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I. INTRODUCTION

The release of the 2010 Merger Guidelines[2] was largely an anticlimax. Unlike the 1982[3] and 1992[4] Merger Guidelines, the 2010 Merger Guidelines did not offer any radical changes in Agency policy or introduce any innovative principles or modes of analysis.[5] Instead, the 2010 Merger Guidelines can best be characterized as reflecting existing Agency practices. To be sure, those practices have evolved over the last 18 years and, consequently, the 2010 Merger Guidelines differ from the 1992 Merger Guidelines in important respects.[6] For example, the 2010 Merger Guidelines' focus on diversion ratios and margins reflects economic thinking about unilateral effects developed since the 1992 Merger Guidelines were issued. However, that the Agencies analyze diversion ratios and margins in merger review should not be news to any experienced antitrust practitioner.

Some commentators view the downplaying of market definition in the 2010 Merger Guidelines as a major development. However, this also should not have come as a shock to anyone. For years, many economists, including chief Agency economists Carl Shapiro and Joe Farrell, have stressed the supremacy of direct evidence of competitive effects over market definition when such direct evidence is available. Moreover, in *Whole Foods*, the Federal Trade Commission ("FTC") explicitly adopted this position.

Some commentators argue that a significant change in the 2010 Merger Guidelines as compared to the 1992 Merger Guidelines is a greater ambiguity as to the specific approach the Agencies will take in a given case, which creates uncertainty for the business community. This characterization of the difference between the 1992 and 2010 Merger Guidelines is accurate. However, it was well-known that the Agencies typically did not follow the script of the 1992 Merger Guidelines—look no further than the HHI thresholds, which were largely ignored. Again, the 2010 Merger Guidelines give a more accurate picture of actual Agency practice, which is not to follow any particular mode of analysis, but instead to focus on the mode that is most relevant given the data available and the nature of the industry.

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[1] Senior Vice President, NERA Economic Consulting. I thank Elizabeth Bailey and Lawrence Wu for helpful discussions. The opinions expressed herein are those of the author alone.

[2] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[3] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (1982), *available at* http://www.justice.gov/atr/hmerger/11248.pdf.

[4] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (1992, rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

[5] For an excellent discussion of the historical evolution of the Merger Guidelines, *see* Carl Shapiro, *The 2010 Merger Guidelines: From Hedgehog to Fox in Forty Years*, forthcoming in ANTITRUST L.J.

[6] Some sections of the 2010 Merger Guidelines, however, such as those on entry, efficiencies, and coordinated effects, differ very little from the corresponding sections in the 1992 Merger Guidelines.

II. DO WE NEED MERGER GUIDELINES ANY LONGER?

If the 2010 Merger Guidelines do not appear to offer much that is new, it is reasonable to ask what purpose they serve. Do we need Merger Guidelines any more?

One reason for the 2010 Merger Guidelines being less of a departure than the 1982 and 1992 Merger Guidelines is that we have reached a point where the general principles of merger review are well established and thus less subject to change. Methodological advances are now centered on the details of how merger analysis is conducted, rather than the general principles. For example, the basic theory of unilateral effects is widely accepted and thus the focus of research has shifted toward seeking better ways to implement those theories.

At the same time, Merger Guidelines, given their scant number of pages (in this case, 34), necessarily must be written at a high level. They cannot provide broad coverage of all methods of analysis. For example, the 2010 Merger Guidelines § 2 provides a list of the types and sources of evidence that the Agencies may consider, but notes that the list is "not exhaustive." Similarly, Merger Guidelines cannot provide a detailed description as to how to implement any given method of analysis. For example, the 2010 Merger Guidelines mention merger simulation, but do not provide any discussion of how the Agencies actually build their simulation models.

For these reasons, it might seem that there is no longer a need for Merger Guidelines. However, the 2010 Merger Guidelines still serve several useful purposes. First, they memorialize Agency policy and confirm the small changes in policy that the Agencies have made. For example, while it was apparent to outside observers that the Agencies would, in some cases, by-pass market definition and go straight to competitive effects, the 2010 Merger Guidelines have confirmed that this is now Agency policy.

Second, Merger Guidelines provide an excellent learning resource for those who are not experienced merger review practitioners. There are at least three important audiences of this type. The first consists of businesses that are involved in transactions. Business people need to understand the process and the issues involved in merger review, and the Merger Guidelines provide this background. The second audience consists of antitrust practitioners in jurisdictions where antitrust laws have recently been enacted, such as China and India. The United States historically has been the leader in antitrust thought, and new agencies in other jurisdictions have looked to the Merger Guidelines as a source of information and, indeed, a model for guidelines of their own. The third audience consists of the courts, which have often cited the Merger Guidelines in the past in antitrust cases.

III. ARE MERGER GUIDELINES ALL WE NEED?

Accurately analyzing a merger's likely competitive effects is a complex and detailed undertaking—particularly in cases that are close calls. To provide real transparency, the Agencies must provide insight into the specific analyses they conduct in merger review.

The 2010 Merger Guidelines attempt to increase the sophistication of the unilateral effects section by explaining how the value of diverted sales between the products of the merging parties can be used as an indicator of the "upward pricing pressure" (UPP) on those products that would result from the merger. This discussion delves deeper into the complexities of merger review than would have been the case if the basic theory of unilateral effects were discussed in general terms, while still providing a calculation that can be done on a calculator.

In my view, however, this is a case where a little additional complexity is worse than no complexity at all. As has been widely noted, both by Farrell and Shapiro in their original UPP paper[7] and by subsequent commentators,[8] UPP does not translate to a predicted post-merger price increase. For a given level of UPP, the predicted price increase could be of almost any size depending on the curvature of the demand functions. Nor is there a natural metric or calibration for UPP.[9] This severely limits the practical usefulness of the UPP approach.

What could the 2010 Merger Guidelines have done instead? One approach would be to embrace complexity even further, such as going into detail about merger simulation, which is mentioned in the 2010 Merger Guidelines, but not described. Alternatively, the 2010 Merger Guidelines could have discussed an approach, which I will call "merger simulation light." A range for the predicted post-merger price increases can be calculated based on alternative assumptions for the form of the demand functions.[10] These calculations require only the same diversion ratio and margin data that are used to calculate UPP, and yet this approach provides a more intuitive basis by which to assess the competitive effects of the merger. It is true that, in contrast to UPP, "merger simulation light" generally cannot be performed using only a calculator. However, simplicity should not be the measuring stick used to evaluate alternative approaches.

But, ultimately, as I emphasized above, Merger Guidelines should summarize general principles; they should not attempt to address the complex forms of analysis that are conducted to apply those principles. In that case, Merger Guidelines are not enough to provide transparency. So, what could the Agencies do instead? The *Commentary on the Merger Guidelines,*[11] issued by the Agencies in 2006, are suggestive. The *Commentary* provides detail on the analytical approaches used by the Agencies and offers actual case examples that illustrate these approaches. The information contained in the *Commentary* substantially increased transparency. Similarly, competitive impact statements and closing statements provide insight into the approaches the Agencies use.

The Agencies, and the antitrust community, would be well-served if the Agencies were to produce an on-going regular series of *Commentaries on Merger Analysis* that describe the details of how they approach merger review.

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[7] Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECONOMICS (2010).

[8] *See*, e.g., Richard Schmalensee, *Should New Merger Guidelines Give UPP Market Definition?*, GCP: THE ANTITRUST CHRONICLE (December 2009 (Release 1)) and Elizabeth M. Bailey, Gregory K. Leonard, G. Steven Olley, & Lawrence Wu, *Merger Screens: Market Share-Based Approaches Versus "Upward Pricing Pressure,"* ANTITRUST SOURCE (February 2010).

[9] *See*, e.g., Schmalensee, *supra* note 8, and Jerry A. Hausman, *2010 Merger Guidelines: Empirical Analysis*, forthcoming in ANTITRUST SOURCE.

[10] Hausman, *supra* note 9. Farrell & Shapiro, *supra* note 7, discuss calculating the predicted price increase under a "default" assumption about the form of the demand functions, but do not consider calculating a range for the predicted price increase under a reasonable set of possible demand functions.