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I. INTRODUCTION

Those of us who practice competition law globally and who engage in international technical assistance are regularly struck by the wide variation in culture and expertise among the world's competition agencies, now numbering more than 100. Uniformity is decades away, if that. But serious efforts towards achieving greater uniformity are a daily event, as (i) the more prominent and sophisticated agencies routinely eyeball and borrow from one another, replacing their own practices with better practices observed elsewhere, and (ii) the newer and emerging agencies carefully read the outputs of the leading agencies with a view towards possible emulation. Even if Americans don't always read the statements from the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") carefully, foreigners do; and even if foreigners don't always elect to follow U.S. practice, they give it serious consideration. The U.S. government's description of its practice is highly influential. One need only examine the rack of submissions by national delegations at meetings of the Competition Committee of the Organisation for Economic Co-operation and Development—the papers from the United States and the European Commission are always the first to run out. Given the range of objectives behind government policy statements, it's probably too much to ask that the statements be written with international implications as the principal concern. It's not too much to ask that the statements be evaluated with international consequences in mind.

In releasing the 2010 Horizontal Merger Guidelines, FTC and DOJ needed to address many objectives and many audiences, and they often succeeded. Promotion of multijurisdictional rationality, however, does not rank high among the Guidelines' strengths. As discussed more fully below, the Guidelines have several related shortcomings when viewed from the perspective of international implications. First, the Guidelines introduce greater flexibility and discretion, but at a cost of diminished predictability and operational specificity. They will be less useful than they might have been as a tool for teaching other jurisdictions the mechanics of sound merger analysis. Second, the greater flexibility is achieved in part through theories and methodologies that are a bit eclectic, sometimes analytically treacherous, and often expressed without clear delineation of limiting principles. The Guidelines are ripe for erroneous application by unsophisticated users. They are also at risk for pretextual application by sophisticated users who might not share our view of appropriate competition policy and who are simply seeking cover in our words. Third, the Guidelines dilute the objective of encouraging rule of law in other jurisdictions. By reducing clarity and consistency in favor of granting broader discretion to

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decision makers, the Guidelines waive an opportunity to serve as a template for bringing greater order to global process.

II. THE INHERENT TRADE-OFF IN GIVING GUIDANCE

In a recent article[2] and in other public comments, I have been generally supportive, though perhaps slightly tepid, in my assessment of the 2010 Guidelines. Although not necessarily endorsing all of the policy choices reflected within the Guidelines' particulars, I regard many of the Guidelines' more controversial aspects (such as their treatment of market definition and their approach to unilateral effects) as being substantially consistent with the agencies' 2006 *Commentary on the Horizontal Merger Guidelines*. More generally, the Guidelines adhere adequately to the case law in their overall design, and they reasonably depict government enforcement policy that has been in force for many years.

The 1992 Guidelines that they supplanted were due for an overhaul. For more than half a decade, various commentators, myself included,[3] have expressed the view that the 1992 Guidelines no longer accurately portrayed the methodology by which the agencies conducted modern-day merger analysis and could sometimes be affirmatively misleading. They certainly did not facilitate international convergence, since they guided the rest of the world to a place at which the United States has not resided for a long time.

The 2010 Guidelines cure the problem of misdirection, but partly by adopting an approach of indirection. We now know that the design choice was a considered one, a selection of an "eclectic approach" that will "really rely on the circumstances of a given case."[4] The choice was neither novel nor unique. Whenever the government issues a guidance document, it encounters a series of engineering trade-offs. Guidance documents have many objectives, many functions, and many audiences;[5] and drafters' efforts to arrive at an optimal balance among those has led over the years to many forms of guidance,[6] which can range from fully-specified

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[2] William Blumenthal, *Scope and Specificity in the 2010 Guidelines*, ANTITRUST, Fall 2010 (forthcoming), at ___ [hereinafter *Scope and Specificity*].

[3] William Blumenthal, *Why Bother?: On Market Definition under the Merger Guidelines*, Statement before the FTC/DOJ Merger Enforcement Workshop (Feb. 17, 2004) ("the 1992 Guidelines . . . may be literally accurate, and their meaning may have been properly understood at the time they were issued, but their meaning is misinterpreted today by a material percentage of readers. . . . If the uninitiated try to apply the Guidelines without detailed annotations explaining terms of art, they are likely to reach an erroneous conclusion."), *available at* http://www.justice.gov/atr/public/workshops/docs/202600.htm. The full proceedings of the Workshop are *available at* http://www.justice.gov/atr/public/workshops/mewagenda2.htm.

[4] The quoted terms are attributed to Carl Shapiro, Deputy Assistant Attorney General for Economic Analysis in the U.S. Department of Justice Antitrust Division, in remarks delivered Sept. 21, 2010, at Georgetown University Law Center's Global Antitrust Economic Symposium. *See International Antitrust Seminar Stresses Convergence, Transparency*, 99 ANTITRUST & TRADE REG. REP. (BNA) 374 (Sept. 24, 2010). Joseph Farrell, Director of the Bureau of Economics at the Federal Trade Commission, similarly used the term "eclectic approach" in remarks delivered Sept. 22, 2010, at Fordham Law School, *see supra* note 1, where he described the 2010 Guidelines as having shifted from "a diagnostic approach to an eclectic approach" that would use "any technique necessary" to conduct a proper economic analysis.

[5] *See generally* William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5 (2000) [hereinafter *Clear Agency Guidelines*].

[6] *See id*. at 23-25.

algorithms to dizzying lists of factors, with most guidance documents consisting of structured inquiries that fall somewhere in between.[7]

The polar extremes can be seen in merger-related guidance documents issued on a single day. On June 14, 1982, DOJ issued a replacement to the 1968 Merger Guidelines. The 1982 Guidelines were essentially an algorithm, in the sense that they limited discretion and could yield a unique conclusion as to a merger's legality or illegality. Finding all of the facts necessary to plug into the Guidelines might be difficult or even impossible, but if a user had the facts, the Guidelines would be capable of providing an unambiguous answer. "[I]f the outcome was uncertain, the reason was attributable to case-limited factual uncertainty, rather than legal uncertainty."[8] That same day, FTC issued a *Statement Concerning Horizontal Mergers*, which was essentially an unstructured list of factors that might be relevant to the agency's analysis.[9]

The approach adopted for the 2010 Guidelines falls in between. The Guidelines retain a significant analytic framework, but they continue a trend that we have seen since 1982—first in the 1984 Guidelines, then in the 1992 Guidelines, then in the 2006 *Commentary* —of moving steadily away from clear rules towards increased discretion.[10] To a significant degree the trend has been forced on the agencies by decisions in the courts, which have opened merger analysis to an ever-broadening range of considerations. If the agencies were to try to replicate their modern-day analytical process in the form of a detailed algorithm, the resulting document would be so lengthy and unwieldy as to be unusable. But by instead allowing for a wide range of judgment, discretion, and flexibility on the part of the agencies, the 2010 Guidelines lose their predictability and operational value. As I have written elsewhere,

> How the Guidelines will be applied in any particular complex case is unclear. If one examines many of the high-profile merger decisions over the past several years, the Guidelines are equally consistent with clearance and challenge. *Maytag/Whirlpool*, legal or illegal? *Whole Foods? Ticketmaster/LiveNation*? *Google/AdMob*? With these Guidelines, who can tell? The agency's determination in each case is consistent with the Guidelines, but the opposite determination would be consistent as well.[11]

One might reasonably debate the implications of the resulting uncertainty for merging firms and their advisors; my own view has been one of modest endorsement under the circumstances.[12] From the narrower perspective of the international battle for heart and minds, however, the consequences of the choice are apt to be adverse.

III. SACRIFICING INSTRUCTION IN PURSUIT OF OTHER GOALS

The 1982 Merger Guidelines have proven to be one of the most influential antitrust outputs of the past fifty years. They have grown rusty and obsolete as a diagnostic tool, of course,

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[7] *See Scope and Specificity*, *supra* note 2. The term "dizzying" was famously used by Derek Bok in describing the list of factors relevant to merger analysis identified in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws*, *see* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960). The Bok article was cited by the U.S. Supreme Court when it adopted a presumptive rule of merger illegality based on market share and concentration statistics in *United States v. Philadelphia National Bank*, 374 U.S. 321, 363-64 (1963).

[8] *Clear Agency Guidelines*, *supra* note 5, at 17.

[9] *See id*. at 13.

[10] *See Scope and Specificity*, *supra* note 2.

[11] *See id.*

[12] *Id.*

due to the passage of time and the evolution of law, economics, and agency practice; but any fair historical judgment has to acknowledge that their contribution to the development of sound competition law around the world was massive. Concepts such as the Herfindahl-Hirschman Index and the hypothetical monopolist test for market definition predated the 1982 Guidelines, but the 1982 Guidelines were the vehicle by which those concepts were placed into everyday usage. The general mode of merger analysis introduced by the 1982 Guidelines has become a norm around the globe.[13]

In an article published a decade ago,[14] I inventoried reasons for the 1982 Guidelines' success. Among the reasons is one central to my discussion here: "The 1982 Guidelines were sufficiently operational to be of practical use. . . . With [their] combination of operational content and full specificity, counsel could readily use them to project outcomes."[15] For new competition regimes abroad, the Guidelines provided a how-to manual, a do-it-yourself kit that was accessible even to jurisdictions in a trainee phase. The novices might not be capable of fully replicating the work of the skilled craftsmen, but the instruction provided by the Guidelines offered a reasonable likelihood that the novices would perform acceptably. By shifting away from administrability and predictability in favor of flexibility and generality, the 2010 Guidelines reduce their instructional role in three ways.

First, regimes that are new to competition analysis benefit from regimentation and structure. The stepwise approach of the earlier Guidelines had material deficiencies that could lead to erroneous conclusions in difficult cases, and it had already been abandoned by the agencies, most publicly in the 2006 *Commentary*, but it was readily accessible and intuitive. For the vast majority of matters, it worked adequately, even well.

Second, the theories of illegality identified in the 2010 Guidelines rely critically upon analytical tools that can be challenging to even the most sophisticated regimes. Propagating those theories broadly and offering them without appropriate caveats—"Professional Driver on a Closed Course. Do Not Try This Yourself"—introduces risk of disorder, at least among those regimes that do not recognize the skill set necessary for proper application. William Kovacic recounts his experience at a technical assistance training session during which another speaker urged the use of econometric techniques in merger analysis:

> Oblivious to the circumstances faced by most of the attendees, [the speaker] emphasised how sophisticated econometric models that used point-of-sale data obtained from electronic scanners had played crucial roles in the Commission's decision to prosecute. During the talk, I sat at the back of the room between attendees from Bangladesh and Tanzania. As he listened to the account. . . , the Bangladeshi official leaned over and said with incredulity, "Scanner data? We don't have scanner data." The Tanzanian muttered what sounded to me like "motu noclu." I asked him what "motu noclu" meant. He answered: "Master of the Universe – no clue."[16]

[13] *See, e.g., Clear Agency Guidelines*, *supra* note 5, at 14-15.

[14] *Id.* at 14-20.

[15] *Id.* at 19-20 (emphasis omitted).

[16] William E. Kovacic, *Lucky Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical Assistance*, 3 EUR. COMPETITION J. 319, 322 (2007).

Similarly, anticipating the effort by new regimes to apply the 2010 Guidelines' theories, one of the drafters of the 1982 Guidelines draws the analogy to a just-licensed teen driver being handed the keys to a Ferrari.[17]

Third and related, the theories of illegality identified in the 2010 Guidelines are not fully described. In numerous instances the Guidelines point to a potential competitive problem, but do not specify all of the preconditions necessary for application of the theory. The omission presumably was intended to limit the risk of impeachment in domestic merger litigation, but it has the collateral consequence of increasing the likelihood that a foreign enforcer will invoke one of the theories without recognizing that an essential element for an adverse competitive effect is not presented on the facts of the particular case.

The potential for mischief abroad is not limited to inadvertent error by unsophisticated regimes. While not frequent, transactions occasionally give rise to disputes between U.S. agencies and sophisticated foreign counterparts—sometimes due to differences in factual evaluations, analytic methods, or judgments as to appropriate competition policy, and other times due to foreign consideration of factors beyond traditional competition analysis. The range of judgment allowed under the 2010 Guidelines is sufficiently broad, and the line between legality and illegality is sufficiently fuzzy, that each side's views are likely to be consistent with the text. We can reasonably anticipate instances in the coming years in which the 2010 Guidelines will be quoted back at the United States in justifying questionable determinations abroad.

IV. A LOST OPPORTUNITY TO FOSTER RULE OF LAW

The importance of "rule of law" has been a recurring theme in international advocacy in the competition field and elsewhere by the U.S. government. One sees efforts to implement the theme in the government's work in the International Competition Network,[18] and one reads messages intended to reinforce the theme in numerous speeches, technical assistance activities, and other presentations delivered abroad by U.S. officials. In 2007, for example, while in public service, I delivered a speech observing that "government has the central role of assuring that society is governed by 'rule of law.' Legal scholars and philosophers see law as achieving order by providing the guidance of general rules by which people can orient their behavior."[19] Citing to the work of Lon Fuller and others from the middle of the last century, the official text pointed to eight principles that a system of rules must satisfy if it is to fulfill that objective:

- *Basis for Decision*. The rules must be expressed in general terms that allow for consistent adjudication.
- *Public*. The rules must be publicly promulgated.
- *Prospective*. The rules must give advance notice of what is expected.
- *Clear*. The rules must be expressed in terms that are understandable.

[17] Abbott B. Lipsky, Jr., Unreported Remarks at Fordham Law School, *supra* note 1.

[18] The ICN's *Guiding Principles For Merger Notification and Review*, for example, include numerous principles reflecting concepts associated with rule of law—transparency, non-discrimination, fairness, protection of confidentiality. *See* http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf (last visited Oct. 11, 2010).

[19] William Blumenthal, General Counsel, Federal Trade Commission, *Government Policy for Fostering Innovation*, Remarks before the China Council for the Promotion of International Trade and U.S. Chamber of Commerce, Global Forum on Intellectual Property Rights Protection and Innovation (Mar. 28, 2007), *available at* http://www.ftc.gov/speeches/blumenthal/070328CCPITFinal.pdf (last visited Oct. 5, 2010).

- *Consistent*. The rules must be consistent with one another.
- *Capable of Being Followed*. The rules must not impose demands that are beyond the power of the subjects.
- *Stable*. The rules must not be changed so frequently as to prevent reliance.
- *Enforced as Written*. The rules must be administered in a manner consistent with their wording. [20]

Measured against these criteria, the 2010 Guidelines would be mixed. Working upward from the bottom of Fuller's list, we should assume that the Guidelines will be *enforced as written*. They are *stable*, in that they are broadly consistent with policy that predated the 2006 *Commentary*. They are *capable of being followed* in that they do not demand impossible or even difficult conduct. They seem to be *consistent*—more so than the 1992 Guidelines, the market definition provisions of which sometimes could not be reconciled with the unilateral effects provisions. And they are *public*. The remaining three criteria are where the Guidelines depart. Their intentional, built-in eclecticism means that the Guidelines will not be *clear* or *prospective* or sufficiently consistent so as to qualify as a *basis for decision* in the sense sought by advocates of rule of law.

No one says guidelines need to operate as rules. A hackneyed line that has entered mass culture from *Ghostbusters*—"it wasn't really a rule. It was more like a guideline"[21] – reminds us otherwise. Even if they depart from the Fuller criteria, guidelines can still have value as a window into the thought process of decision makers.

But the world does need rule of law, and it could benefit by having it in the field of merger control. The discipline urged by prior versions of the U.S. Guidelines has been especially constructive in furthering that objective. By opening analysis to greater imprecision and flexibility and latitude, the 2010 Guidelines represent a lost opportunity as a tool for bringing greater order to a chaotic world.

V. CONCLUSION

Government guidance documents need to address many purposes and many audiences, and the 2010 Horizontal Merger Guidelines do a praiseworthy job of addressing most. Their biggest limitation—failing to provide enough specificity to assure predictable outcomes in particular cases—probably reflects a reasonable editorial choice on the part of the agencies, given the wide range of tools that the agencies use in day-to-day practice and the wide range of considerations that the courts entertain in the merger cases brought before them. But the editorial choice has consequences. Foremost among them are likely to be the implications of the Guidelines for achieving international convergence on sensible policy. First, the Guidelines will be less useful than they might have been as a tool for teaching other jurisdictions the mechanics of sound merger analysis. Second, the Guidelines are ripe for erroneous application by unsophisticated users and for misuse by sophisticated users. Third, the Guidelines dilute the objective of encouraging rule of law in other jurisdictions and forfeit an opportunity to serve as a template for constructive global process. I offer those points more in lament than in criticism. The international audience is one of many, and we cannot expect the agencies necessarily to give

[20] *Id.* (citing LON L. FULLER, THE MORALITY OF LAW (1964), and H.L.A. Hart, *Book Review of "The Morality of Law*," 78 HARV. L. REV. 1281, 1285-86 (1965)).

[21] For more detailed background on the line, *see Clear Agency Guidelines*, *supra* note 5, at 27 & n.96.

it primacy. One only wishes that the international implications could have been better accommodated consistent with other objectives.