly unlikely that a court—let alone an appellate court—would adopt the presumption in Guideline 6, but instead would leave the assessment of vertical foreclosure to the fact-intensive incentive and effects analyses that courts have been undertaking for decades.

A "Dominant Firm" Entrenchment Theory at 30 percent? *P&G* on Steroids

Consistent with a recent trend to think of Section 7 and Section 2 of the Sherman Act as complements, Guideline 7 proposes that "Mergers Should Not Entrench or Extend a Dominant Position." On the surface the framework sounds plausible –e.g., for a monopolist that acquires a firm that, on the evidence, helps "maintain" its monopoly power. But this is far from what the Agencies have in mind. Instead, it appears that the Agencies plan to breathe new life into a conglomerate entrenchment theory—as in *P&G,*[34] in which the Supreme Court blocked a large, diversified company from acquiring a dominant company in another product market, because the acquisition could burden rivals in the dominant target company's market. Under current antitrust jurisprudence, that improperly penalizes firms for being too big and efficient, and the Agencies subsequently stopped bringing cases under this theory. Hence, Guideline 7 can be viewed as the most "ideological" because it in essence declares that "big is bad" and must be constrained, irrespective of the absence of horizontal or vertical effects. There is a *reason* why *P&G*—though technically "good law"—is read only in the classroom, and not in government briefs (at least to date).

"Dominance" is Not the Same as Monopoly. As a threshold matter, the very language of Guideline 7 is distinctly European, where "dominance" can be found with a much lower market share (approximately 40 percent) as opposed to the 60-70 percent share for monopoly power under U.S. law.[35] Moreover, in the DMG, the Agencies latch onto some language from *PNB* to the effect that the government should try and "preserve the possibility of deconcentration." This appears to have infused the Agencies with the enthusiasm for an even lower and more flexible notion of what may be viewed as "dominance" or, in U.S. terms, monopoly power.

Guideline 7 defines a firm with a "dominant position" as (i) having—through direct proof—the power to raise price, reduce quality, or otherwise impose terms that they could not obtain but for the dominance (akin to the unequal bargaining power), *or (*ii) having a least a 30 percent market share. There is no cite to controlling Section 7 cases or literature for this 30 percent market share figure. The closest precedent is the "leading firm" proviso in the 1984 Guidelines, which recognized that the Agencies might challenge certain horizontal mergers of large firms (at 35%) where the Guidelines might not otherwise support it. But as Carl Shapiro explains, that provision was dropped in the 2010 HMG because a unilateral effects analysis was much more exacting and reliable (though he now supports a 50% leading firm proviso).[36] At a minimum, the Agencies needed to cite some academic literature or studies supporting a revitalized leading firm proviso, especially at this new lower level.

"Entrenchment" is Not an Existing Section 7 Doctrine. Guideline 7 also treats as established that a firm with a 30% share is "entrenched" and that the concept is viable as a presumption of anticompetitive effects for any such firm's acquisition. Hence, Guideline 7 would replace effects analyses—e.g., even unilateral effects or UPP—with a broad presumption that would stop any qualifying merger that may "through any mechanism consistent with market realities, lessen competitive threats in the marketplace."

Looking at the type of merger-related entrenchment highlighted in the DMG, one can readily see that the concerned effects are just as likely to be procompetitive as not, especially under the prevailing CWS. Thus, Guideline 7 highlights whether the merger may increase entry barriers "generally;" increase switching costs; interfere with competitive alternatives; deprive rivals of scale or networks effects; or eliminate a nascent threat (although this one may also implicate several other Guidelines). As to each of these it is wishful thinking, at best, to suppose that a court will conclude that it is bound, "as a matter of law," to apply a *P&G*-like conglomerate entrenchment theory. Again, what leaps out with this Guideline is close to the self-declared regulation of successful firms, particularly Big Tech platforms, where Congress has chosen not to act.

The "Extension Into a Related Market" Prong Sounds in Speculative Leveraging. Guideline 7 also asserts that, after a merger, a "dominant" firm "might" use tying, bundling,

or conditioning to leverage its position, which could harm firms in related markets. But even older cases rejected the use of Section 7 for potential leveraging,[37] especially where Section 2 is available for any actual post-merger misconduct. Further, as one FTC Commissioner observed several decades after *P&G,* Section 7 has never been extended to the theory that the acquisition raises the potential for unlawful tying because "such conduct appears to fall short of the 'reasonable probability' standard under Section 7 of the Clayton Act."[38] Again, as with other Guidelines, the Agencies do not offer an analytical framework for proving whether such effects are likely to occur—the *status* of a "dominant" firm is enough of a risk in the Neo-Brandeisian world.

Protecting Workers....Okay, But Which Ones?

Under new antitrust leadership, there is a clear and express desire to ensure that all of the antitrust statutes work to the benefit of labor, wherever possible. This is captured in Guideline 11, which focuses on mergers that may lessen competition for "workers or other sellers." But this actually is not a new idea, either in concept or the case law; it is more a matter of emphasis. The bigger issue is whether the Agencies will be able to help the type of worker they appear to have in mind—e.g., an average worker (and perhaps not part of a union)—and not those whose skill and bargaining power would likely already enable them to protect themselves to a large extent—e.g., famous authors or professional golfers.

Was there a Need for New Guidance in Labor Markets? Probably not, although as a matter of policy and priorities there is no harm in the Agencies highlighting the labor focus. The 2010 HMG already discussed the buy side in detail, including an explanation of the reverse analytics that apply for buy-side market definition and effects. While the 2010 HMG address harms to input sellers, they obviously apply to sellers of labor services as well.

Are Famous Authors and Professional Golfers the "Workers" in Mind? The more practical problem with the analytics of monopsony or oligopsony market definition involving labor is that they tend to narrow markets to highly skilled or unique labor categories, which in turn leaves somewhat hollow the consistent call of the Agencies to use antitrust, including Section 7, to protect workers from low wages or other degraded terms of employment. In many respects, those perceived to be most exploitable—i.e., with the least bargaining power—tend to be relatively less skilled (though as the Guideline highlights, ease of mobility cannot be assumed). For these workers, it may be more difficult to define narrower markets, notwithstanding the DMG's detailed attempt to focus on mobility barriers and the like. And although labor markets are not particularly complex, identifying a merger that meets an HHI structural presumption may be difficult. Perhaps this is why the DMG, without apparent support from case law or economic literature, state that market concentration thresholds for mergers between rival employers will be lower than those between rival sellers.

Continued Scrutiny of Partial Acquisitions/ Minority Investment

Guideline 12 focuses on partial ownership and minority interests. This is not particularly new or ground-breaking, as most of the content was detailed in the 2010 HMG. As before, Guideline 12 highlights the concern over the incremental ability to influence operational decisions or to gain access to competitively sensitive information. And, as before, this Guideline focuses on the potential for reduced unilateral incentives for the acquiring firm to compete, along the lines of traditional diversion and UPP analysis covered in the 2010 HMG. Hence, if there is anything particularly new or controversial here, it has yet to be revealed.

A New Emphasis on "Roll-Ups"

Guideline 9 provides a framework for analyzing a merger that is "part of a series of multiple acquisitions"—including "roll ups"—a focus that is relatively new, especially when the Agencies graft onto it the question of whether there is a trend toward consolidation in the industry (Guideline 8). And, of course, for some time now the Supreme Court has looked at a series of acquisitions as monopolization or attempted monopolization under Section 2 of the Sherman Act in combination with Section 7.[39] Again, the challenge for the Agencies will be how to persuade courts that (i) factually, the merger in question is part of a scheme or plan, and (ii) that a "trend" matters in terms of *projecting* likely harm to competition under today's CWS. At a minimum, however, businesses need to prepare themselves for this scenario as it is not a subject that courts will reject out of hand.

Beefing Up the Arsenal for Big Tech Mergers

One can legitimately argue, or simply observe, that a primary purpose of the entire DMG is for the Agencies to alert parties and the courts that they are laying down the asserted legal foundation to expand their arsenal against Big Tech and other large platforms. This is evident from the Agencies' statements accompanying the release of the DMG, and it has been the focus of speeches and panels since the new administration was put in place. And, of course, it was the entire focus of the 2020 House Report, and has since been the subject of numerous legislative proposals, none of which have yet to pass. Transparency is not an issue here.

The more fundamental question in reviewing Guideline 10 is whether it makes sense under Section 7 jurisprudence—with or without Section 2 supplementation. A brief review of what the DMG say about platforms, as well as the DMG assertion that all of the guidelines will be available to target Big Tech, suggest that courts will have to determine what theories are in fact viable under existing law and what evidence may or may not support them. What courts will not do is let the Agencies, through the DMG, assert essentially legislative changes in law that have yet to be achieved.

No Limits Based on Market Definition or Platform Structure. From a traditional perspective, acquisitions

involving platforms, including Big Tech, can involve any number of marketplace perspectives, such as nascent competition (small, but in the relevant market), potential competition (potentially in the market), vertical relationships (including potential foreclosure or raising of rivals' costs), and conglomerate mergers (adjacent markets). But Section 7 is not a statute de-linked from a market definition requirement; nor is Section 2. One of the first tasks of Guideline 10, then, is to deal with market definition, and in particular *AMEX*.[40] Note 76 of the DMG attempts to take this on, observing that *AMEX* was limited to "transaction" platforms under a Sherman Act challenge. It also asserts that many platforms are not purely transactional or offer other bundled products or services, and that even pure transactional platforms can have changes in market structure that adversely affect non-price competition. Clearly, the Agencies are trying to give a nod to *AMEX* but leave themselves as much running room as possible to go after Big Tech and other large platforms.

All Potential Adverse Effects are on the Table. The main import of Guideline 10, however, is to give notice to parties—and lay a foundation for later use in courts—that there are no limits on what the Agencies can argue in terms of potential anticompetitive effects for the platform economy: the Agencies will consider competition *between* platforms, "*on*" a platform, or to "*displace*" a platform or any of its services. As the Guideline 10 declares at the outset: "Mergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical." In the Agencies view, the entire ecosystem, and any part of it, is in play.

Expect All the Guidelines to Target Big Tech at Once. The DMG (and the Agencies' related statements) also make clear that none of these frameworks or asserted presumptions are mutually exclusive; they all can be brought to bear at once. It is easy to see, then, the gauntlet that Agencies would like to have Big Tech run for any acquisition—and this is in addition to the expanded HSR requests that the Agencies recently announced. Take, for example, a hypothetical acquisition by a Big Tech platform of a new start-up that is looking for an investment offramp. Under the DMG, what theories will the Agencies explore for the transaction that "may" substantially reduce competition under the Agencies expansive view of causation? One can easily imagine, to wit:

- Significantly increase concentration in a highly concentrated market? (Guideline 1)—could be a tough one for the Agencies
- Eliminate substantial competition between firms? (Guideline 2)—clearly in play as the Agencies would look hard at current or future overlaps, including on innovation and so-called future potential competition
- Increase the risk of coordination? (Guideline 3)—not likely relevant
- Eliminate an actual or perceived potential entrant? (Guideline 4)—very much in play, especially with the Agencies expansive view of innovation and causation
- Create a firm that controls products or services needed by rivals? (Guidelines 5)—seems custom made for this type of acquisition (though a stretch on the law, as described above)
- Create a vertical market structure that "forecloses" 50 percent of a market or involve "plus factors"—again, likely in play
- "Entrench or extend" a dominant position (Guideline 7)—as with No. 5, this one appears written (especially on the factors below 50 percent) for Big Tech
- Evidence a trend toward concentration (Guidelines 8)—enough flexibility not to be ignored
- "Otherwise substantially lessen competition or tend to create a monopoly"? (Guideline 13)—if all else fails, go back to the statute…but the current law comes with it!

Whether targeting Big Tech or other transactions, can it be said that all of these theories reflect "binding" Supreme Court authority or well-settled Section 7 doctrines at any point in time? Of course not. But the long-term play of the Agencies is to see if any of these theories can gain traction in the courts as frameworks, much like the HHIs did for horizontal mergers decades ago and, to a lesser extent, unilateral effects analysis more recently. But unlike those analytical principles (and sometimes presumptions), there is nothing in the DMG demonstrating to courts that these purported established frameworks are based on extensive Agency experience, robust academic studies, or a line of cases leading up to today's doctrines and law—which is what courts will inevitably apply.

Conclusion: Will the Courts Buy It?

The DMG reflect structuralist Neo-Brandesian values and priorities more than interpretive guidance under existing case law. Thus, while the DMG include many instances of transparent and useful clarifications and additions, in the end they effectively make legal arguments for a broad range of presumed violations, while providing little insight into how the government would demonstrate probable anticompetitive effects once the parties come forward with rebuttal evidence. And that is separate and apart from minimizing the CWS and the overarching objectives of the 2010 HMG, which was the prevention of harmful enhancements of demonstrable market power. When combined with the Agencies' rejection of the courts' decades-long interpretation of the "may" incipiency standard to mean "probable," there is a serious risk that courts will view the DMG in large part as an ideological advocacy document rather than a reflection of extensive agency experience and expertise that can guide judicial analyses and decisions. And, if that turns out to be the case, much of what is new and useful in the DMG will be minimized or lost. Ultimately, perhaps the

most disturbing message from the DMG is the Agencies' belief that they are following binding case law that allows them to retreat into the type of structuralism that gave us *Vons.*[41] They are likely in for a rude awakening. ■

[1] Clayton Act § 7, 15 U.S.C. § 18.

[2] *See* N. Rose and C. Shapiro, *What Next for the Horizontal Merger Guidelines?*, ANTITRUST, Spring 2022, at 4.

[3] J. Keyte, *New Merger Guidelines: Are the Agencies on a Collision Course with Case Law?* ANTITRUST*,* Fall 2021, at 49.

[4] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[5] Brown Shoe v. United States, 370 U.S. 294 (1962).

[6] FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967).

[7] *See Brown Shoe Co,* 370 US. at 323 & n.39 (Congress used the words "may be substantially to lessen competition" to indicate *probabilities,* not certainties): US v Baker Hughes Inc., 908 F.2d 981, 984 CDC. Cir. 1990 ("Section 7 involves *probabilities,* not certainties or possibilities"): Hospital Corp of America v. FTC, 807 F.2D 1381 (7TH Cir. 1986) (requiring appreciable danger of higher prices in the future).

[8] *See* FTC v. Microsoft Corp., 23-cv-02880-JSC (N.D. Cal, July 10, 2023); FTC v. Meta Platforms, Inc., Case No. 5: 22-cv- 04325-EJD (N.D. Cal, Jan 31, 2023); Illumina, Inc. and GRAIL, Inc., No. 9401 (Sept. 9, 2022) (Initial Decision); United States v. UnitedHealth Group, Inc., No. 1:22-cv-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept 19, 2022); United States v. United States Sugar Corp., et al., No. 1:21-cw-01644-UNA (D. Del. Nov. 23, 2021).

[9] *See* D. Francis & C.J. Springman, Antitrust: Principles, Cases and Materials (2023), at 421.

[10] Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[11] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 468 n.10 (1977). (1977).

[12] Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[13] Illinois Tool Works, Inc. v. Ind. Ink, 547 U.S. 28 (2006).

[14] Leegin Creative Leather Prods. Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[15] Ohio v. Am. Express, 138 S. CT. 2274 (2018).

[16] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[17] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990)

[18] See note 22, *infra.*

[19] *See Brown Shoe,* 370 U.S. at 324 ("determination of the relevant market is a *necessary predicate* to a finding of a violation [of Section 7] because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition"); *see also Marine Bancorp,* 418 U.S. at 618; *PNB,* at 356. And, in modern cases, the court again put the assertion to rest in FTC v. Whole Foods Mkt, Inc., 548 F.3D 1028, 1036 (D.C. Cir. 2008) (rejecting argument that market definition can be avoided as a "means to an end," citing *Brown Shoe).*

[20] *Compare* C. Shapiro, Antitrust in a Time of Populism, Int'l Journal of I.O., Vol. 61 pp. 714-748 (2018) with E. Dorsey, et al, Consumer Welfare & The Rule of Law: The Case Against the New Populist Antitrust Movement, Regulatory Transparency Project (April 15, 2019).

[21] *See* L. Kaplow, Market Definition: Impossible and Counterproductive, 79 ANTITRUST L.J. 1 (2013). *See also* D. Francis & C.J. Springer, note 9, *supra*, at 421 (highlighting that *PNB* itself limited the presumption to the facts before it).

[22] Courts now often easily move beyond a structural starting point in upholding mergers with significant high combined shares. *Baker Hughes*, 908 F. 2d at 963 n.3 (76% post-merger share); FTC v. Butterworth Health Corp. No. 96-2440, 1997 US App LEXIS 17422, at 6 (65% post-closing share); United States v. Waste Management, Inc*.,* 743 F. 2d 976, 980- 81 (2d Cir. 1984) (48% post-closing share).

[23] United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1166-73 (N.D. Cal. 2004) (rejecting a unilateral effects analysis that focused on substantial head-to-head competition on a localized "node" rather than assessing other potential competitive constraints). *See generally* J. Keyte & K. Schwartz, "Tally-Ho;" UPP and the 2010 Horizontal Merger Guidelines, 77 ANTITRUST L.J. 587 (2011) ("Tally-Ho").

[24] *See* Tally-Ho*,* at pp. 596–98.

[25] While the DMG rely on ProMedica Health System, Inc. v. FTC, 749 F. 3d 559, 568-70 (6th Cir. 2014), for its unilateral effects presumption, the case is not so supportive. To be sure, it observes that a "merger to monopoly" would enjoy that conclusion, but the court found unilateral effects only after a detailed analysis of likely harm; no finding was based on the mere assertion that the parties were "substantial" competitors.

[26] United States v. Marine Bancorp., 418 U.S. 602 (1974).

[27] United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

[28] *See* United States v. AT&T, 916 F.3d 1029 (D.C. Cir. 2019*).*

[29] *Id.* at 1032-33.

[30] *Brown Shoe,* 380 U.S. at 323-24.

[31] Fruehauf Corp. v. FTC, 603 F. 2d 345 (2d Cir. 1974).

[32] United States v. El du Ponte De Nemours & Co., 353 U.S. 586 (1957).

[33] *See* at *supra* notes 10 & 14 (discussing theories and precedent).

[34] *See* note 6, *supra.*

[35] *See* J. Keyte, *Why the Atlantic Divide on Monopoly Dominance Law and Enforcement is So Difficult to Bridge*, ANTITRUST*,* Fall 2018, at 113.

[36] *See* note 2, *supra.*

[37] *See* Heublein, Inc. 96 F.T.C. 385, 596-99 (1980) (rejecting a claim based on potential leveraging).

[38] *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in Time Warner Inc., Docket C-3709 (July 19, 1996).

[39] *Cf.* United States v. Grinnell Corp., 384 U.S. 563 (1966).

[40] *See* note 15, *supra.*

[41] *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966).