SHOULD THE AGENCIES ISSUE NEW MERGER GUIDELINES?: LEARNING FROM EXPERIENCE

Gregory J. Werden[*]

Patrick Henry observed: "I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging of the future but by the past."[1] Like Patrick Henry, I am guided by the lamp of experience, having participated in the drafting of most guidelines and similar policy statements issued by the Antitrust Division of the U.S. Department of Justice during the last three decades. They include the 1982 Merger Guidelines,[2] the 1984 Merger Guidelines,[3] the 1997 revisions of the guidelines relating to efficiencies,[4] and the 2006 Commentary on the Horizontal Merger Guidelines ("Commentary").[5] I also helped draft antitrust guidelines relating to competitor collaboration,[6] intellectual property licensing,[7] international operations,[8] and vertical restraints.[9]

---

[*] Senior Economic Counsel, Antitrust Division, U.S. Department of Justice. The views expressed herein are not purported to reflect those of the U.S. Department of Justice. This essay was prepared for the George Mason Law Review's Twelfth Annual Symposium on Antitrust Law, "Antitrust Policy in the New Administration," Dec. 4, 2008.

[1] 8 THE WORLD'S FAMOUS ORATIONS 63-64 (William Jennings Bryan & Francis W. Halsey eds., 1906).

[2] U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102, *available at* http://www.usdoj.gov/atr/hmerger/11248.pdf [hereinafter 1982 MERGER GUIDELINES].

[3] U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103, *available at* http://www.usdoj.gov/atr/hmerger/11249.pdf [hereinafter 1984 MERGER GUIDELINES].

[4] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (rev. 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.pdf [hereinafter HORIZONTAL MERGER GUIDELINES].

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf [hereinafter COMMENTARY].

[6] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[7] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132, *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf.

[8] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm.

[9] U.S. DEP'T OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES (1985), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,105. These guidelines were withdrawn on August 10, 1993. Anne K. Bingaman, Assis-

In discussing guidelines for merger enforcement, it is best to begin with the guidelines issued on May 30, 1968, by Assistant Attorney General Donald F. Turner.[10] Before Turner took office in mid-1965, Attorney General Nicholas DeB. Katzenbach already had announced that the Justice Department was developing merger guidelines.[11] While the guidelines were being written, the Justice Department challenged many mergers and regularly won its cases on direct appeal to the Supreme Court. Three cases decided by the Supreme Court while Turner was working on his merger guidelines are high watermarks of the Court's interventionist approach to mergers.[12]

United States v. Von's Grocery Co.[13] declared unlawful the merger of grocery chains with shares totaling 7.5 percent in a market with a post-merger Herfindahl-Hirschman Index ("HHI") of about 250.[14] The Court did not find significant the fact that the two chains operated in largely different parts of the Los Angeles metropolitan area.[15] *United States v. Pabst Brewing Co.*[16] declared unlawful the merger of brewers within the context of markets rejected by the district court for a failure of proof.[17] The Court saw no need to reverse the district court's finding or even cite the Justice Department's defense of its alleged markets.[18] *FTC v. Procter & Gamble Co.*[19] declared unlawful the acquisition of the leading producer of household bleach by a firm that was not already in the market and that most likely

---

tant Att'y Gen., U.S. Dep't of Justice, Antitrust Enforcement, Some Initial Thoughts & Actions (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/speeches/0867.htm.

10 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101, *available at* http://www.usdoj.gov/atr/hmerger/11247.pdf.

11 *See* Nicholas DeB. Katzenbach, U.S. Att'y Gen., Remarks before the Business Council (May 8, 1965).

12 Turner's name appeared on the government's merits brief in all three cases, as did that of Richard A. Posner. The plaintiff in one of the cases was the FTC, but the Solicitor General handled all three in the Supreme Court.

13 384 U.S. 270 (1966).

14 *Id.* at 272, 279; United States v. Von's Grocery Co., 233 F. Supp. 976, 980 (S.D. Cal. 1964). The post-merger HHI is a concentration index introduced in the 1982 Merger Guidelines. 1982 MERGER GUIDELINES, *supra* note 2, § III.A. It is computed by summing the squared market shares of all the firms in the relevant market then adding twice the product of the shares of the two merging firms. HORIZONTAL MERGER GUIDELINES, *supra* note 4, § 1.5.

15 *Von's Grocery*, 384 U.S. at 282, 295-96 (Stewart, J., dissenting).

16 384 U.S. 546 (1966).

17 *Id.* at 548, 552-53; United States v. Pabst Brewing Co., 233 F. Supp. 475, 483-87 (E.D. Wis. 1964).

18 Brief for the United States at 25-46, Reply Brief for the United States at 2-7, *Pabst Brewing*, 384 U.S. 546.

19 386 U.S. 568 (1967).

would not have entered de novo.[20] The Court declared that "[p]ossible economies cannot be used as a defense to illegality."[21]

Because the Supreme Court's decisions in these and other cases articulated no meaningful limits, a cloud of uncertainty hung over all mergers. Turner's guidelines were a measured response to this uncertainty. By clarifying enforcement policy, the guidelines could have had two beneficial effects—enhanced deterrence of the anticompetitive mergers subject to challenge and reduced chilling of the other mergers not subject to challenge. In this way, Turner's guidelines were a model for future antitrust guidelines relating to business practices sometimes anticompetitive, but other times competitively neutral, or even procompetitive. Turner's guidelines, however, offered no new insights or analytic tools and made no lasting contribution to antitrust doctrine or agency practice. When I arrived at the Antitrust Division, less than a decade after their release, Turner's guidelines were almost forgotten.

When William F. Baxter became the Assistant Attorney General in early 1981, there was a good reason to issue new merger guidelines. The Department was challenging many mergers, but the existing guidelines said nothing useful about which mergers it would challenge. Baxter sought to remedy that with the guidelines he issued on June 14, 1982.[22] Baxter's merger guidelines were the most successful antitrust guidelines ever issued and had by far the greatest influence on both doctrine and practice. Their influence stemmed largely from a single footnote adopting the hypothetical monopolist test for market delineation.[23]

Initially, however, the hypothetical monopolist test was widely attacked. Critics argued both that it had no practical application[24] and that it

---

20 *Id.* at 581.

21 *Id.* at 580.

22 1982 MERGER GUIDELINES, *supra* note 2.

23 Footnote 6 stated that

> the market definition used by the Department can be stated formally as follows: "a market consists of a group of products and an associated geographic area such that ([i]n the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely future levels)." The standards for market definition in the text below implement this definition.

1982 MERGER GUIDELINES, *supra* note 2, § II n.6. On the influence of the hypothetical monopolist test, see Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 259-68 (2003).

24 *See* Thomas W. Dunfee et al., *Bounding Markets in Merger Cases: Identifying Relevant Competitors*, 78 NW. U. L. REV. 733, 754 (1983) ("impractical conceptual device"); Robert G. Harris & Thomas M. Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CAL. L. REV. 464, 481 (1983) ("simply impracticable"); Joe Sims & William Blumenthal, *New Merger Guidelines Provide No Real Surprises*, LEGAL TIMES, June 21, 1982, at 17 (not a "useful practical test"); George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 582 (1985) ("completely nonoperational").

would yield unreasonably broad relevant markets.[25] Had Walter Mondale been elected president in 1984, I speculate that his Antitrust Division would have formally jettisoned the hypothetical monopolist test. Those in charge of a Mondale Antitrust Division most likely would neither have known nor cared that the test was not Baxter's brainchild, nor that of anyone he brought into the Division. It had been both articulated and applied in a report issued by the Division during the Carter administration,[26] and it had been advocated in an article I wrote then.[27]

The only major revision of the 1982 Merger Guidelines came a decade later.[28] By that time, the Division was basing many merger challenges on unilateral effects theories not articulated in the Guidelines. The Horizontal Merger Guidelines issued on April 2, 1992, codified a significant policy change that had been announced and implemented several years earlier.[29] The 1992 Guidelines also clarified a few points that had been misunderstood. They made clear that the question posed by the hypothetical monopolist test is whether the profit-maximizing price increase is significant, rather than whether a significant price increase is profitable.[30] And they declared that the 5 percent significance threshold used for market delineation is not also used for judging the substantiality of competitive effects.[31]

A minor revision to the Merger Guidelines was released in 1984, and a minor revision to the Horizontal Merger Guidelines was released in 1997. The 1984 revision restated the treatment of imports[32] and substantially softened statements that a merger challenge was likely under specified circum-

---

25 *See* Harris & Jorde, *supra* note 24, at 486; Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1822-23 (1990); NAT'L ASS'N OF ATT'YS GEN., HORIZONTAL MERGER GUIDELINES § 4 n.31 (1987), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,405.

26 U.S. DEP'T OF JUSTICE, ANTITRUST DIV., COMPETITION IN THE COAL INDUSTRY 26-27 (1978) (report to Congress pursuant to section 8 of the Federal Coal Leasing Amendments Act of 1975). For details on the origin of the test, see Werden, *supra* note 23, at 254-57.

27 Gregory J. Werden & Kenneth G. Elzinga, *The Use and Misuse of Shipments Data in Defining Geographic Markets/Defining Geographic Market Boundaries*, 26 ANTITRUST BULL. 719, 721 (1981) (written in mid-1978).

28 HORIZONTAL MERGER GUIDELINES, *supra* note 4.

29 *See, e.g.*, *60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 59 ANTITRUST L.J. 45, 51-53 (1990).

30 HORIZONTAL MERGER GUIDELINES, *supra* note 4, § 1.11, at 7 ("In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control.").

31 *Id.* § 1.0, at 4 ("The 'small but significant and non-transitory' increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases.").

32 1984 MERGER GUIDELINES, *supra* note 3, §§ 2.34 (on the treatment of foreign competition in market delineation), 2.4 (on assigning market shares to foreign competitors).

stances.[33] In addition, the 1984 revision moved the articulation of the hypothetical monopolist test from a footnote into the text,[34] and it introduced some flexibility in the magnitude of the significance threshold for applying the test.[35] The 1997 revision affected only the section of the Guidelines on efficiencies, which was substantially expanded.[36] This provided much greater detail than any prior guidelines on how the agencies evaluated efficiencies claims.

Also notable is the Commentary issued in 2006.[37] Using actual cases, the Commentary explained how the federal enforcement agencies had assessed the likely competitive effects of many proposed mergers. To a considerable extent, the Commentary did what revising the Guidelines could have done by elaborating significantly the exposition of unilateral effects. The Commentary set out five distinct categories of unilateral effects theories illustrated by summaries of twenty-three agency investigations.[38]

The Horizontal Merger Guidelines usefully describe the agencies' analysis without acting as a straightjacket. They allow the agencies to refine their analysis on a continuous basis and apply the best available tools. And they allow the agencies to take the enforcement action warranted by the available evidence. Changes in the intensity of enforcement are possible without changes in either the analytical framework or basic policies set out in the Guidelines. Because of the flexibility carefully designed into the Horizontal Merger Guidelines, only the efficiencies section was found in need of revision during the Clinton administration.

---

33 *Id.* § 3.11 (qualifying the statements of conditions under which a challenge was likely with: "unless the Department concludes . . . that the merger is not likely substantially to lessen competition").

34 *Id.* § 2.0 ("Formally, a market is defined as a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a 'small but significant and nontransitory' increase in price above prevailing or likely future levels."); *see also* Statement Accompanying Release of Revised Merger Guidelines (June 14, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551 ("Many important points have been moved from footnotes to the text to emphasize their importance . . . .").

35 1984 MERGER GUIDELINES, *supra* note 3, § 2.11 ("In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Department in most contexts will use a price increase of five percent lasting one year. However, what constitutes a 'small but significant and nontransitory' increase in price will depend on the nature of the industry, and the Department at times may use a price increase that is larger or smaller than five percent.").

36 HORIZONTAL MERGER GUIDELINES, *supra* note 4, § 4.

37 COMMENTARY, *supra* note 5.

38 *Id.* at 25-36. The ABA transition report released last fall expressed "concerns that some parts of the Guidelines no longer reflect current economic thinking and the approach taken by the agencies." ABA SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 33 (2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf [hereinafter 2008 TRANSITION REPORT]. As to horizontal mergers, the report singled out unilateral effects theories, but the ABA neither identified any specific inadequacy of the guidelines nor noted the treatment of unilateral effects in the Commentary. *Id.* at 33-34.

I believe that the business community and merger practitioners understand current enforcement policy on horizontal mergers quite well. This is true with respect to general policies and also with respect to fine points on market delineation, competitive effects analysis, and evaluation of efficiencies claims. Therefore, I perceive no significant uncertainty that should be addressed through revising the Horizontal Merger Guidelines.

Moreover, experience suggests that a thorough revision of the Guidelines would take up to three years and occupy some of the agencies' best people for a total of more than two thousand hours.[39] Consequently, all new heads of the federal enforcement agencies would be well-advised to announce plans to issue revised guidelines only after both identifying the uncertainty to be addressed and formulating a plan to address it. Taking this cautious approach may lead to a determination that there is no significant problem or a determination that there is no satisfactory solution.

Gregory Sidak and David Teece argue that the federal enforcement agencies should completely overhaul the Horizontal Merger Guidelines.[40] Rather than focus on static price competition over the near term, they contend that the agencies and their guidelines should focus on dynamic aspects of competition over the long term. The sort of merger analysis advocated by Sidak and Teece is appropriate in exceptional cases, and it has been used by the Antitrust Division. Such analysis has been applied to defense mergers that threatened to lessen competition in the development of new technologies.[41] For example, when the Division challenged the merger of Lockheed Martin and Northrop Grumman,[42] it alleged that the merger would have lessened competition in both the development and production of a variety of important defense systems.[43] Competition to develop new products also can be the focus of merger analysis outside of defense industries, as it was in the Division's challenge to the merger of Monsanto Co. with Delta & Pine Land Co.[44] The Division challenged the merger on the basis of an-

---

39 This estimate is based mainly on experience with the 1992 Horizontal Merger Guidelines. It took six months to produce the eight paragraphs in the 1997 revision.

40 J. Gregory Sidak & David J. Teece, *Rewriting the Horizontal Merger Guidelines in the Name of Dynamic Competition,* 16 GEO. MASON L. REV. 885, 885 (2009).

41 *See, e.g.*, United States v. AlliedSignal Inc., 2000-2 Trade Cas. (CCH) ¶ 73,023 (D.D.C. 2000) (final judgment and competitive impact statement); Complaint, United States v. Gen. Dynamics Corp., No. 01-02200 (D.D.C. Oct. 23, 2001), *available at* http://www.usdoj.gov/atr/cases/indx337.htm; United States v. Northrop Grumman Corp., 2003-1 Trade Cas. (CCH) ¶ 74,057 (D.D.C. 2003) (final judgment and competitive impact statement); United States v. Raytheon Co., 1997-2 Trade Cas. (CCH) ¶ 72,029 (D.D.C. 1997) (final judgment and competitive impact statement).

42 Complaint, United States v. Lockheed Martin Corp., No. 98-00731 (D.D.C. Mar. 23, 1998), *available at* http://www.usdoj.gov/atr/cases/f212600/212680.pdf.

43 *See* Daniel L. Rubenfeld & John Hoven, *Innovation and Antitrust Enforcement*, *in* DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES 65, 85-90 (Jerry Ellig ed., 2001).

44 United States v. Monsanto Co., 2009-1 Trade Cas. (CCH) ¶ 76,464 (D.D.C. 2008) (final judgment and competitive impact statement).

ticompetitive effects in both the development and production of genetically engineered cotton seeds.

For the general run of proposed mergers, however, the focus of the Horizontal Merger Guidelines on price competition in the near term is entirely proper. And for such mergers, the Guidelines accurately describe the analysis the federal enforcement agencies actually have undertaken. Sidak and Teece contend that this is not true with respect to the XM-Sirius merger.[45] That merger presented highly unusual facts, so the result of the Antitrust Division's analysis might seem unusual, but the press release issued by the Division describes a conventional analysis entirely consistent with the Guidelines.[46] Of course, the Guidelines do not address every unusual factual scenario the agencies may encounter and thus did not anticipate the precise analysis undertaken in that case.

Sidak and Teece advocate analyzing mergers within the longer time frame applicable to the analysis of single-firm exclusionary conduct under section 2 of the Sherman Act.[47] The argument for symmetric treatment, however, is unconvincing because section 7 and section 2 have somewhat different concerns. The concern of section 7 is the potential of mergers to create or enhance "market power,"[48] which is "the ability to raise prices above those that would be charged in a competitive market."[49] Fleeting market power is of no significance under the Clayton Act, but anticompetitive price increases lasting only a couple of years easily could be a sufficient basis for finding a merger unlawful.[50] The concern of section 2 is

---

45 Sidak & Teece , *supra* note 40, at 889.

46 *See* Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.pdf.

47 Sidak & Teece , *supra* note 40, at 891.

48 *See* Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 274 (8th Cir. 2004) ("[T]he main purpose of section 7 is to limit mergers that increase market power." (quoting William A. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981))); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001) ("Merger enforcement . . . is directed at market power." (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST § 9.1, at 511 (2000))); United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988) ("The lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power . . . ."); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 327 (Jonathan M. Jacobson et al. eds., 6th ed. 2007) ("[T]he principal concern with mergers under the antitrust laws is the creation or enhancement of market power.").

49 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984) (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984)); United States Steel Corp. v. Fortner Enters., Inc. 429 U.S. 610, 620 (1977); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)); *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 4, § 0.1.

50 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 4, § 3.2 (employing a two-year time horizon for determining whether entry triggered by a merger would be timely enough to prevent a substantial lessening of competition); *see also* United States v. Syufy Enters., 903 F.2d 659, 666 n.11 (9th Cir.

"monopoly power,"[51] which differs from market power as a matter of degree.[52] Durability is one distinction,[53] as monopoly power alone requires the "power to exclude competitors."[54] So merger analysis under section 7 has a shorter-term focus than the application of section 2.

In addition, enforcement against mergers has a different potential impact on dynamic competition than does enforcement against single-firm exclusionary conduct. The "unrelenting investment in innovation" has been responsible for "the unprecedented and unparalleled growth performance of the capitalist economies,"[55] and the Supreme Court has observed that the

---

1990); FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 42 (D.D.C. 2007), *rev'd on other grounds*, 548 F.3d 1028 (D.C. Cir. 2008); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 55 (D.D.C. 1998); United States v. United Tote, Inc., 768 F. Supp. 1064, 1079 (D. Del. 1991).

51 Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize." 15 U.S.C. § 2 (2000). One element of the monopolization offense is "the possession of monopoly power in the relevant market." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). One element of the attempt offense is "a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 820, at 312 (1978)). Most of the notable recent cases have involved alleged maintenance of monopoly, which entails "anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (quoting 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 650c, at 78 (1996)).

52 *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power . . . ."); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991) ("Monopoly power is also commonly thought of as substantial market power." (citing Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 967 (10th Cir. 1990))); *Reazin*, 899 F.2d at 967 ("Market and monopoly power only differ in degree . . . ."); Deauville Corp. v. Federated Dep't Stores Inc., 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (noting that "monopoly power" is an "extreme degree of market power").

53 *See* Colo. Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695-96 (10th Cir. 1989) ("If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense."); *id.* at 696 n.22 ("[M]arket power must be persistent to make a firm a monopolist for purposes of the antitrust laws."); 3A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801d (3d ed. 2008) (noting that the market power required for a section 2 violation must be "sufficiently resistant to correction so as to warrant judicial intervention, which is always costly."). Another distinction relates to the proper definition of the competitive price level that serves as a benchmark. *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 372-73 (1998).

54 Monopoly power has traditionally been defined in the case law as "the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. This definition should be understood as if the word "and" had been used instead of the word "or." *See* Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159, 164 (10th Cir. 1986); Werden, *supra* note 53, at 374-80.

55 WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE 3 (2002). Empirical research indicates that technical progress accounted for as much as three-quarters of the economic growth in major industrialized countries since World War II. *See* Michael J. Boskin & Lawrence J. Lau, *Capital, Technology, and Economic Growth*, *in* TECHNOLOGY AND THE WEALTH OF NATIONS 17, 49 (Nathan Rosenberg et al. eds., 1992); Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 GEO. MASON L. REV. 1191, 1194-96 (2008).

"opportunity to charge monopoly prices—at least for a short period— . . . induces risk taking that produces innovation and economic growth."[56] To "safeguard the incentive to innovate,"[57] section 2 enforcement heeds the warning of Judge Learned Hand: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[58] The application of section 2, thus, is sensitive to the fact that enhancing short-term price competition could prevent the most successful competitors from reaping the rewards from risky investments, thereby undermining the incentive to innovate.[59]

In contrast, enjoining a merger on the basis that it lessens short-term price competition is highly unlikely to deprive the merging firms of the rewards from risky investments.[60] Moreover, empirical evidence indicates that mergers of close competitors, which are the most likely to raise significant competitive concerns, have not led to increased research and development.[61] Dynamic competition, therefore, is not ordinarily a focus of section 7 enforcement.

Dr. James Langenfeld suggests that the federal enforcement agencies issue new guidelines for just non-horizontal mergers,[62] and the American Bar Association Transition Report released last fall tends to agree.[63] At present, the only agency statement of enforcement policy for such mergers is a section of the 1984 Merger Guidelines still in force,[64] and it states the policy of the Justice Department alone. Although thinking on the competitive effects of non-horizontal mergers has evolved significantly since 1984, I question whether issuing new guidelines should be on the agencies' agenda.

---

56 *Trinko*, 540 U.S. at 407.

57 *Id.*

58 United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

59 This does not mean that monopoly necessarily, or even commonly, promotes innovation. The relationship between competition and the incentive to innovate is complex. *See, e.g.*, Richard J. Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, *in* 6 INNOVATION POLICY AND THE ECONOMY 159 (Adam B. Jaffe et al. eds., 2006); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 389 (1988); Jennifer F. Reinganum, *The Timing of Innovation: Research, Development, and Diffusion*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 850 (Richard Schmalensee & Robert D. Willig eds., 1989).

60 *See* ORG. FOR ECON. CO-OPERATION & DEV., DYNAMIC EFFICIENCIES IN MERGER ANALYSIS 216-19 (2007), *available at* http://www.oecd.org/dataoecd/53/22/40623561.pdf (presenting the U.S. federal enforcement agencies' views on the assessment of possible dynamic efficiencies from mergers).

61 *See* Bruno Cassiman et al., *The Impact of M&A on the R&D Process: An Empirical Analysis of the Role of Technological- and Market-Relatedness*, 34 RES. POL'Y 195, 213 (2005); Carmine Ornaghi, *Mergers and Innovation in Big Pharma*, 27 INT'L J. INDUS. ORG. 70, 78 (2009).

62 James A. Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?*, 16 GEO. MASON L. REV. 851, 852 (2009); *see also* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 68 (Apr. 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

63 2008 TRANSITION REPORT, *supra* note 38, at 36-37.

64 1984 MERGER GUIDELINES, *supra* note 3, § 4.

Issuing guidelines makes sense only if significant legal uncertainty exists and there is a real prospect that guidelines can materially mitigate that uncertainty, yet I have doubts on both points. I doubt that either the business community or merger practitioners are anxious about non-horizontal merger enforcement, and I doubt that useful guidance could be provided.

Merger guidelines should explain in a meaningful manner how the agencies sift through proposed mergers and identify the relatively few likely to lessen competition substantially. Only a minute fraction of proposed non-horizontal mergers raise concerns sufficient to warrant a challenge, and I doubt that it is possible to characterize usefully what sets apart the few cases that do. Guidelines merely outlining the teachings of the economic literature seem unlikely to be of much value to the business community or merger practitioners.

The European Commission issued guidelines on non-horizontal mergers in late 2007,[65] and the Australian commission did so in late 2008.[66] Both outline the possible anticompetitive effects of such mergers as identified by the economic literature, but they say little about the conditions under which action will be taken against proposed non-horizontal mergers. The reason is that the economic literature does not lend itself to practical application. None of the multiple theories of anticompetitive effects has general applicability under readily identifiable conditions.

Tone also is a critical aspect of any statement of enforcement policy. To the business community, enforcement attitudes are communicated in a general way. Prefatory language is important, as are the relative proportions of a document devoted to positive and negative statements. It is difficult to get the balance right with non-horizontal mergers. Describing all the theories of competitive harm requires vastly more words than describing theories of efficiency gains, yet the latter theories have much more widespread applicability. Consequently, the relative proportions devoted to positive and negative statements in the European and Australian guidelines do not signal the rarity of significant anticompetitive effects from non-horizontal mergers.

If enforcement policy with respect to non-horizontal mergers in the United States changes significantly, the change should be announced promptly. The broad contours of a shift in policy can be quickly and effectively communicated through a speech, and a shift in policy should be communicated before any enforcement actions are taken. Guidelines could

---

65 EUROPEAN COMM'N, GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (2007), 2008 O.J. (C 265) 6, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF (adopted on Nov. 28, 2007 and published on Oct. 18, 2008).

66 AUSTL. COMPETITION & CONSUMER COMM'N, MERGER GUIDELINES §§ 5.18-43 (2008), *available at* http://www.accc.gov.au/content/index.phtml/itemId/809866.

make sense later, after accumulating enforcement experience on the issues they would address.