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By Gregory J. Werden[1]

The form of the draft Merger Guidelines ("dMGs") released by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC," and collectively, "the Agencies") is radically different from prior Merger Guidelines ("MGs") and Horizontal Merger Guidelines ("HMGs"). Appendices now address the how the Agencies delineate relevant markets, assign market shares, and assess unilateral and coordinated effects.[2] The body of the dMGs consists mainly of 13 "Guidelines."

Guidelines 1–8 are "frameworks" for assessing "the risk that a merger's effect may be substantially to lessen competition or to tend to create a monopoly." All eight can be seen as variations on the single "unifying theme" of the MGs and HMGs from 1982 to 2010—that mergers should not be permitted to create or enhance market power. Guidelines 9–12 "explain issues that often arise when the Agencies apply those frameworks in several common settings."[3]

At the outset, the dMGs usefully explain that the Agencies begin a merger assessment by asking "how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?" The dMGs assert that the Agencies' risk assessment is not an attempt "to predict the future or the precise effects of a merger."[4]

The radical changes in form offer advantages, but the radical changes in substance do not. In some ways, the dMGs read as if the last half-century of antitrust evolution never happened. And the dMGs, unlike their predecessors, fail to uphold the rule of law by identifying the mergers that the agencies do not intend to challenge. The frightening message of the dMGs is that nothing is safe, just as before the 1968 MGs.

BACKGROUND

A key rule-of-law principle is that the law must be known and predictable.[5] Congress and the courts have the primary responsibilities, but when a statute and associated case law does not tell potential offenders what is safe, the relevant enforcement agency has a responsibility to do so. Enforcement guidelines serve several useful purposes, but their primary function is telling potential offenders how to comply.

In 1950, Congress amended Section 7 of the Clayton Act to prohibit mergers and acquisitions when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The Agencies racked up over a 100 merger challenges before the Supreme Court provided some guidance in 1962.

On May 8, 1965, Attorney General ("AG") Nicholas Katzenbach declared that the DOJ felt obliged to "clarify" which mergers were challenged.[6] The task fell to Assistant Attorney General ("AAG") Donald F. Turner, who had been nominated the day before. In his first

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[2] This first look at the dMGs does not delve into the appendices.

[3] Guideline 13 is a space left open for any other framework the Agencies might devise. Prior MGs and HMGs left comparable space without making the lack of perfect foresight so conspicuous.

[4] The claim that the Agencies "do not seek to predict the future" is in tension with Supreme Court precedent. The Court described its task under Section 7 as trying "to predict the probable future consequences of this merger." Brown Shoe Co. v. United States, 370 U.S. 294, 332–33 (1962). And the Court has asserted that Section 7 requires "a prediction of [a merger's] impact upon competitive conditions in the future." United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).

[5] *See* Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOU. L. REV. 185, 194 (2019) (One aspect of the rule of law is that: "The law must be known and predictable so that persons will know the consequences of their actions.").

[6] Nicholas deB. Katzenbach, Att'y Gen., Remarks Prepared for Delivery before the Business Council (May 8, 1965), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/05-08-1965.pdf; *see also Business Assured on Trust Actions*, N.Y. TIMES, May 9, 1965, at 36.

speech, AAG Turner made the key point: "People wishing to comply with what the Government thinks the law is can only do so if the Government's views are made known."[7]

The guidelines project got sidetracked while AAG Turner dealt with Congress on bank merger legislation and helped brief Supreme Court merger cases that set the enforcement high-water mark. In *Von's*, the Court condemned a horizontal merger with a post-merger HHI less than 300.[8] Justice Potter Stewart groused that the "sole consistency" he could find in Section 7 decisions was that "the Government always wins."[9]

In *Pabst*, the Court suggested that proof of an alleged relevant market was unnecessary.[10] And in *P&G*, the Court held a conglomerate merger unlawful, in part, because the merging firms might someday have competed but for the merger.[11]

On May 30, 1968, AG Ramsey Clark released the first MGs. Using market share and market concentration thresholds, the 1968 MGs indicated which mergers the DOJ would challenge and which mergers the DOJ would not challenge. The 1968 MGs remain a shining example how enforcement guidelines promote the rule of law.[12]

From a rule-of-law perspective, the major shortcoming of the 1968 MGs was that they did not usefully explain how the DOJ would define the relevant market. That problem was addressed by the hypothetical monopolist paradigm articulated in the 1982 MGs, which were released under AAG William Baxter. The 1982 MGs, with a slight revision in 1984, arguably were the most successful enforcement guidelines ever issued.

AAG Baxter's enforcement adhered strictly to the MGs' thresholds for the post-merger HHI and HHI increase from the merger. With strict thresholds and reproducible relevant markets, the 1982 MGs did more to make merger law known and predictable than did any other merger enforcement guidelines, before or since.

The 1984 MGs did less because of the added statement "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." This statement opened the door to substantially less strict merger enforcement with exactly the same HHI thresholds, and that is what happened.

Under FTC Chair Janet Steiger and AAG James Rill, the Agencies issued joint Horizontal Merger Guidelines (HMGs) in 1992, which were revised in 1997 as to the treatment of efficiencies. The 1992/97 HMGs aligned the Agencies' stated policies and updated the description of merger assessment, but the thresholds of the 1982 MGs were retained, even though they were not indicative of Agency practice.

The HMGs were revised under FTC Chair Jon Leibowitz and AAG Christine Varney. Early in the process, AAG Varney acknowledged "gaps" between the 1992/97 HMGs and agency practice, citing data on merger challenges during fiscal years 1999–2003.[13] In the end, the gap was only narrowed because Agency litigators preferred thresholds set so that they would never have to concede that a challenged merger was a close case.

CLINGING TO THE PAST

The Agencies' 2023 press release asserts that the dMGs were needed to "keep pace" with "commercial realities," but the dMGs suggest that the Agencies have not kept pace with legal

[7] Donald F. Turner, *Antitrust Enforcement Policy*, 29 ABA SEC. ANTITRUST L. 187, 190 (1965).

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

[9] *Id.* at 301 (Stewart, J., dissenting).

[10] United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

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

[12] Gregory J. Werden, *The 1968 Merger Guidelines: In Praise of Committing to Restraint*, 53 REV. INDUS. ORG. 445 (2018). Prior MGs and HMGs are available at https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

[13] Christine A. Varney, An Update on the Review of the Horizontal Merger Guidelines, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, Washington, D.C., Jan. 26, 2010, https://www.justice.gov/atr/file/518236/download (citing Fed. Trade Comm'n & U.S. Dep't of Justice, Merger Challenges Data, Fiscal Years 1999–2003 (Dec. 18, 2003), https://www.justice.gov/atr/merger-challenges-data-fiscal-years-1999-2003 [hereinafter Merger Challenges Data]).

realities. The dMGs present a skewed version of current law on several key points, and more than three-quarters of the many case law citations are to cases decided before the issuance of the 1982 MGs.

Guideline 1 is that: "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets." Under Guideline 1, the Agencies examine only the merging firms' market shares and market concentration, which can establish a rebuttable presumption of illegality.[14] But the Agencies have the ultimate burden of persuasion, and they can rest on market shares and concentration only in exceptional cases.

Guideline 1 states that, when the post-merger HHI exceeds 1,800, an increase in the HHI of just 100 points is sufficient to trigger a merger challenge. The Agencies thus cling to the past in attacking mergers of firms with modest shares. Consider a relevant market with firms having shares of 25, 20, 16, 14, 10, 8, and 7. Guideline 1 indicates that the Agencies will challenge the merger of *the two smallest firms*, but no basis in experience or economics indicates that such a merger substantially lessens competition.[15]

Guideline 3 is that: "Mergers Should Not Increase the Risk of Coordination." The explanatory text asserts that high concentration facilitates coordination on key aspects of competition, such as price, and that every horizontal merger "increases the risk of coordination." This is the thinking that inspired the 1968 MGs, but it had lost any credibility by the time of the 1992 HMGs.

Guideline 4 is that: "Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market." In the Nixon administration, eliminating potential competition was a common theory for Agency merger challenges, particularly bank mergers. But the Agencies nearly always were rebuffed. The DOJ last succeeded in 1973.[16] With extraordinary facts, the FTC succeeded more recently.[17] The Agencies have no reasonable expectation of successfully with a potential competition theory if they rely on the evidence highlighted by the text accompanying Guideline 4.

The determine whether the merging party deemed a potential entrant likely would enter but for the merger, the dMGs explain that the Agencies examine the firm's "capabilities and incentives" and whether it "considered entering absent the merger." But such evidence is insufficient, as the court held in *Steris*.[18] The potential entrant in that case had decided not to enter for valid business reasons.

Guideline 6 is that: "Vertical Mergers Should Not Create Market Structures That Foreclose Competition." The explanatory text declares that the Agencies will challenge vertical mergers with a foreclosure share above 50 percent subject only to rebuttal on the bases of entry, efficiency, or failure.[19] The Agencies argue that this rule is supported by case law, but that is true only if 50 percent "approaches" 100 percent.[20]

The Agencies seem to think that the law remains static if they do not litigate any relevant cases, but the same concerns animate the law on vertical mergers and vertical restraints, and the latter changed drastically over the past half-century.[21] Precedents favorable to plaintiffs

[14] United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975) (the presumption can be rebutted by evidence that "market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition."); United States v. Gen. Dynamics Corp., 415 U.S. 486, 496–504 (1974) (prima facie case based on market shares and concentration was successfully rebutted).

[15] During fiscal years 1999–2003, the only years for which both Agencies released data, they challenged mergers in 1,206 markets with HHIs of 1,800 or higher. The increase in the HHI was less than 500 in just 18.1% of them. *See* Merger Challenges Data, *supra* note 13, at 4.

[16] United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1254–56 (C.D. Cal. 1973).

[17] Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (8th Cir. 1981).

[18] FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[19] The Agencies evidently would challenge a merger in which the acquired firm supplied only the acquiring firm and was poorly positioned to supply any of its rivals. For many reasons, the merger could be the best way forward for competition and consumers.

[20] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 328 (1962) ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated . . . .").

[21] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (abandoning the per se rule applicable to minimum resale price maintenance); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (narrowing the scope of the per se rule applicable to

have been overturned, and it is now exceptionally difficult to succeed in challenging a vertical restraint.

Guideline 8 is that: "Mergers Should Not Further a Trend Toward Concentration." A half-century ago, the Supreme Court cited a trend toward concentration as a basis for condemning mergers, but it made little sense. The trend in *Von's* was due mainly to the fact that supermarkets were replacing small neighborhood stores.[22] The trend in *Pabst* was a transition to larger-scale production and national distribution.[23] And even when market conditions are static, increasing concentration is a consequence of competition.[24]

NOTHING IS SAFE

AAGs Turner and Baxter resolved to make merger enforcement known and predictable, and the enforcers who came after were similarly motivated. All MGs and HMGs from 1968 until now identified which mergers would not be challenged. But the Agencies either lost respect for the rule of law, or, more likely, they decided that no mergers should be safe.

All prior MGs and HMGs featured what amounted to safe harbors.[25] The 1982/84 MGs and the 1992/97 HMGs indicated that the Agencies ordinarily would not challenge horizontal mergers where the post-merger HHI was below 1000 or the increase in the HHI was less than 100. The 2010 HMGs raised the post-merger HHI threshold to 1,500 but kept the HHI increase threshold at 100. The dMGs are different.

The dMGs reject the foundational proposition that some mergers and acquisitions are efficient and procompetitive. Paraphrasing the 1997 HMGs, the D.C. Circuit noted that "a merger's primary benefit to the economy is its potential to generate efficiencies."[26] And the Sixth Circuit quoted the 2010 HMGs stating that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[27]

Acquisition is the goal of many startups, which prefer to let others finish what they begin. Acquisition of these startups promotes innovation. Acquisition often promotes efficiency and competition by solving problems in distribution, supply, or technology. And antitrust law has long recognized that mergers inject new competition when the acquired firm is a small incumbent with limited prospects.[28]

The 1982/84 MGs and the 1992/97 HMGs stated that the agencies seek "to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral." The 2010 HMGs similarly stated: "The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral." The dMGs omit this reassurance.

The Overview in the dMGs trumpets the enforcement mandate from Congress, without acknowledging Congressional direction to leave small companies alone.[29] Nor do the dMGs

tying); State Oil Co. v. Khan, 522 U.S. 3, 21–22 (1997) (abandoning the per se rule applicable to maximum resale price maintenance); Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (abandoning the per se rule applicable to non-price vertical distribution restraints).

[22] *See* United States v. Von's Grocery Co., 233 F. Supp. 976, 981 (S.D. Cal. 1964).

[23] *See* United States v. Pabst Brewing Co., 296 F. Supp. 994, 997 (E.D. Wisc. 1966); Kenneth Elzinga, *The Beer Industry*, *in* THE STRUCTURE OF AMERICAN INDUSTRY 189, 194–201 (Walter Adams, ed., 4th ed. 1971).

[24] *See, e.g.*, Irma G Adelman, *A Stochastic Analysis of the Size Distribution of Firms*, 53 J. AM. STAT. ASS'N 893 (1958).

[25] The 1968 MGs had market-share-based safe harbors for horizontal and vertical mergers.

[26] FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001). The 1997 HMGs said "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets" and "the primary benefit of mergers to the economy is their potential to generate such efficiencies."

[27] ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014).

[28] *See* United States v. Marine Bancorp., Inc., 418 U.S. 602, 625 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 530 & n.10, 537 (1973); BOC Int'l v. FTC, 557 F.2d 24, 25–27 (2d Cir. 1977).

[29] H.R. Rep. No. 81-1191, at 8 (1949) ("Small companies which cannot produce the specified effect upon competition are not thereby forbidden to acquire either stock or assets.").

properly acknowledge the constraint imposed by the statutory text: "Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; [Section 7] deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . ."[30]

Justice Thurgood Marshall, a champion of antitrust enforcement, recognized that: "Congress did not intend to prohibit all expansion and growth through acquisition and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms."[31]

Guideline 2 is that: "Mergers Should Not Eliminate Substantial Competition Between Firms." This framework is unilateral effects. Despite using the word "substantial," the explanatory text alludes to no indicator of substantiality, and it contemplates challenges to mergers of firms with low market shares: "Focusing on the competition between the merging parties can reveal that a merger between competitors may substantially lessen competition even where market shares are difficult to measure or where market shares understate the competitive significance of the merging parties to one another."

Guideline 3 is that: "Mergers Should Not Increase the Risk of Coordination." Neither the guideline itself nor its explanatory text contains anything harkening to the statutory test of "substantial" lessening of competition. The text omits the vitally important point that a modest increase in market concentration, especially when the market is not already highly concentrated, does not (normally) appreciably elevate the risk of coordination. Guideline 3 should have a safe harbor tied to the HHI increase.

Guideline 4 is that: "Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market." This guideline needs limiting principles, but the explanatory text omits one stressed by the 1982/84 MGs: "If more than a few firms have the same or a comparable advantage in entering the acquired firm's market, the elimination of one firm is unlikely to have any adverse competitive effect." Before 1982, the leading commentators had stressed this limitation.[32]

WHAT SHOULD BE DONE

If the Agencies want their MGs to gain acceptance with the courts and survive a Republican presidency, changes must be made. Numerous changes are needed to rid the MGs of anachronisms. Antitrust law has moved on since the Supreme Court last decided a Section 7 case on the merits, and the MGs must reflect current law.

As a start, the Agencies should eliminate all citations to cases and legislative history. The function of enforcement guidelines is to explain how the Executive exercises discretion. MGs should clearly articulate the Agencies' enforcement intentions, and nothing more. MGs become defensive when they cite authority to justify policies, and they lose influence with the courts when they become legal advocacy.

Changes also are needed to rid the MGs of the recurring theme that nothing is safe. The MGs should observe that mergers can be procompetitive. The MGs additionally should assure that (quoting the 2010 HMGs): "The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."

The phrasing of the first eight guidelines should parallel that of Guideline 5 by incorporating the statutory phrase "substantially lessen competition" (or the equivalent). The present phrasings generally describe merger effects that need not violate Section 7. The explanatory text

[30] *Id.* at 7 (quoting Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930)).

[31] United States v. Falstaff Brewing Corp., 410 U.S. 526, 555–56 (1973) (Marshall, J., concurring).

[32] Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 75–77 (1977); Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1363 (1965).

associated with the first eight guidelines also must acknowledge the possibility that the risk posed by competitive concerns is insufficient to meet the statutory test. Finally, MGs should have “off ramps”—specific conditions under which a merger does not warrant a challenge.