

Comments of Professors Jonathan B. Baker and Joseph Farrell on the treatment of non-purposive coordination in the draft Merger Guidelines

Thank you for inviting us to comment on the draft Merger Guidelines (dMGs).¹

We are writing to urge the Agencies to clarify the dMGs' treatment of what the 2010 HMG called "parallel accommodating conduct" and we in subsequent work have called "non-purposive coordination,"² the term that we use below.

As Donald Turner explained six decades ago, a rational oligopolist understands that its rivals will "inevitably react," typically with their own price cuts, when it cuts its price—and such reactions do not rest on any "purposive" attempt to reach or implement a common understanding or to discipline departures from such an understanding (although those other motives may well also be present).³ We believe that such non-purposive responses are widespread and important in oligopoly pricing dynamics.⁴ Professor Turner also argued that those responses, with their demotivation of price cuts, become negligible in an unconcentrated market but are likely to be strong in a highly concentrated one.⁵ That idea suggests why mergers that increase market concentration may harm competition by strengthening non-purposive coordination.

The central economic issue in coordinated effects, construed broadly, is the risk that a merger will enhance the degree to which "a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals" (dMGs, II.3.B).⁶ As that formulation correctly suggests, the implications of such responses for merger enforcement do not generally turn on the rivals' rationale for those responses. In particular, the responses might represent an illegal explicit collusive design, a tacit "anticompetitive minuet" of raising prices through signaling,⁷ or rivals' natural non-purposive reactions to a change in their competitive environment.

¹ U.S. Department of Justice & Federal Trade Commission, Merger Guidelines, Draft for Public Comment (2023) (hereinafter "dMGs").

² Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 U. PA. L. REV. 1985 (2021); Joseph Farrell & Jonathan B. Baker, *Natural Oligopoly Responses, Repeated Games, and Coordinated Effects in Merger Analysis: A Perspective and Research Agenda*, 58 REV. INDUS. ORG. 103 (2021).

³ Turner reasoned that rivals will "inevitably" respond to a cut with their own cuts "because otherwise the price cut will make a substantial inroad on their sales." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665 (1962). Modern oligopoly theory suggests that a non-purposive reaction could in principle go either way, but we believe that everyday experience points to matching or partial matching of price changes as the typical oligopoly response even when there is no evident attempt at "disciplining."

⁴ In somewhat outdated technical language, these responses could be described as conduct predicated on non-zero conjectural variations in prices.

⁵ For a modern discussion supporting Turner's logic on this point see Joseph Farrell, *The Oligopoly Problem, Trigger Strategies, and "Coordinated Effects"*, COMPETITION POLICY INTERNATIONAL CPI ANTITRUST CHRONICLE, July 2023.

⁶ This language echoes that of the 2010 HMG: "...reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals" (2010 HMG, section 7).

⁷ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227-28 (1993). The Comments of Economists and Lawyers in which Professor Baker joined also include a suggestion to strengthen the dMGs' treatment of how a merger may increase the risk or effectiveness of the more often discussed forms of horizontal

As is well recognized, because a tacit minuet “may be difficult to address under Section 1 of the Sherman Act, vigorous enforcement of Section 7 of the Clayton Act... is especially critical” (dMGs, II.3). The same applies—perhaps even more strongly—to non-purposive coordination. Thus, we would urge, new MGs should make clear that they are not abandoning or downplaying concerns about non-purposive coordination.

The dMGs’ discussion of coordinated effects *allows* the interpretation that they intend to include that concern without stressing a dividing line between it and other forms of rival responses.⁸ If so, we applaud that approach: such a division is not necessary for merger enforcement and may be distractingly difficult to draw precisely. At the same time, however, we are concerned lest the dMGs be (mis)read to exclude or downplay non-purposive coordination, particularly because the 2010 HMG explicitly included the topic and the dMGs do not.

To address that risk, we urge the drafters to promote and slightly expand the first sentence in the paragraph in II.3.B labeled “Competitive Responses.” That key sentence reads “A market is more susceptible to coordination if a firm’s prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals.” In our view, that sentence succinctly describes the overall concern, including all three of the types of rival response mentioned above. In an explicit collusive price-fixing scheme, or in the goal of a classic “anticompetitive minuet,” rivals’ responses are designed precisely to achieve that diminution; and non-purposive responses in the direction of fully or partially matching price cuts, à la Turner, also have that consequence. Accordingly, we urge that the key sentence should feature prominently at the head of section II.3, rather than being somewhat buried in the fourth paragraph of subsection II.3.B under the de-emphasizing phrase “Secondary Factors.”

As a further clarification, we suggest appending to the key sentence a phrase along the lines of “whatever the motivation and process behind those responses,” so that it would read “A market is more susceptible to coordination if a firm’s prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals, whatever the motivation and process behind those responses.”⁹

As a somewhat separate point, section II.3 overall refers in several places to coordination being more likely in certain circumstances. It would be helpful to clarify that “more susceptible to coordination” refers not only to whether or not coordination happens but also to the degree to which it happens. The latter is arguably more the point with non-purposive responses.

coordination. Jonathan B. Baker et. al. *Comments of Economists and Lawyers* 10 (September 15, 2023) (discussion of Mavericks and the Risk of Coordination (Guideline 3)).

⁸ For instance, the first paragraph of dMG II.3: “...or tacitly, through observation and response to rivals” arguably includes non-purposive as a form of tacit coordination. But it could helpfully be more explicit that it does so.

⁹ In general the dMGs treat merger effects on counterparties (customers and suppliers) symmetrically, but in some places such as here they are phrased with the more conventional focus on effects on customers. We are not sure whether that is intentional.

We are each joining these comments in our individual capacities and have identified our institutional affiliations for identification purposes only.

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Disclosure: During the past two years, I have consulted on two merger matters: a telecommunications industry merger with the Antitrust Division and another matter with a private sector entity that I am not authorized to disclose. I am not currently consulting for any client or entity with respect to the Merger Guidelines or any pending or contemplated merger. I served on the enforcement agency working groups charged with drafting the 1992 and 1997 Horizontal Merger Guidelines.

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