U.S. ANTITRUST POLICY INTEGRATION: THE 2010 U.S. HORIZONTAL MERGER GUIDELINES

William E. Kovacic*
Commissioner, U.S. Federal Trade Commission

En août 2010, le Département de la justice des États-Unis et la Federal Trade Commission ont publié des nouvelles lignes directrices qui décrivent comment les deux organismes fédéraux antitrust doivent analyser les fusions horizontales. L'efficacité du nouveau document, qui a apporté les premières révisions majeures aux *Lignes directrices sur les fusions horizontales* des États-Unis depuis 1992, dépendra beaucoup du succès des agences à adopter une approche analytique cohérente dans la mise en oeuvre et dans les activités de sensibilisation externes. Cet article propose des mesures que les agences américaines peuvent prendre afin de mieux réaliser une intégration des politiques dans l'application des lignes directrices de 2010.

In August 2010, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued new guidelines to describe how the two agencies would analyze horizontal mergers.[1] The issuance of the new Horizontal Merger Guidelines (HMG) followed a custom begun in 1968 when the DOJ announced how it would exercise the prosecutorial discretion inherent in the Supreme Court's expansive interpretations of the Clayton Act's merger control provision.[2]

The 2010 guidelines are important for at least three reasons. First, merger policy is an essential foundation of U.S. competition policy. Merger control impedes collusive conduct and forestalls the creation of market power that can reduce competition with respect to price, output, quality, or other dimensions of rivalry.[3] Sensible merger policy also dictates that antitrust agencies recognize the value of a strong market for the buying and selling of firms and stand aside when transactions seem likely to be benign or precompetitive.[4]

A second reason is the contribution the 2010 HMG can make to influence merger analysis in a world of roughly 120 competition agencies. A growing number of nations (notable examples include China and India) have the capacity to determine whether mergers proceed or founder through the application of their own competition laws. The United States and other countries have a strong stake in the broad acceptance of sensible competition policy standards. A country's influence upon international standards depends heavily on its ability to devise analytical approaches that elicit emulation due to their superior intellectual vision and demonstrated quality in implementation. Owing to new developments in economic theory and learning gained from enforcement experience, merger guidelines share a vital characteristic with computer software: they require periodic upgrades. The U.S. federal antitrust agencies last had issued a major upgrade of their merger guidelines in 1992, and it was time to put a new edition into circulation.

A third reason for which the 2010 Guidelines are important is that they provide an opportunity to revisit the institutional arrangements through which the United States implements its competition laws. The federal government's application of the antitrust laws takes place principally through a joint venture between the DOJ and the FTC, with sectoral regulators such as the Federal Communications Commission and the Federal Energy Regulatory Commission sharing power to review mergers in certain sectors. Since 1914, when the Congress gave both the DOJ and the FTC authority to enforce the Clayton Act and its ban on anticompetitive mergers and various other forms of conduct, the relationship between the two federal antitrust agencies has displayed the sustained tension that usually arises when two public bodies are assigned the same or similar duties. The DOJ/FTC relationship features many of the same frictions that arise in commercial joint ventures when rivals seek to function as partners.

The performance of the federal government's antitrust joint venture in applying and explaining the 2010 HMG will be a major determinant of the success of the new guidelines. The first anniversary of the 2010 HMG approaches quickly, and it is worth considering what the two agencies have done to make their collaboration in applying the guidelines effective.

The focus here is squarely on implementation. The article does not address debates about the soundness of the underlying analytical framework, or whether the 2010 HMG make the right tradeoffs between the timeless polarities of clarity and flexibility, simplicity and completeness. The emphasis on implementation seeks to correct an imbalance in discussions about competition law. The scrutiny of analytical concepts ordinarily comes at the expense of seemingly mundane considerations of implementation – the procedures and methods of organization that must be effective if concepts are to be useful in practice. The physics of competition law (concepts) usually eclipses engineering (implementation). Superb physics applied through weak engineering is a losing combination.

The 2010 HMG concepts will thrive only if policy engineering receives its due. The issuance of the new document was only a first step. Everything depends on what comes next. The DOJ and the FTC devoted considerable effort to preparing the new guidelines. This was a major achievement in its own right. The two agencies have shown little urgency, however, to take measures that will determine whether the document will improve the quality of merger policy. The FTC today has a better working relationship with the Competition Directorate of the European Union than it has with the Department of Justice. The new guidelines present an ideal opportunity to place the process of merger review within the federal antitrust agencies on a better footing and to strengthen the relationship between the DOJ and the FTC – to move beyond cooperation that takes place begrudgingly on an as-needed basis and embrace a fuller, willing collaboration that takes full advantage of accumulated knowledge and policy complementarities.

Policy Integration

The 2010 HMG have important elements of commonality with previous federal merger guidelines, and they add new features. To achieve policy coherence, it is important for the DOJ and the FTC to achieve and sustain a consistent interpretation of the document. Like their predecessors, the 2010 HMG unmistakably, and inevitably, give the federal agencies extensive discretion to determine the decision to prosecute. Even if the agencies had issued more fully specified methodologies that purported to cabin the government's analysis, the exercise of discretion would seep through in the definition and application of key operative terms. Elaborate, comprehensive drafting cannot suppress the hard issues that frequently emerge in a diagnosis of likely competitive effects.

Nonetheless, there are a number of steps the agencies can take to increase the likelihood that the public authorities will do two things that are essential elements of a well-functioning competition policy system: (1) apply the 2010 HMG in a manner that promotes the development of coherent policy throughout the U.S. antitrust system and (2) facilitate future discussion about the appropriate design of merger policy. Some measures are readily within the agencies' grasp and require only a sustained commitment to their implementation over time. Other tasks are more difficult. These include a basic re-examination of the enforcement framework and operation of merger policy. All of the suggested steps involve what amounts to a long-term investment in the infrastructure of merger control – not a strong suit of public policy making in the United States.

Easier Measures

Merger guidelines are a policy product whose successful application demands intensive post-sale services. There is little point in creating the complex antitrust software of new merger guidelines without careful attention to customer service and to their compatibility with the operating system on which the software runs.

In the case of federal merger guidelines, the provider of the product and the post-sale services is a joint venture of two government bodies: the DOJ and the FTC. The overall quality of the post-sale services delivered to users of the guidelines is a function of the effort of the two agencies, especially their effort to achieve coherence in the application of the guidelines.

Two sets of users require special attention: the agency staffs, on the one hand, and the potential participants in mergers and their advisors, on the other hand. A useful starting place for the agencies is the education of their own professionals. The two federal agencies have yet to set in place a systematic program to

ensure that the DOJ and the FTC establish and share a coherent vision of the 2010 HMG. One useful way to achieve this common vision would be to establish common and continuing instructional programs for attorneys and economists now employed by the agencies and for new hires. Joint DOJ and FTC training exercises would help ensure that the interpretation of key 2010 HMG provisions takes place in a consistent manner.

No less important is the sharing of know-how about actual applications of the 2010 HMG. The DOJ and the FTC presently have no programs to engage their merger case handlers and managers (attorneys and economists) in regular discussions to share know-how about what they have learned through the application of the new guidelines. Among other topics, regular common discussions of experience under the new guidelines could consider whether the typical information requests made in the second request process are well linked to the new HMG framework. A further means to improve the exchange of know-how would be a continuing program of secondments by which the merger groups of both agencies exchanged attorneys and economists.

The issuance of new merger guidelines also provided an opportunity, as yet untaken, to build a common framework to assess the consequences of past enforcement decisions and identify areas for improvement in the merger review process. One could envision joint, regular consultations about assessment techniques and the development of a research agenda to evaluate process and substantive outcomes. This could be linked to collaboration with external groups to devise evaluation methodologies and discuss outcomes.

The indifference of the DOJ and the FTC to measures that would yield deeper integration between the agencies forfeits a potentially valuable source of policy improvements. Imagine that there were two commonly owned hospitals with cardiology units in the same community. The cardiology teams of these hospitals would be engaged in a continuous process of consultation about matters such as diagnostic techniques, surgical methods, and post-operative care. Such cooperation would reflect the awareness that the two teams can accelerate performance improvements by pooling knowledge rather than working in isolation. The DOJ and FTC have common ownership but no culture or habit of routine consultation that links the work and knowledge of their merger teams.

Along with greater efforts to build a common base of knowledge between the two agencies, the attainment of coherent merger policy under the 2010 HMG requires greater efforts to integrate efforts to engage external audiences. The rollout of the guidelines will be more effective if there is true congruence between the themes and specific ideas conveyed by officials at the DOJ and the FTC. A basic starting point is to consult on the formulation of an outreach program – including agreement on messages communicated in public appearances, the advance sharing of the texts of speeches, and the identification of speaking opportunities for agency officials.

The outreach program has several dimensions that go beyond appearances at conferences, seminars, and workshops to give the agencies' interpretation of guidelines and recounting of experience with the new document. One focus of attention is fuller disclosure of DOJ and FTC activity related to merger review. A more complete program of disclosure would entail a commitment to issue closing statements in each instance in which an agency has undertaken a significant inquiry and has decided not to intervene. Closing statements would be appropriate in each investigation in which the agencies issue Second Requests. Such statements would describe, in informative detail, the reasons why an agency permitted specific transactions to proceed without intervention. A further valuable form of disclosure would be to continue the agencies' practice over the past decade of publishing data sets on enforcement tendencies, including data that illuminates actual experience under the new HMG.

The external education program also would engage other government institutions that participate in merger reviews. These include the state governments and federal sectoral regulators such as the FCC and the FERC. The United States would do well to create its own equivalent of the European Competition Network, the mechanism by which DG Comp and the national competition authorities of the European Union coordinate their activities.

More Difficult Forms of Policy Integration

The measures described above could promote coherence through means that are largely within the control of DOJ and the FTC. Their implementation only demands institutional will and perseverance. If undertaken, these steps would increase the likelihood that the two agencies will implement the 2010 HMG in a coherent manner and, as a side benefit, improve routine cooperation and team spirit across the agencies.

There are additional steps that would improve national policy coherence but require more complex and difficult reforms. Among the most important is to improve the interagency clearance process – the mechanism the DOJ and the FTC use to determine which institution will review a particular matter. The existing system relies mainly on recent agency experience in a sector to determine the assignment of files. In most cases, this allocation rule results in the smooth distribution of matters between the agencies. Yet there are instances in which the agencies reach an impasse during the initial thirty-day waiting period in the Hart-Scott-Rodino merger review process and achieve agreement only as the initial period is about to expire. When these conflicts occur, the parties find themselves in the annoying position of being asked to withdraw and refile their notification to avoid the certainty that they will receive a second request simply in order to enable the agencies to do the job they ought to have performed in the first thirty days. Disputes over the entitlement to review specific matters can be a source of persistent bitterness between the agencies, and disagreements that result in forced re-filings arouse needless antipathy in the private sector.

An allocation mechanism that emphasizes recent experience also can create perverse incentives for each agency. An agency might be tempted to issue second requests in borderline matters simply for the purpose of expanding its experience base and bolstering its claim for future matters. Where second requests are appropriate, the agency might draft specifications more broadly than necessary (for example, covering a broader rather than a narrower array of products) as a way to assert a broader base of experience.

The resolution of disagreements over clearance issues often involves elaborate forms of bargaining between the agencies. This is especially true for merger or nonmerger matters will involve firms with a high public profile. One agency will surrender a high profile matter to the other agency upon a promise to receive other high profile matters in the future. In some instances, DOJ and FTC agree to trade cases involving significant firms or sectors, so that experience with respect to a given company or sector is subdivided between the agencies rather than concentrated in a single case handling team. Such trades can reduce agency effectiveness by denying to any single team the full body of knowledge that would come from greater exposure to a firm or a sector. When an agency trades items of considerable value to obtain clearance for a specific matter, it may feel a stronger need than usual to realize the greatest possible return for its investment. This can impart momentum in the direction of intervening in a transaction, a step that is more likely to attract favorable attention, rather than standing down after an investigation.

Reforms to the clearance process are certain to require a three-way negotiation among the DOJ, the FTC, and the Congress. In early 2002, the DOJ and the FTC sought to change the existing allocation of sectoral oversight and alter the calculus for clearance decisions and did not consult Congress in advance before doing so. Key legislators objected and made credible threats to reduce the DOJ and FTC budgets unless the agencies withdrew the reforms. DOJ capitulated, and the reforms collapsed. The agencies had underestimated the value the legislative oversight committees derive from the number and type of companies subject to the jurisdiction of the agencies within their purview. Companies subject to the jurisdiction of a regulatory agency often give campaign contributions and other forms of homage to members of Congress who sit on the legislative committee that oversees the agency. When an agency ceases to exercise jurisdiction over a company (for example, by allocating oversight to another federal agency), the firms have weaker incentives to provide contributions to the agency's congressional oversight. For the affected oversight committee, this is the equivalent of losing an income stream. Thus, reforms to the DOJ and FTC clearance process are likely to require congressional approval if they are to endure.

There is a deeper and still more difficult issue confronting the U.S. antitrust system: should it reduce the number of existing public enforcement agents or reallocate tasks among them? Given the political dynam-

ics described above, it is difficult to imagine what form of exogenous shock would be necessary to induce Congress to revisit the dual federal enforcement agency structure and either consolidate federal government responsibility in one agency or redistribute authority between the DOJ and the FTC. Simplification by merger of the existing agencies may be unattainable, but greater policy integration by agreement between the two agencies is not. The menu of possibilities, presented earlier, that require no congressional approval can be adopted by the agencies alone. To do so would improve the prospects for success of the 2010 HMG and establish ties that strengthen coherence throughout the U.S. antitrust system.

Endnotes

* Commissioner, U.S. Federal Trade Commission; Professor, George Washington University Law School (on leave). This article is based on a presentation made to the Competition Law Roundtable hosted by the Canadian Bar Association and the University of Toronto in Toronto on April 8, 2011. The views are the author's alone.

[1] Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[2] Department of Justice, Merger Gudelines (1968), reprinted in 2 Trade Reg. Rep. (CCH) ¶ 4510. The liability standards established by Supreme Court decisions that led up to the 1968 guidelines are discussed in Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 439-48 (2d edition, Thomson West, 2008). Before the DOJ 1968 guidelines, the FTC had issued guidance concerning the analysis of mergers in specific sectors, including cement and food distribution. See Hillary Greene, "Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective," 72 Antitrust L.J. 1039, 1042-44 (2005) (discussing FTC sector-specific guidelines of 1960s and 1970s).

[3] Gavil et al., supra note 3, at 432-36.

[4] William Blumenthal, "The ICN Recommended Practices for Merger Process: Why They Matter" (Brno, Czech Republic, Mar. 18, 2008) (presentation at the ICN Merger Notification & Procedures Workshop: Implementing the Recommended Practices), available at http://www.ftc.gov/speeches/blumenthal/20080318ICNBrnoSpeechMergerRPs.Final.pdf.