The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?

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The U.S. antitrust enforcement agencies designed the 2010 Merger Guidelines in part to assist the courts "in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context."[1] But with respect to at least one key issue, the treatment of market definition, there is a significant question as to whether the courts will be persuaded to follow the 2010 Guidelines' approach.

The 2010 Guidelines state that defining a relevant market is useful "to the extent it illuminates [a] merger's likely competitive effects" but note that the exercise "is not an end in itself."[2] Accordingly, the 2010 Guidelines indicate that the Agencies will "normally"—but not always—define a relevant market in merger challenges.[3] This is a notable departure from the 1992 Guidelines, which provided that, in analyzing a prospective merger, "[t]he Agency will first define the relevant product market."[4] In a separate statement, Commissioner J. Thomas Rosch described the new treatment of market definition as a "monumental contribution" that corrects the "misimpression" created by the 1992 Guidelines that defining the market and measuring shares are "'gating items,' without which competitive effects cannot be considered."[5]

Under general principles of administrative law, the Merger Guidelines are a statement of agency enforcement policy that is not binding on the courts.[6] Rather, a court may consider the

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010) [hereinafter 2010 Guidelines], *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf; Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Merger Guidelines Workshops (Sept. 22, 2009) [hereinafter Merger Guidelines Workshops], *available at* http://www.usdoj.gov/atr/public/speeches/250238.pdf at 5 (suggesting that revisions to the guidelines may be useful to the courts).

[2] 2010 Guidelines, *supra* note 1, § 4.

[3] *Id.* This discussion of what the Agencies will do in litigated merger challenges is arguably in some tension with footnote 2 of the 2010 Guidelines, which states that the "Guidelines are not intended to describe how the Agencies will conduct the litigation of cases." The clear statement in the body of the Guidelines regarding what the Agencies will do in litigation seems more telling than footnote 2, and more consistent with the Agencies' repeated comments that the 2010 Guidelines do in fact reflect the Agencies' enforcement plans. *See, e.g.*, Varney, Merger Guidelines Workshops, *supra* note 2, at 1.

[4] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 1.1 (1992, rev. 1997) [hereinafter 1992 Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf; *see also id.* at § 1.0 ("[a] merger is unlikely to create or enhance market power . . . unless it significantly increases concentration and results in a concentrated market, properly defined and measured.").

[5] Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf. This change may have been designed at least in part to improve the Agencies' odds of winning merger challenges in court. *See, e.g.*, Daniel M. Wall & Hanno F. Kaiser, *What the New Merger Guidelines Mean for Technology Companies* (Apr. 24, 2010), *available at* http://www.lw.com/upload/pubContent/_pdf/pub3492_1.pdf (arguing that showing a substantial lessening of competition in a properly defined relevant market "has been a core point in nearly every case the government has brought and lost").

[6] *See, e.g.*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws."); United States v. Kinder, 64 F.3d 757, 771 & n.22 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect . . . courts commonly cite them as a benchmark of legality."); Cal. v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120, 1128–32 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues").

Merger Guidelines to the extent it finds them persuasive.[7] In practice, courts have relied heavily on prior versions of the Merger Guidelines, quickly adopting new analytic tools promoted therein.[8] The 1982 Guidelines had such an effect on antitrust jurisprudence that they have been described as "the most significant contribution by the federal agencies to non-criminal competition policy analysis in the modern era."[9]

Some commentators have suggested that this influence is a result of the relative lack of court precedent in the merger arena, particularly following the decline in litigated merger challenges after the adoption of the Hart-Scott-Rodino Antitrust Improvements Act in 1976.[10] Others have attributed the importance of the Merger Guidelines to the lack of Supreme Court precedent in the area in recent decades.[11] Still others have suggested the courts have made a policy choice to interpret case law as consistently as possible with enforcement agency practice.[12] Whatever the reason, the Merger Guidelines' effect on the courts has been substantial and has led some commentators to suggest that courts have been too deferential to the Merger Guidelines, granting them "precedent-like" treatment that is inappropriate for a statement of enforcement policy.[13]

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In some cases, courts even seem to have given the Merger Guidelines more weight than their own precedent. In *United States v. Baker Hughes*, for example, the D.C. Circuit rejected an attempt by the Department of Justice to shift the burden to the defendant to show that entry would be "quick and effective" on the grounds that this "would require of defendants a degree of clairvoyance alien to section 7."[14] Following that decision, the Agencies adopted the 1992 Guidelines, which framed entry as a defense to the extent it is shown to be "timely, likely, and sufficient."[15] When the D.C. District Court next considered entry in *FTC v. Cardinal Health, Inc.*, it adopted wholesale the "timely, likely, and sufficient" framework of the 1992 Guidelines.[16]

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[7] *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) ("Although the Merger Guidelines are not binding on the court, they provide 'a useful illustration of the application of the HHI.'") (citation omitted); FTC v. Swedish Match, 131 F. Supp. 2d 151, 167 n.12 (D.D.C. 2000) ("The Merger Guidelines are not binding on the Court, but as this Circuit has stated, they do provide 'a useful illustration of the application of the HHI.'") (citation omitted).

[8] Courts have been similarly deferential in response to other revisions to the Guidelines. Courts were quick, for instance, to adopt HHI calculations of market concentration in the wake of the 1982 revisions, and to analyze efficiencies as described in the 1997 revisions. *See, e.g.*, FTC v. PPG Indus. Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (citing 1982 Merger Guidelines in adopting HHI as a measure of concentration), FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (analyzing efficiencies under framework in 1997 revisions to the 1992 Merger Guidelines), United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997) (same).

[9] William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 435 (2003) (arguing that the 1982 Guidelines "changed the way the U.S. courts and enforcement agencies examine mergers").

[10] *See, e.g.*, Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice*, 65 ANTITRUST L.J. 865, 866 (1996) ("[S]ince HSR became effective in 1978, only about 22 percent of the mergers that have been formally challenged by the agencies have actually been litigated in district court—compared to about 50 percent in the decade preceding HSR.").

[11] Varney, Merger Guidelines Workshops, *supra* note 2, at 10 ("The lack of modern Supreme Court precedent also underscores the need for Horizontal Merger Guidelines that accurately reflect the best economic and legal reasoning.").

[12] Allis-Chalmers Mfg. Co. v White Consol. Indus., Inc., 414 F.2d 506, 523 (3d Cir. 1969).

[13] Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 835 (2006) ("For guidelines to gain a status akin to rules," as the Merger Guidelines have, "is inappropriate as a matter of law."); Louis B. Schwartz, *The New Merger Guidelines: Guide to Government Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 576–77 (1983) (urging commentators to "continuously emphasize the nonbinding character of the Guidelines").

[14] 908 F.2d 981, 987 (D.C. Cir. 1990).

[15] 1992 Merger Guidelines, *supra* note 4, § 3.0.

[16] 12 F. Supp. 2d 34, 55 (D.D.C. 1998).

Persuading the courts to adopt the 2010 Guidelines' approach to market definition, however, is likely to be a more considerable challenge. The courts' long-standing treatment of market definition as a predicate to Section 7 claims is not a result of the 1992 Guidelines. In fact, in 1957—a decade prior to the adoption of the first set of Merger Guidelines—the Supreme Court in *United States v. E.I. du Pont de Nemours & Co.* described "[d]etermination of the relevant market" as "the necessary predicate" to a Section 7 claim.[17] And, in *Brown Shoe Co. v. United States*, the Supreme Court indicated that defining a market is required by the language of Section 7, which prohibits transactions that substantially lessen competition "in any line of commerce in any section of the country."[18]

In the half-century since *du Pont*, lower courts have continued to view market definition as a predicate to Section 7 claims. For example, the D.C. Circuit in *FTC v. Cardinal Health, Inc.* stated that "[d]efining the relevant market is the starting point for any merger analysis."[19] Similarly, the Eighth Circuit in *FTC v. Tenet Health Care Corp.* held that it is "essential that the FTC identify a credible relevant market before a preliminary injunction may properly issue" because "[w]ithout a well-defined relevant market, a merger's effect on competition cannot be evaluated."[20] And, just weeks before the final version of the 2010 Guidelines was published, the district court in *United States v. Dean Foods Co.* reaffirmed that "[i]n determining the likely anti-competitive effects of an acquisition, courts look to the relevant product market, as well as the relevant geographic market."[21]

Given the weight of this precedent, courts may be reluctant to embrace the 2010 Guidelines as readily as they have accepted past versions. Courts have, in other contexts, resisted adopting significant changes in agency guidance documents when the changes appeared to conflict with existing case law. In *United States v. Kinder*, for example, a prisoner defendant requested reconsideration of his sentencing for drug charges based on an amendment to the Sentencing Guidelines that changed the definition of how carrier weight would be calculated.[22] The Second Circuit rejected the request, finding that the Sentencing Guidelines amendment could not trump binding precedent that adopted the older method of carrier weight calculation. The dissent, in contrast, specifically pointed to the Merger Guidelines, and argued that with the Merger Guidelines courts had in fact altered prior precedent "by voluntarily accepting uncompelled guidance from a constructive administrative interpretation."[23]

Here, however, the existing court precedent does not simply adopt the treatment of market definition from an earlier version of the Merger Guidelines. Rather, the precedent is based on the language of the statute and predates the guidelines. It is not surprising, then, that judges have dismissed recent merger challenges that did not include a defined relevant market. For example, the Southern District of New York in *City of New York v. Group Health, Inc.* recently specifically rejected the plaintiff's attempt to use an alternative to a market definition screen.[24] The court dismissed the case on the grounds that the plaintiff's definition of the relevant market was inadequate as a

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[17] 353 U.S. 586, 593 (1957).

[18] 370 U.S. 294, 324 (1962).

[19] 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

[20] 186 F.3d 1045, 1051 (8th Cir. 1999).

[21] No. 10-CV-59, 2010 WL 1417926 at *1 (E.D. Wis. Apr. 7, 2010).

[22] 64 F.3d 757 (2d Cir. 1995).

[23] *Id.* at 771–72.

[24] No. 06 Civ. 13122 (RJS), 2010 WL 2132246 (S.D.N.Y. May 11, 2010).

matter of law, and rejected the plaintiff's attempt to amend the complaint to include evidence of anticompetitive effects based on an economic test emphasizing margins and diversion. The district court found no authority that might permit a case to go forward without a clear market definition and noted that "[i]n light of the case law's clear requirement that a plaintiff allege a particular product market in which competition will be impaired, this absence of authority is hardly surprising."[25]

[T]he 2010 Guidelines ask more of the courts than previous versions have . . . courts may not be willing to forgo market definitions in Section 7 cases.

Similarly, in August 2010, just after the announcement of the 2010 Guidelines, a district court rejected the FTC's post-acquisition challenge to Lundbeck Inc.'s purchase of a pharmaceutical treatment in development for patent ductus arteriosus.[26] The FTC had claimed that the acquisition enabled Lundbeck to raise the price of its earlier acquired treatment for the same condition by 1300%. Despite evidence of higher post-acquisition prices, and without mentioning the 2010 Guidelines, the court noted that market definition was a "necessary predicate" to a Section 7 claim and rejected the FTC's complaint on the grounds that the FTC had failed to demonstrate a relevant product market.[27]

It is possible that the courts may ultimately accept the 2010 Guidelines, as has been the case with past revisions to the Merger Guidelines. In fact, even prior to the 2010 Guidelines' release, there were indications that at least some courts might be receptive to a decreased emphasis on market definition. The split D.C. Circuit decision in *FTC v. Whole Foods Market, Inc.*, for instance, opens the door for the use of other economic tools in lieu of strict market definitions.[28] But the 2010 Guidelines ask more of the courts than previous versions have, and if recent court decisions are any indication, courts may not be willing to forgo market definitions in Section 7 cases. ●

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[25] *Id.* at *6 n.6.

[26] FTC v. Lundbeck, Inc., Civil No. 08-6379, slip. op., 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010).

[27] *Id.* at 38.

[28] 548 F.3d 1028 (D.C. Cir. 2008).