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The Final Merger Guidelines: Will the Agencies Have the Courage of Their Convictions?

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NOW THAT WE HAVE THE FINAL MERgers Guidelines ("MGs") from the Federal Trade Commission and Department of Justice ("Agencies")—and as we await likely broad revisions to the pre-merger notification ("HSR") filing requirements—it is fair to ask whether the Agencies will actually start litigating the MG's more novel, or at least provocative, analytical frameworks. After all, the Agencies have asserted time and again that all of the MGs are based on established and controlling Supreme Court authority.[1] And whatever one thinks of that proposition, practitioners, businesses, and the courts themselves will remain in a state of disequilibrium until the more far-reaching theories in the MGs are litigated. It would also be particularly unsettling—if not counterproductive and arguably unfair—to have the Agencies burden merger parties with extensive investigations under all of these theories, only then to avoid testing them in court.

What I do here, then, is highlight the MG's presumptions and analytical frameworks that can be viewed as in particular need of judicial scrutiny, if in fact Section 7 (and Section 2) jurisprudence is to evolve into something clear and predictable. How that would likely to turn out I do not predict, but let the Agencies stand behind this dramatic enforcement sea change and bring on some real defining litigations.

Some Tweaks and Retreats

Before diving into the substance of what remains most novel in the MGs, it is worth summarizing some of the changes made as a result of the public comment period. Some are subtle changes in language, while others abandon (or minimize) positions and thresholds asserted in the draft MGs.

In terms of useful language changes and clarifications, the MGs certainly soften the presumptive language that pervaded the earlier draft. In particular, rather than asserting that "mergers should not . . . ," the final MGs speak more in terms of "mergers may violate the law when they. . . ." Further, and relatedly, the MGs make it clear throughout that the Agencies' theories of harm may be "defended" or "rebutted" by the parties (though the scope of that evidence remains quite narrow, and the burden arguably remains higher than courts may require).

As for retreats on the presumptions themselves, the MGs remove (though, as discussed below, not completely) the draft guideline that a 50% market foreclosure in a vertical deal (or "related" product) presumptively violates Section 7. Similarly, and with slightly different equivocation (also discussed below), the MGs no longer assert that a "dominant position" (presumably referring to an actual or potential monopoly position if one is to be textual) can be presumed from a 30% market share.

Finally, the MGs give up treating a trend toward concentration as a standalone violation, turning it instead into an "important consideration" in other analyses. But even here the Agencies transparently disclose what they have in mind (which is a good thing), including a desire to thwart a so-called "arms race for bargaining leverage."[2] Yet, here, as elsewhere (though less express), the causal chain supposedly captured by "incipiency" in the provided example is manifestly speculative: distributors "might" merge to gain leverage against suppliers, who then "might" merge to gain leverage against distributors, resulting in a wave of mergers that might lessen competition at both levels. This is a prime example of seeing Section 7 through a lens of mere possibilities rather than probabilities, as Section 7 requires.[3]

Guidelines 1-6: What Needs Judicial Testing

Not all of the Guidelines, of course, break complete new ground. What I focus on here is where a Guideline either (i) contemplates a structural showing but adds further presumptive thresholds, or (ii) does not appear to require market definition at all—something a court would likely find to be new ground.

Guideline 1: The 30% Presumption for Horizontal Mergers. Guideline 1 deals with horizontal mergers, and as we all know, it lowers the concentration thresholds (itself debatable). But the new presumption that could use particular judicial clarification is the provision that a merger resulting in a mere 100 point HHI delta, without more, is presumed anticompetitive if the merged firm has a 30% market share. For this, the MGs rely on the *Philadelphia National Bank*[4] dicta about "threatened" undue concentration, but as many have observed, that proposition is neither a holding nor a stated presumption for all mergers under Section 7.[5] We await a case where the Agencies rely solely on this Guideline provision for much needed judicial scrutiny.

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Guideline 2: Unilateral Effects With No Market Definition. One of the more subtle changes in the MGs is to take the established concept of unilateral effects (with all of its qualitative and quantitative analyses, including UPP) and strip it of any need to prove a relevant market or put the theory of harm in a structural context. Instead, Guideline 2 boldly asserts that the merger of parties that have "substantial" competition between them "ordinarily suggests that the merger may substantially lessen competition."[6] For this broad proposition, the MGs cite a Section 1 case from 1964 and a more recent appellate court decision that was making an observation about mergers to monopoly in well-defined markets.[7] Hence, Guideline 2, even with all of its analyses, will test courts on the market definition requirement—here, too, the Agencies have yet to bring that case.

Guideline 3: Coordinated Effects. Subject to some of the observations below on incipiency and burden of proof, this Guideline does not offer particularly new issues for the courts to consider.

Guideline 4: Potential Competition: Pushing the Envelope. Guideline 4 is most interesting because it deals with a potential competition doctrine that already faces rather restrictive Supreme Court authority in *Marine Bancorp*[8] and its progeny. But the Agencies clearly are quite interested in flexing this theory as much as possible, especially in the context of Big Tech, pharma, and other dynamic industries.

Hence, the main new issues under potential competition theory are evidentiary. For example, with respect to the actual potential competition doctrine, the Guideline asserts that if the company even "considered" organic entry instead of a merger, this is evidence "that, absent the merger, entry would be reasonably probable."[9] That simply makes no sense, especially absent an assessment of why, objectively, organic entry was rejected.

Another perplexing proposition of evidence is found with respect to perceived potential competition. Guideline 4 asserts that there need not be any evidence that current market participants were concerned about or had reacted to the asserted potential entrant.[10] The Guideline also goes out of its way to make clear that the Agencies want it both ways on the likelihood of entry under the potential competition doctrine and in the rebuttal context, respectively. For potential competition, the government does not have to prove that potential entry would be "timely, likely and sufficient" in the absence of the merger—notwithstanding that this sounds a lot like *Marine Bancorp.* In contrast, the parties will continue to be saddled with that heightened burden for rebuttal. The rationale, again arguably contrary to case law, is that in concentrated markets, "the loss of even an attenuated source of competition such as a potential entrant may substantially lessen competition"[11]—i.e., the Agencies once again fall back on a broad incipiency principle that embraces mere possibilities as proof of a substantial reduction in competition flowing from a merger.

Guideline 5: Anything Goes for Vertical or Conglomerate Mergers or for Any Form of Raising Rivals' Costs. Guideline 5 is perplexing and should be put to the test in the courts, because it bears little resemblance to anything we see in past Section 7 (or Section 2) jurisprudence. The title—"Mergers . . . [That] Create a Firm that May Limit Access to Products or Services That its Rivals Use to Compete"—is itself groundbreaking and without apparent limit. Further, on its face, it is not targeted at any particular category of non-horizontal merger, and in fact the MGs make clear that the only requirement is that a rival may use or need any of the "products, services, or routes" (or, presumably any assets) encompassed by the merger "*whether or not they involve a traditional vertical relationship. . . .*"[12] And it applies even if the "related product" is not being used by rivals, as it purportedly could affect a rival's negotiating position with other suppliers. Moreover, it does not matter if the merged firm has no intent to foreclose or harm a rival—the simple control of an important related product or service is sufficient.[13] As one reads this Guideline, it is easy to imagine a group of well-meaning drafters that only had one objective in mind—protecting rivals—with little sense that Section 7 is fundamentally concerned with substantial and durable reductions in market-wide competition within relevant markets. Thus, as a purported established principle of Section 7 (or Section 2) law in the merger context, this Guideline has more of a regulatory feel with a blank slate for the Agencies to identify (or perhaps imagine) any form of potential foreclosure, raising rival's costs, or other theory of non-horizontal harm that the Agency determines may pose a risk to a rival or even just to a rival's bargaining position. And while the Agencies gave up the 50% share threshold for vertical mergers in the body of the Guideline, it remains highlighted in a footnote as structural factor in assessing potential foreclosure of a "related market."[14]

Guideline 5 also spills several pages—again, quite transparently—on all of the risks that the drafters could envision for acquisitions that (i) are not horizontal and hence do not directly eliminate any competition; (ii) are not necessarily vertical (raising more traditional foreclosure issues); and (iii) do not involve "dominant" firms (saved for Guideline 6). In short, it reaches far beyond the standard Neo-Brandeisian concern with consolidation or even traditional vertical integration or foreclosure, instead invoking a distinctly European precept of "leveling the playing field," irrespective of whether the transaction demonstrably has the probability of causing market-wide harm.

Guideline 6: "Dominance" Without Market Definition, Novel Theories, and Protecting Adjacent Markets From Theoretical Section 2 Violations. Guideline 6 is something to behold, as much of it harkens back to a time when Section 7 essentially condemned bigness per se. While those days are long gone in modern jurisprudence, the MGs clearly want to bring them back, but with the added twist of targeting nascent acquisitions. Here, any number of issues will need to be litigated to gain clarity, and, again, the Agencies appear to be shying away from reliance on these entrenchment theories in litigation, including in the most recent Amgen case (dealing with the theory of possible post-merger bundling), where the FTC decided to settle with a conduct decree rather than seek to enjoin the transaction.

Proof of "Dominance" by "Direct Evidence" Is Highly Questionable. While Guideline 6 gave up the notion that "dominance" can be shown with 30% market share, this will not enable the Agencies to escape court scrutiny where dominance in U.S. terms means monopoly power—i.e., much greater power than captured by the European concept of dominance[15] and with a structural component (requiring market definition assessment) even under Section 2 analyses.

What remains in place, however, is the startling assertion that a "dominant position" can be established based solely on "direct evidence" of market power, which as all practitioners (and academics) know takes one down a variety of rabbit holes dealing with costs, margins, entry conditions, and so on. Hence, it would be very useful for the Agencies to bring a merger challenge based on an entrenchment theory where the asserted dominant position is based solely on direct evidence—but do not hold your breath.

Condemning Potential Efficiency–Enhancing (or Competitively Neutral) Acquisitions. Guideline 6 also appears to revive the notion—long abandoned in Section 7 analyses and antitrust law generally—that otherwise efficiency-enhancing mergers can be condemned for making the merged firm a better competitor. Guideline 6 of course does not put it in these terms, but it dedicates a section of the Guideline to examples where a firm merges with a firm producing a "complementary product" or acquires a "service that supports the use of multiple providers," asserting that these facially procompetitive transactions would violate Section 7 if they in any way impair rivals (e.g., by increasing switching costs, interfering with use of competitive alternative services, depriving rivals of scale economics or network effects, or interfering with interconnectivity).[16] In short, this part of Guideline 6 is the modern vision of big is bad, especially if the merged firm's enhanced attractiveness or efficiency makes it harder for rivals to compete. And that is difficult, at best, to cast as a substantial *reduction* in competition.

Continued Ambiguity Over What Is Anticompetitive About Nascent Acquisitions. The part of Guideline 6 dealing with nascent acquisitions is fairly transparent but troubling from a traditional Section 7 (or Section 2) perspective, especially as it relates to market definition, likely effects, and causation.

On market definition, the Guideline concedes that its concern over nascent acquisitions often will involve targets that do not compete directly with the acquiring firm (even at a nascent level) but instead do business in adjacent and narrow segments (which, of course, makes one think more about potential competition theories than "nascent" rivals). The Agencies' escape route for this situation is twofold: first, the Guideline highlights that these small, non-rivalrous firms may have the potential to "grow" into a future threat, again invoking (here, implicitly) an expansive causal premise for Section 7.[17] Second, the Agencies plainly acknowledge that what they are concerned about is "ecosystem" competition, akin to the massive regulatory efforts going on (rightly or wrongly) in the EU and U.K. relating to so-called "gatekeepers." But here in the U.S., the courts must deal with clearly asserted—and proven—market definitions and the theories that they implicate…or preclude.

Guideline 6 also references Section 2 as well as rapidly changing technologies—neither of which necessarily will make it easier for a court to accept what the Agencies have in mind. For Section 2, the Agencies invoke the *Microsoft* language about using predatory conduct to harm an actual nascent rival,[18] but this is not the same as an acquisition involving speculative future rivals.

And as for "technological transitions"—where the Guideline suggests that a nascent acquisition may "reinforce or recreate entry barriers"—Section 7 jurisprudence has long been weary of enjoining mergers where a firm's past success is not indicative of its future prospects, which is especially true in the context of rapid and dramatic technological change or innovation.[19]

Courts (and the Agencies) Long Ago Rejected Section 7 for Preventing Possible Post-Merger Section 2 Misconduct. Finally, the lengthy part of Guideline 6 dealing with potential extensions of a dominant position into another market is likely a non-starter on the law, and in fact the evidence to date is that the Agencies may know as much.

As the Agencies have long understood, courts have addressed and rejected the idea of seeking to enjoin a merger based on the possibility that the merged firm may engage in post-merger tying or bundling—it simply is too speculative a theory of harm, and in any event, it can be addressed by Section 2.[20] (And, importantly, unlike a horizontal merger, it does not involve an elimination of actual competition and a known change in market structure from which harmful effects are more properly asserted.)

Based on the recent *Amgen/Horizon* transaction, it is fair to conclude that the Agencies (or at least the FTC) are aware of the flaw in their post-merger misconduct theory (or at least the risk of loss in court). There, the FTC pursued a theory that the merged firm would have the incentive to offer post-merger bundled pricing and discounts, and the matter resulted in a settlement.[21] From one perspective, an argument could be made that the settlement vindicates the FTC's theory; on the other hand, the Agencies have been quite consistent in declaring that they are not interested in merger settlements but instead would seek to enjoin mergers that violate Section 7. The better view is that when the Agencies are either breaking new ground (or, here, already dealing with settled propositions that do not favor their theory) in a non-horizontal setting, they may be much less inclined to litigate. This, of course, changes the whole risk profile for these types of mergers, which also suggests that if the Agencies work up the gumption to litigate these more provocative theories, the merging parties might very well choose to fight it out.

The Kitchen Sink Approach to Gatekeepers and Ecosystems

Guideline 9 (which deals with the application of Guidelines 1-6) addresses mergers involving multi-sided platforms. The

important point to highlight here is the Agencies' express commitment to asserting Section 7 (or the Sherman Act) for mergers involving platforms, irrespective of whether the merger involves traditional horizontal competition, vertical relationships, or some form of conglomerate acquisition. As with Guideline 5, everything is on the table within an "ecosystem," including mergers "involving two platforms;" a platform operator acquiring a participant; a platform acquiring services or tools; or even a platform acquiring data.[22]

Again, the Agencies seemingly set down and thought about the ways in which rivals may be limited by acquisitions in the platform space—including far into the future—and then simply asserted that these theoretical "risks" can constitute presumptive Section 7 violations if they seem possible; no further analytics or analyses appear necessary, including any rigorous assessment of market structure, market dynamics, or likely effects. Accordingly, the myriad types of platform acquisitions will also have to be sorted out in actual litigations, which is at least underway in some respects in the FTC/Facebook case.[23]

The Agencies' Gambit on Incipiency and Burden of Proof

Finally, stepping back from individual Guidelines, an overarching theme in the MGs is that the Agencies need only identify "risks" and possible competitive harms to prevail in a merger challenge. Gregory Werden's article in this issue, "The Risk Concept of the New Merger Guidelines–Treating a Proposed Merger Like Schrodinger's Cat," thoroughly takes the Agencies to task for jettisoning the established "reasonable probability" standard of Section 7, and relying instead on the mere possibility of harm to establish a prima facie case—coupled with a restrictive opportunity for the parties to defend or rebut the claim.

In this respect, what is disappointing in the MGs, and what the courts will inevitably have to grapple with, is how to frame and organize the *evidence* the Agencies will have to show to meet their *ultimate* burden of proof on these novel theories—if the courts allow them in the first place. More useful guidance would have set forth how the Agencies will demonstrate likely harm to competition under these theories once the parties inevitably offer rebuttal evidence challenging either the structural case or the asserted theory of harm. In time, perhaps these issues will be resolved in actual litigated cases. What we should not have however, are Agencies undertaking broad investigations (with all of their costs and deterrent effects) under the cover of theories that they are unwilling to test in court.

Conclusion

There is no doubt that the Agencies, as well as those behind the drafting of the MGs, truly believe in the legal and economic bases of the more aggressive and provocative theories reflected in the MGs, and the Agencies deserve full credit for clearly signaling their apparent enforcement intentions. Ultimately, however, while the MGs and the Agencies are long on conviction, the real test will be whether the Agencies will be willing to submit their theories to the crucible of litigation. ■

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[1] *See, e.g.,* Press Release, Fed. Trade Comm'n, *Federal Trade Commission and Justice Department Release 2023 Merger Guidelines* (Dec. 18, 2023), www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines.

[2] MGs at 2.7.

[3] *See, e.g.,* Brown Shoe v. United States, 370 U.S. 294, 323, 323 n.39 (1962) ("Statutes existed for dealing with clear-cut menaces to competition, no statute was sought for dealing with ephemeral possibilities."); United States v. Baker Hughes Inc., 908 F.2d 981, 984 (D.C. Cir. 1990) ("Section 7 involves *probabilities*, not certainties or possibilities. (emphasis in original)).

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

[5] *See, e.g.,* Daniel Francis & Christopher Jon Sprigman, Antitrust : Principles, Cases, and Materials 421 (2023). To be sure, the district court in FTC v. IQVIA Holdings, Inc., No. 1:23-cv-06188-ER, 2024 WL 31232, at *33 (S.D.N.Y. Jan. 8, 2024), recently discussed the debate over the viability of a 30% presumption—stating that it would be "hard pressed" to hold that this presumption has been "repudiated" as a matter of law. But given the 46% share and an HHI of 3,635 and a 997-point increase, the court relied on both measures, leaving for another day any sole reliance on this new Guideline threshold. *Id*. at *34, 37.

[6] MGs at 2.2.

[7] *See* United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 665 (1964) (invoking Section 1); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 568-69 (6th Cir. 2014) (observing that a "merger to monopoly" would enjoy that presumption), *cert. denied*, 575 U.S. 996 (2015).

[8] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624-25 (1974).

[9] MGs at 2.4.A.

[10] *Id*. at 2.4.B ("Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants' internal perceptions or direct evidence of strategic reactions to the potential entrant.").

[11] *Id*. at 2.4.C.

[12] *Id*. at 2.5 (emphasis added).

[13] *Id*. at 2.5.C.

[14] *Id*. at 2.5.A.2 n.30.

[15] *See generally* James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, Antitrust, Fall 2018, at 113.

[16] MGs at 2.6.A.

[17] *Id*.

[18] *Id*. at 2.6.A. n.38-39 (citing United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam)).

[19] *Id*. at 2.6.A. *See generally* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974), and its progeny.

[20] *See* Heublin, Inc., 96 F.T.C. 385, 596-99 (1980) (rejecting claim based on potential leveraging); *see also* Dissenting Statement of Commissioner Mary L. Azcuenaga at 5,Time Warner Inc., FTC Docket No. C-3709 (July 19, 1996), www.ftc.gov/system/files/documents/cases/c-3709_dissenting_statement_of_commissioner_mary_l._azcuenaga.pdf ("challenging the mere potential to engage in such conduct appears to fall short of the 'reasonable probability' standard under Section 7 of the Clayton Act. . . . It is difficult to imagine a merger that could not be enjoined if 'mere possibility' of unlawful conduct were the standard.").

[21] *See* Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Settling Horizon Therapeutics Acquisition Challenge* (Dec. 14, 2023), www.ftc.gov/news-events/news/press-releases/2023/12/ftc-approves-final-order-settling-horizon-therapeutics-acquisition-challenge.

[22] MGs at 2.9(A)-(D).

[23] First Am. Compl. for Injunctive and Other Equitable Relief, 1:20-cv-03590-JEB (D.D.C. filed Aug. 19, 2021), ECF No. 75-1.