TREATING LIKE CASES ALIKE: THE NEED FOR CONSISTENCY IN THE FORTHCOMING MERGER GUIDELINES

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The U.S. Department of Justice and Federal Trade Commission are expected to release new merger guidelines soon. Among other requirements, the Agencies should strive to develop new guidelines that are consistent both internally and with binding precedent. Indeed, because the "essence of the rule of law is that like cases are treated alike," it is doubtful that inconsistent guidelines could win judicial adoption. Based on recent statements and enforcement actions, there is a risk that the New Guidelines will adopt inconsistent positions on several topics. For example, recent discussions of "nascent competition" suggest the Agencies might formally adopt a lenient test for assessing the competitive significance of entrants deemed "nascent competitors," but a different, more stringent test for assessing the competitive significance of any other potential entrants. Public statements also suggest the Agencies could take inconsistent positions with respect to market definition and out-of-market effects.

I. INTRODUCTION

Earlier this year the U.S. Department of Justice and Federal Trade Commission (hereinafter "the Agencies") announced their intention to revise "federal merger guidelines," including the 2010 Horizontal Merger Guidelines.[2] As Assistant Attorney General ("AAG") Jonathan Kanter explained, these revised Guidelines (hereinafter "New Guidelines") will "ensure our merger enforcement tools are fit for purpose in the modern economy."[3] FTC Chair Lina Khan similarly emphasized how the New Guidelines will "equip us to forcefully enforce the law against unlawful deals."[4] To be successful in this endeavor, the Agencies must persuade the courts to adopt the New Guidelines and incorporate the Guidelines' analysis into antitrust jurisprudence.

Although there are many factors that will affect the persuasiveness of the New Guidelines, we focus here on one critical aspect: *Consistency*. As Attorney General Merrick Garland recently explained, "[t]he essence of the rule of law is that like cases are treated alike."[5] This principle is sometimes restated as a requirement that "the laws be applied equally, without unjustifiable differentiation."[6]

As we describe here, we believe the New Guidelines should strive for both *internal* and *external* consistency, meaning that they should treat the same concept the same way (i) within the document and (ii) as existing legal doctrines, particularly binding precedent.

Based on recent statements and enforcement actions, there is a risk that the New Guidelines will adopt internally or externally inconsistent positions. For example, and as described below, recent discussions of "nascent competition" suggest the Agencies might adopt one (fairly lenient) test for assessing the competitive significance of entrants deemed "nascent competitors," but a different (and fairly stringent) test for assessing the competitive significance of any other potential entrants. Although other possibilities abound, we briefly mention two others: (1) the risk that the New Guidelines will dispense with market definition despite clear Supreme Court precedent requiring it, and (2) the risk that the New Guidelines will consider out-of-market competitive harms (e.g. in conglomerate mergers) but not out-of-market competitive benefits (efficiencies).

II. THE VALUE OF CONSISTENCY IN MERGER GUIDELINES

Merger Guidelines can serve a variety of purposes. FTC Commissioner Christine Wilson recently identified four: (1) to summarize the law, (2) to clarify how the Agencies intend to approach topics on which there is no clear binding precedent, (3) to disclose and formalize an approach that the Agencies have heretofore used informally, and (4) to advance new analytics techniques.[7]

Thus, Guidelines can be descriptive (describing the law or agency practice), persuasive (arguing what the law *should be* going forward), or both. The 1992 Horizontal Merger Guidelines illustrates each of these modes. As Commissioner Wilson explains, the 1992 Horizontal Merger Guidelines "formally codified" several unilateral effects analyses the DOJ had been using for years – a descriptive function.[8]

As Jonathan Baker observes, the 1992 Guidelines also introduced a new test for "easy" entry that requires it to be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects or concern"[9] – an attempt largely aimed at judi-

2 Fed. Trade. Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

3 Dept. of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

4 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers, Jan. 18, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

5 Dept. of Justice, Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime, (Mar. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime.

6 Karen Steyn, *Consistency – A Principle of Public Law?*, 2 Judicial Rev. 22-26 (1997).

7 Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Fed. Trade Comm'n, (2019)

8 *Id.* at 6.

9 The U.S. Dept. of Justice Horizontal Merger Guidelines §3.0 (1992) [hereinafter 1992 Guidelines]; Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines, Dep. Of Justice* (Aug. 5, 2015), https://www.justice.gov/archives/atr/responding-developments-economics-and-courts-entry-merger-guidelines.

cial persuasion. And as Greg Werden states, the 1992 Guidelines clarified the "hypothetical monopolist" test, an effort that was arguably both descriptive (because the Agencies were already using it) and persuasive (because the Guidelines made some modifications and sought judicial adoption).[10]

Merger Guidelines are occasionally persuasive because, as Hillary Greene has observed, they are not the law. They are still quite important, and the Agencies have historically sought to use Guidelines to persuade the courts to adopt their proposed analysis into law, to influence how businesses evaluate potential mergers or other conduct, and to inform a variety of other constituencies. For all these purposes, then, the Guidelines depend on the strength of their ability to persuade others that their approach is (or should be) the law.

To earn judicial adoption, consistency is particularly important. As Attorney General Garland put it earlier this year, "[t]he essence of the rule of law is that like cases are treated alike."[11] This principle has been widely espoused and is often summarized as requiring that "the laws be applied equally, without unjustifiable differentiation."[12] Thus, because consistency is the "essence" of the rule of law, courts cannot adopt an approach that would lead to like cases being treated differently.

Consistency also aids predictability, and therefore helps businesses and other constituents accurately forecast how the Agencies are likely to approach a particular fact pattern. Or to put it the other way around, without a consistent set of Guidelines, the business and legal communities will be ill-equipped to understand when the Agencies will scrutinize a transaction. Thus, consistency helps businesses and their counsel predict which transactions enforcers are likely to declare "should never have emerged from the boardroom" in the first place.[13]

III. MARKET ENTRANTS AND "NASCENT" COMPETITORS

Among other areas, the Agencies should strive in the New Guidelines to take a consistent approach to entry.

The 2010 Horizontal Merger Guidelines[14] already proscribe a stringent test for entry. Under Section 9, "[a] merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger."[15] Entry is easy if it "would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[16] Following the introduction of the concept of "easy" entry in the 1992 Guidelines, courts adopted the same language that entry must be *"timely, likely,* and *sufficient"* to deter or counteract the competitive effects of concern."[17] The Agencies continue to apply this test when seeking to dispel would-be entrants advanced by defendants. In Altria-Juul, for example, FTC Complaint Counsel argued that "neither the entry of new producers, nor repositioning by existing producers would be timely, likely, or sufficient to counteract the competitive effects of Altria's agreement to exit the relevant market,"[18] which in that case included alleged harms to innovation.[19]

The courts have widely accepted and adopted this relatively stringent test for assessing would-be entrants. Indeed, since at least *Marine Bancorporation*, courts have rarely credited firms advanced either by plaintiffs or defendants as likely entrants or "would be" com-

10 Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines: Learning from Experience*. 16 Geo. Mason L. Rev. 839, 842 (2009).

11 Dept. of Justice, *Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime*, (Mar. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime.

12 Karen Steyn, *Consistency – A Principle of Public Law?*, 2 Judicial Rev. 22-26 (1997).

13 This quote was first attributed to former AAG Bill Baer, but has since become a common credo. See, e.g. Kirk Victor, *A Bad Merger Proposal? It's in the Eye of the Beholder*, MLex.com, Nov. 11, 2019, https://www.mlexwatch.com/articles/6912/print?section=ftcwatch (attributing the quote to both AAG Bill Baer and subsequently to Ian Conner, then the Director of the FTC's Bureau of Competition).

14 The U.S. Dept. of Justice Horizontal Merger Guidelines § 9 (2010) [hereinafter 2010 Guidelines].

15 *Id.* § 9 (Entry).

16 *Id.*

17 See, e.g. *Cardinal Health*, 12 F.Supp.2d at 55 (quoting Guidelines § 3.0) (emphasis in original).

18 Complaint at *4, *In re* Altria Grp. Inc., 2020 FTC Lexis 71 (F.T.C. Apr. 2, 2020).

19 *Id.* at *22.

petitors.[20] In *Marine Bancorporation*, a potential competition case, the Supreme Court rejected the Government's attempt to include potential entrants in the relevant geographic market, observing that the Government "failed to establish that NBC [a subsidiary of the merging party] has alternative methods of entry that offer a reasonable likelihood of producing procompetitive effects."[21]

Courts have shown an equal willingness to reject defendants' theories of entrants. For example, when the FTC challenged Staples' attempted acquisition of Office Depot, defendants argued that market entrants like Amazon would be timely and sufficient to restore lost competition.[22] However the court the rejected the defense, contending that the relevant temporal scope for entry was two to three years and any potential entry would occur beyond then.[23] In these assessments, courts routinely reject what Administrative Law Judge Chappell, in the *Altria-Juul* matter, recently called "[u]ncabined speculation"[24] about competitive entry.

Despite this apparently clear legal test, recent enforcement efforts suggest the current Agency leadership believes a different entry test should apply to acquisitions of purportedly nascent competitors. In this situation, the Agencies rarely allege that the nascent firm's entry will be "timely, likely, and sufficient," let alone that it is the only firm to meet these conditions. For example, in Visa-Plaid, the DOJ argued that Visa would eliminate "a nascent competitive threat" because Plaid was "developing and launching new, innovative solutions in competition with Visa" that would "drastically lower costs for online debit transactions."[25] The DOJ stipulated that Plaid would enter the market simply because Plaid powers modern innovative financial technology, including Venmo, Acorns and Betterment, and maintains connections to "11,000 U.S. financial institutions."[26] But the DOJ did not allege that Plaid's entry would be timely, likely, or sufficient to substantially increase competition in the relevant market, let alone that it was the only potential entrant that could do so.

Likewise, in *Illumina-PacBio* the FTC alleged that the merger would "extinguish" a nascent competitive threat because PacBio's DNA sequencing system "offers substantial benefits over Illumina's systems, including longer individual sequence read lengths."[27] Echoing the DOJ's approach in *Visa-Plaid*, the FTC did not allege that PacBio's entry would, absent the merger, be timely, likely, and sufficient to substantially increase competition in the relevant market. In both of these examples, the Agencies eschewed the "timely, likely, sufficient" test they first proposed in the 1992 Horizontal Merger Guidelines.

This trend away from the traditional entry test seems likely to continue. On September 22, 2022, FTC Chair Khan testified before Congress that the agency challenged the *Meta-Within* transaction because "the mere possibility of Meta's entry has likely influenced competition in the virtual reality dedicated fitness app market."[28]

In these circumstances, if the Agencies intend to use a different entry test for nascent competitors in the New Guidelines, then they would do well to explain how it is consistent with the basic legal requirement to treat "like cases alike."

IV. OTHER POTENTIAL SOURCES OF INCONSISTENCY

Although not fully addressed nor explored here, the Agencies would do well to take consistent positions on several other that may arise in the new Guidelines. Here we briefly mention two: market definition and out-of-market competitive effects.

The Supreme Court has long said that market definition is a statutory requirement. In *Marine Bancorporation*, the Court held that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton

20 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

21 *Id.* at 639, 652.

22 FTC v. Staples, Inc., 190 F. Supp. 3d, 1000 (D.D.C. 2016).

23 *Id.* at 72.

24 *In re* Altria Grp., Inc., 2022 FTC Lexis 6, (F.T.C. Feb. 23, 2022), at *557.

25 Complaint at ¶¶ 13, 66, 76, *United States v. Visa Inc. and Plaid Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).

26 *Id.* at ¶ 7.

27 Complaint at *2, *In re* Illumina, Inc. and Pacific Biosciences of California, Inc., 2019 FTC Lexis 97, (F.T.C. Dec. 17, 2019).

28 *Id.* at 6.

Act."[29] Most recently, in the Section 1 case *Ohio v. American Express*, the Court explained that "we must first define the relevant market" before assessing even direct evidence of anticompetitive effects.[30]

The Guidelines have long fought against this approach, but to little avail. For example, the 2010 Merger Guidelines assert that "[t]he Agencies' analysis need not start with market definition" and [s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition."[31] Even so, however, the Guidelines state that "evaluation of competitive alternatives available to customers is always necessary as some point in the analysis."[32]

Recent statements suggest the Agencies may be tempted to push the New Guidelines even further from judicial precedent. In connection with the proposal to revise the Merger Guidelines, in January 2022 the Agencies sought public comment on the "use of market definition in analyzing competitive effects."[33] Since then, AAG Kanter has argued that "market realities" — like indicia of market power or the existence of head-to-competition — "should drive the antitrust analysis, not merely market definition."[34] FTC Chair Khan likewise endorsed the elevation of "market realities" to "tackle the pressing issues of today and tomorrow"[35] and committed to issuing "updated guidelines or rules to ensure our merger analysis aligns with market realities."[36]

There is likewise some risk that the Agencies will treat out-of-market effects inconsistently in the New Guidelines. Today the Guidelines typically ignore out-of-market effects on both sides of the ledger, focusing on both harms and cognizable efficiencies that will occur within a given relevant market. (There is, however, an exception in the current Guidelines for out-of-market efficiencies that are "inextricably linked" to a particular market.) Yet in a speech earlier this year, FTC Chair Khan noted her enthusiasm for scrutinizing cross-market effects in conglomerate mergers,[37] even though conglomerate effects occur when a deal has an impact on competition "but the products affected are not in the same product market and are not inputs or outputs of one another."[38] We shall have to see whether this willingness to consider out-of-market competitive harms also includes a willingness to consider out-of-market competitive benefits, i.e. out-of-market efficiencies.

V. CONCLUSION

Antitrust jurisprudence for the last several decades has relied upon the consistency and durability of the Horizontal Merger Guidelines. Guidelines can be both descriptive and persuasive, but cannot persuade courts to create legal rules that would not treat like cases alike. Therefore, the Agencies should strive for both internal and external consistency when drafting the New Guidelines, including any revisions to the standards used to assess potential entrants, the necessity of defining a relevant market, and the treatment of out-of-market effects.

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29 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974).

30 *Ohio v. Am. Express* Co., 138 S. Ct. 2274, 2284–85 (2018).

31 2010 Guidelines § 4.

32 2010 Guidelines § 4.

33 Fed. Trade. Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

34 Dept. of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

35 Fed. Trade Comm'n, *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights "Oversight of the Enforcement of the Antitrust Laws,"* (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

36 Fed. Trade Comm'n, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

37 Keynote Remarks of Lina M. Khan at the ICN, Berlin, Germany, May 6, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%2C%202022_final.pdf.

38 Alex Wilts, US agencies considering conglomerate issues during merger guideline review, Khan says, GCR, Apr. 25, 2022, https://globalcompetitionreview.com/gcr-usa/article/us-agencies-considering-conglomerate-issues-during-merger-guideline-review-khan-says; see Roundtable on Conglomerate Effects of Mergers – Background Note by the Secretariat, at 2, June 10-12, 2020, https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf ("Conglomerate effects arise when the products of the merging firms are not in the same product market, nor are they inputs or outputs of one another.").

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