The 2023 Draft Merger Guidelines: A Comment

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To the Federal Antitrust Agencies and the guideline drafters:

Thank you for this opportunity to comment on your 2023 draft merger guidelines.

By adopting new merger guidelines, you, the Federal antitrust agencies, have an opportunity to make an important contribution to the development of US competition law and to bring it in line not only with new and evolving market realities but also with competition law around the world. The draft guidelines take an important step in this direction. I write these comments with a view to help making them stronger. I begin with a view of the background problem and proceed to offer a few suggestions.

1. The background problem

The background problem is the extreme laissez faire lens that has shaped the perspective of US antitrust law for 43 years. For mergers, the problem can be traced to the DOJ antitrust merger guidelines of 1982, which was a revolutionary document that identified the merger problem if any as (almost) only cartels. The guidelines were incrementally amended thereafter, most importantly by the horizontal guidelines of 2010, which made important advances. Even so, I think it fair to say that this string of guidelines emanating from the 1982 touchstone is part of the problem. Judges adopted or were guided by them. They have helped, symbiotically, to entrench laissez faire premises in US antitrust case law. Those premises give excessive deference to firms with significant market power, to their stories of how their acts are good for the market, and to their arguments that their mergers do not fit the narrow out-put limit[2] box that defines proscription. If this is so, it is time for a very different-looking document. By the 2023 draft, the Agencies do give us a very different-looking document. Here are some points on which it does well and some ways that I think it can do better.

2. Important improvements

a. Moving our gaze from whether the merger will probably raise price and lower output and thereby increase market power, to whether the merger creates a significant risk of diminishing competition, is an important advance. It returns us to the task of examining and appreciating the quality of competition that is likely to be lost by the merger. Lost competition between merging rivals was the first point of focus under Section 7 of the Clayton Act from 1914 until 1982, when the guidelines simply wiped out

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[1] I thank my colleague Harry First for his very helpful suggestions.
[2] The scope of the proscription need not be so narrow even if output limitation is the touchstone. See Herbert Hovenkamp and Fiona Scott-Morton, The Life of Antitrust's Consumer Welfare Model (April 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/;
Steven Salop, An Excessive Evidentiary Burden Sunk the FTC's Case Against the Meta/Within Merger (February 22, 2023), https://www.promarket.org/2023/02/22/an-excessive-evidentiary-burden-sunk-the-ftcs-case-against-the-meta-within-merger/. But defendants have been very successful in their characterization, and proof of output limitation has been very challenging and resource-intensive, provoking battles of the experts that are often indeterminate.

this mode of offense. It was not restored until 1992[3] and more robustly in 2010 under the rubric of unilateral effects. The economists' methodology for determining unilateral effects is good and might be sufficient if harm, to be considered, has to be modeled; but models do not tell the whole story. An important quality-of-competition dynamic between merging rivals may be lost even if the Agency cannot prove that insufficient diversion will lead to a price rise. The guidelines appear to acknowledge this gap.[4] I wish I could do a better job of articulating the problem of the lost "quality of competition" in its many unique dimensions. I opined on scores of mergers for investment bankers in the 1960s and 1970s, and this lost-competition concern was our (the expert community's) principal focus. We sat down with business people, marketing people, and executives and learned how the firms competed with one another, and could often discern that on various dimensions the firms were thorns in each other's side, or, putting it differently, inspirations to constantly do better. The compromising of that dynamic could make the market worse off.

b. Format. Placing the means of lessening competition up front, before market definition, is helpful. It makes the document much more accessible because it tells a story of what we are worried about. The guidelines of the last 43 years are highly technocratic and they are inaccessible to non-experts. Placing the concerns before market definition also helps to telescope the contingencies of market definition. It is instrumental and not always necessary.

c. Law versus economics. It is helpful to emphasize that antitrust Law is LAW. Antitrust law is deeply informed by economics but it is a different discipline from economics. The law generalizes economics to fit both Congress' mandate (to stop anticompetitive mergers in their incipiency) and judicial administrability of rules and principles. The *Philadelphia National Bank*[5] presumption is a good example of both. Helpfully, the broad statutory commands are flexible enough to accommodate changes in business models and advances in economic learning.

3. Suggestions

a. Format and guidelines style

The "should nots" – the black letter commands. I suggest abandoning the "should not" format. What you want to convey is: When is a merger likely to trigger antitrust concerns, and which of the concerns, under what circumstances, are so serious that the merger is probably illegal. The tone of the current approach may be more peremptory than you intended. More important, the "should nots" do not work. Except for Guideline 3 (Don't increase the risk of coordination), they cannot mean what you say, or they are too ambiguous to be meaningful commands. Guideline 8 – don't merge if it furthers a trend towards concentration -- is an example of the former. You must want to know more facts and context

[3] The 1982 Guidelines dropped the concern of elimination of competition between the merging parties despite the fact that, in the original Section 7 of the Clayton Act in 1914, this was the clearly specified and only concern. The 1950 amendment was intended to expand, not shrink, the scope.

[4] The European Union does not use the term "unilateral effects" because the phenomenon often involves more than *unilateral* effects. Remaining firms in the market tend to adjust in the wake of the direct elimination of competition. EU merger control and the many following jurisdictions call the effects "non-coordinated effects." See the Merger Control regulation, para. 25, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0139,
and supportive law of the EU Court of Justice, most recently in CK Telecoms. Case C-376/20 P, Commission v. CK Telecoms UK Investments, ECLI:EU:C:2023:561.

[5] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

before deciding that the merger is prohibited. Guideline 13 – don't merge if your merger otherwise substantially lessens competition – is too ambiguous to be a guideline. The text fills in some of the missing pieces, but that does not cure the problem. The text leaves major pieces missing, and, besides, the guidelines give black-letter commands.

I think it would be helpful, as well as more user-friendly, to rephrase each of the "should not" guidelines with language such as, for Guideline 3 as example: The effect of a merger may be substantially to lessen competition if it creates a serious risk, or significantly enhances the risk, that the firms in the market will behave collaboratively rather than rivalrously.

b. Presumptions and their relationship with the rebuttal

The should-not guidelines appear to create presumptions. If the black-letter principle is offended, it seems, the Agencies will treat the merger as illegal unless the merging parties introduce sufficient rebuttal evidence; and rebuttal is a narrow gateway.

But the guideline concerns are not equal in terms of whether and how tightly the concern expressed links to anticompetitive harm. For mergers of rivals in concentrated markets, you can take advantage of the *Philadelphia National Bank* presumption. Otherwise, there is no legal presumption in the caselaw.

Users of the Guidelines should be able to understand how they reach the conclusion that there is a presumption, and the significance of that conclusion. What does "presumption" mean? Does it mean that, on the given facts – such as elimination of a potential entrant from a concentrated market -- experts could and should logically infer a significant risk of lessened competition? Are not more facts necessary, such as: the merging party was one of few important potential entrants? and: the potential entrant would probably have entered grass roots or by toe-hold but for the acquisition, or was exerting an edge effect? It would be helpful to clarify, as to each concern, the additional requirements necessary either to amount to a presumption in court or, where court standards are tougher than they should be, otherwise to satisfy you that the merger crosses the line of illegality absent admissible convincing defense evidence that would save it. Some guidelines (such as 8, trend toward concentration) do not lend themselves to setting out the elements of the prima facie case. The point of the guideline seems to be to flag the concern. It would be useful to label it a red flag, not a presumption, and to create a category of red flags where you do not or should not claim presumption.

Second: rebuttal and courts. The structure of the guidelines is: presumption/rebuttal. Where the guideline is or should be only a red flag, a shift to rebuttal is premature. Moreover, the presumption/rebuttal framework is very litigation-oriented. Most merger guidelines (prior US guidelines and those around the world) project a different tone; namely, that the agency is trying to understand the whole merger, listening to, and including in its analysis, evidence that would come in as defense evidence if the case goes to court. The latter approach --understanding the whole rather than rushing to shift the burden as soon as possible – may be more fitting for a document that calls itself guidelines.

I assume that you want to influence the courts. You are more likely to do so with tighter links to harm to competition and, where presumption would be an overreach, with recognition of a red flag category. Indeed, with clear articulation of how a given concern links to a serious risk to competition, the language of presumption is fine, and would serve the dual purposes of guidance to businesses and their lawyers and hoped-for persuasion of courts.

c. Concentration and its relation to competition

I worry about Guideline 1. (Don't significantly increase concentration in a highly concentrated market.) If your concern is with increased concentration as such, the guideline should so acknowledge, and should probably not get top billing because it is different in kind from guidelines identifying how mergers can lessen competition. If your concern is with competition, as I believe it is, you should say so and explain the correlation. One solution is to move Guidelines 2 and 3 to first and second place, and to introduce the guideline (which would be) formerly known as 1 as in support of renumbered Guidelines 1 and 2 and the interaction between them.

d. Building some bridges

There are available touches that can allay some fears and gain credibility by tying up loose ends and drawing on positive developments of the past. Here are three.

(1) Market power. It would be useful to mention market power more directly and to explain that harms to competition tend to increase market power; that the merger law aims to preserve the forces of competition; to preserve an environment for robust competition so that firms will behave responsively. Preventing creation and increase of market power is a major desired result.

(2) Vertical mergers and elimination of double marginalization. It would be useful to mention this claim in the section on defensive justifications. You may note that the efficiency properties of EDM have been overstated, but still, defendants can raise the claim along with any other possibly qualifying efficiencies.

(3) Efficiencies generally. To allay false alarms, it might be worth making the following point: Although the draft guidelines are slightly tighter on efficiency considerations, they build on and parallel most of what has gone before, since 1982. The guidelines have always been very tough on efficiencies and have always rejected an efficiencies affirmative defense to an anticompetitive merger.

CONCLUSION

The 2023 draft merger guidelines are an important step towards a more realistic, progressive application of the merger law.
Thank you to the drafters for your hard work.
I look forward to the completed project.

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