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The "Litigation Mulligan" in the 2010 Merger Guidelines: Better Economics but Not (Necessarily) More Clarity Before the Agencies and the Courts

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The 2010 Merger Guidelines and the "Litigation Mulligan": Better Economics but Not (Necessarily) More Clarity Before the Agencies and the Courts

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I. INTRODUCTION

The new Horizontal Merger Guidelines,[2] issued by the U.S. antitrust Agencies on August 19, 2010,[3] mark a clear change from their 1992 predecessor.[4] They reduce the importance of traditional market definition, increase Herfindahl-Hirschman Index ("HHI") thresholds,[5] and expand the types of evidence considered. Most commentary to date has focused on the fact that the new Guidelines largely codify hitherto-unofficial (although widely known) practices of Agency staff, and this is true, with some key exceptions. But such commentary suggests a no-big-deal view of the new Guidelines that misses something important.

The big development of the new Guidelines is that, read as a whole, they embrace three trends with the potential to make merger work significantly longer and less predictable. Those trends are (1) the pursuit of economic-analytical perfection; (2) the identification of ever-smaller groups of customers that might be subject to a discrete, unquantifiable, or even speculative harm; and (3) an indifference to the growing divergence between merger advocacy before the Agencies and merger litigation before the courts. If these trends continue, the 2010 Guidelines will turn out to be a big deal indeed.

The Agencies' stated goal for the new Guidelines is to increase "clarity and transparency, and provide business with … greater understanding of how we review transactions."[6] This statement is more complex and controversial than it might immediately appear. If the focus is on the "we," meaning the Agencies, and the "how," meaning the process alone, then the 2010 Guidelines soundly accomplish the goal: they put merging firms on notice that the Agencies have changed their internal approach. But if the focus is on "clarity and transparency," the new Guidelines' impact is harder to judge. Merging firms are only tangentially interested in the

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[2] U.S. Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines ("2010 Guidelines"), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[3] We follow the convention of describing as the "Agencies" the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). The Agencies' press releases announcing the new Guidelines are *available at* http://www.ftc.gov/opa/2010/08/hmg.shtm *and* http://www.justice.gov/atr/public/press_releases/2010/261642.htm.

[4] U.S. Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.htm. The 1992 Guidelines were revised slightly, in Section 4 related to Efficiencies, in a 1997 release. The rest of the Guidelines were unchanged in 1997, so we follow the convention of referring to the document—including the 1997 revision—as the "1992 Guidelines."

[5] Discussed in detail below at the end of Part II.

[6] U.S. Dept. of Justice, Press Release, Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines, *available at* http://www.justice.gov/atr/public/press_releases/2010/261642.htm.

"how" of the Agencies' internal processes. What firms really want is "clarity and transparency" as to the ultimate outcome of a merger review. That requires something the Guidelines do not necessarily improve: better prediction of ultimate agency decisions and, in hotly contested cases, outcomes of litigation or at least of hard-fought consent decrees that will be negotiated in (and thus colored by) litigation's shadow.

The Agencies can, if they wish, diverge from courts at the early staff stages of an investigation, but they cannot escape the impact of courts' views at the endgame. As a result, merging parties may be well-advised to pursue dual strategies in their advocacy: an agency track in which they marshal evidence and models toward persuading Agency lawyers and (particularly) economists under the new Guidelines, and a litigation track in which they assemble a traditional market-definition case for a court. This does not sound like a recipe for "clarity and transparency," or speed or low cost.

Much will depend on how the new Guidelines are implemented. It is too early to give a report on implementation, so, for now, we confine this article to a summary of the 2010 Guidelines and their changes from the 1992 version; a contrasting illustration of how courts recently have approached mergers; and a discussion of how the new Guidelines are likely to affect merger advocacy.

II. KEY CHANGES TO THE GUIDELINES

The 1992 Guidelines were organized as a linear roadmap to merger analysis, with sections listed in the order that they normally would be applied by Agency staff. The 2010 Guidelines take a quite different approach, as a comparison of the documents' table of contents shows in Table 1:

Table 1:

1992 Guidelines		2010 Guidelines	
0.	Purpose, Underlying Policy Assumptions, and Overview	1.	Overview
1.	Market Definition, Measurement and Concentration	2.	Evidence of Adverse Competitive Effects
2.	The Potential Adverse Competitive Effects of Mergers	3.	Targeted Customers and Price Discrimination
3.	Entry Analysis	4.	Market Definition
4.	Efficiencies	5.	Market Participants, Market Shares, and Concentration
5.	Failure and Exiting Assets	6.	Unilateral Effects
		7.	Coordinated Effects
		8.	Powerful Buyers
		9.	Entry
		10.	Efficiencies
		11.	Failure and Exiting Assets
		12.	Mergers of Competing Buyers
		13.	Partial Acquisitions

The primacy of market definition in the 1992 Guidelines was obvious: market definition was quite literally the first step. Market definition also affected every step that followed in the 1992 Guidelines; for example, the evaluation of competitive effects was done as to that already-defined market, as was the analysis of entry. Defining the product and geographic market, therefore, long was recognized as a make-or-break initial step in a merger.

The 2010 Guidelines have not done away with market definition but that step is no longer first, no longer linear, and no longer even necessary. The focus is on "direct" measurement of effects, rather than "inference" from analysis of markets, and accordingly the text devoted to Evidence of Adverse Competitive Effects (§2), Targeted Customers and Price Discrimination (§3), Unilateral Effects (§6), Coordinated Effects (§7), and Powerful Buyers (§8)—each of which is a new stand alone section—dwarfs that devoted to Market Definition (§4) and Concentration (§5). The Guidelines state that "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition,"[7] which is an understatement; none of the effects sections depends on market definition as an initial step, or perhaps as a step of any kind. Moreover, effects generally will be used to define markets, not the other way around.[8] The result is that the linear process of 1992 has changed to a free-flowing one in 2010, allowing the Agencies to start their analysis wherever they wish.

Other key features of the 2010 Guidelines are:

- ***A broader set of possible evidence.*** The new Guidelines expand both the "types" and the "sources"[9] of evidence to be considered. Included are actual effects observed in consummated deals, economic modeling, direct comparisons, party documents, and a wide range of customer views. The emphasis on better economics and actual effects should be applauded (and has been, by many leading economists), but the expansion into other areas is potentially distressing. For example, the new Guidelines state, "a purchase price in excess of the acquired firm's stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition."[10] But such a purchase price describes the great majority of acquisitions!
- ***A greater focus on unilateral effects.*** The 1992 Guidelines listed coordinated effects first and devoted slightly more space to them, versus unilateral effects;[11] that order and emphasis is reversed in the 2010 Guidelines.[12]
- ***A new focus on economic modeling, particularly as to unilateral effects.*** Among the new economic models, the 2010 Guidelines embrace critical loss analysis as a market-definition tool;[13] this is a well-accepted test, but not one mentioned in the 1992 document. The new Guidelines also embrace the Gross Upward Pricing Pressure Index

[7] 2010 Guidelines, § 4.

[8] *See id*. (noting that "competitive effects can inform market definition, just as market definition can be informative regarding competitive effects."). The Agencies are most likely to rely on effects when traditional market definition principles suggest multiple plausible markets with differing predicted effects. *Id*.

[9] These are the titles, respectively, of 2010 Guidelines §§ 2.1 and 2.2.

[10] 2010 Guidelines, § 2.2.1.

[11] *See* 1992 Guidelines, § 2.1 (discussing coordinated effects), § 2.2 (discussing unilateral effects).

[12] *See* 2010 Guidelines, § 6 (discussing unilateral effects), § 7 (discussing coordinated effects).

[13] *See* 2010 Guidelines, § 4.1.3.

("GUPPI"), a new and controversial economic test for harmful effects.[14] GUPPI attempts to assess the unilateral effects of a merger by measuring the value of sales that a price increase might divert from a product sold by one merging firm to a product sold by the other merging firm. One frequent criticism of the GUPPI test is that it always will predict a price increase if the merging firms' products are substitutable, potentially causing the agencies to challenge more mergers.[15]

- ***A greater importance for non-price effects.*** The new Guidelines note that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[16] The Agencies have always believed this but the point now receives more emphasis. These effects are harder to quantify than price changes, making pre-merger counseling that much more difficult.

- ***A larger concern about price discrimination and "targeted" customers.*** The 1992 Guidelines mentioned price discrimination and customers that could be targeted for price increases, but only did so in passing, and only as a factor in helping to define markets.[17] As recently as the 2008 Single-Firm Conduct Report, the Department of Justice ("DOJ") took the position that price discrimination was output-enhancing and benign, or at least generally "ambiguous."[18] The 2010 Guidelines continue to use price discrimination to define markets but also appear to identify price discrimination as an independent competitive harm.[19] No mention is made of price discrimination's potential positive effects, and "small" business customers are identified in the only example as the most likely to be harmed[20]—an odd point of emphasis, given that price discrimination under usual scenarios means that smaller, poorer customers get lower prices, not higher ones.

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[14] *Id.*, § 6.1. The exact phrase and the acronym GUPPI are not used but § 6.1 clearly refers to the GUPPI test articulated in a brand-new article by Joseph Farrell and Carl Shapiro who, at the time of the new Guidelines' publication, were (and still, as of this writing, are) respectively the Director of the Bureau of Economics at the FTC and the Deputy Assistant Attorney General for Economics at the DOJ Antitrust Division. *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10(1) THE B.E. J. THEORETICAL ECON., Article 9 (2010), *available at* http://faculty.haas.berkeley.edu/shapiro/alternative.pdf.

[15] *See, e.g.*, Marius Schwartz & George Rozanski, Comments on Horizontal Merger Guidelines (June 3, 2010), at 4, *available at* http://www.ftc.gov/os/comments/hmgrevisedguides/548050-00021.pdf.

[16] 2010 Guidelines, § 1.

[17] 1992 Guidelines, § 1.0 (noting that "where a hypothetical monopolist likely would discriminate in prices charged to different groups of buyers, distinguished, for example, by their uses or locations, the Agency may delineate different relevant markets corresponding to each such buyer group").

[18] *See* U.S. Dept. of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008) at 86, *available at* http://www.justice.gov/atr/public/reports/236681.pdf (noting that "[m]ore consumers can be served when firms charge higher prices for customers that value a product highly and lower prices for those that value the product less"). DOJ subsequently "withdrew" this Report in May 2009. *See* Press Release, Justice Department Withdraws Report on Antitrust Monopoly Law, *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm.

[19] 2010 Guidelines, § 3 & Ex. 3 ("The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed.").

[20] *Id.*

Finally, the new Guidelines update the HHI inquiry, significantly raising the HHI thresholds that are likely to give rise to competitive concerns.[21] The 1992 Guidelines thresholds were:

Table 2:

Below 1000	*Unconcentrated* Mergers in such markets were unlikely to be challenged.
1000-1800	*Moderately Concentrated* Mergers causing an increase of 100 points "potentially raise[d] significant competitive concerns."
Above 1800	*Highly Concentrated* Mergers causing an increase of below 50 points were unlikely to be challenged; increases of 50-100 points "raise[d] significant competitive concerns;" and increases of more than 100 points were presumptively illegal.

The 2010 Guidelines thresholds are:

Table 3:

Below 1500	*Unconcentrated* Mergers in such markets are unlikely to be challenged.
1500-2500	*Moderately Concentrated* Mergers causing an increase in the HHI of more than 100 points "potentially raise significant competitive concerns and often warrant scrutiny."
Above 2500	*Highly Concentrated* Mergers causing an increase between 100-200 points "potentially raise significant competitive concerns;" increases of more than 200 points create a rebuttable presumption that a merger will enhance market power.

[21] 1992 Guidelines, § 1.5; 2010 Guidelines, § 5.3. The HHI measures market concentration by adding the sum of the squares of each firm's market share. A market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). 2010 Guidelines, § 5.3 & n.9.

This change to HHI thresholds is in one sense significant: much larger shares are now officially tolerated, and the difference between 1000 and 1500 as the virtual safe harbor territory, for example, is quite substantial. But it is less important as a practical matter. The 1992 HHI thresholds were well known to be out of date, and the new thresholds merely recognize longstanding and uncontroversial Agency practice.

III. REJECTION OF THE COURTS' FOCUS ON TRADITIONAL MARKET DEFINITION?

The 2010 Guidelines sharply diverge from the modern trend in high-profile contested merger cases, which have turned on market definition issues—and, generally, not in the Agencies' favor—even when the Agencies attempted to rely on the types of evidence espoused by the new Guidelines.

For example, the FTC lost its challenge to the Whole Foods/Wild Oats merger at the district court level. There, the agency relied heavily on "direct evidence" of likely anticompetitive effects in the form of e-mails written by Whole Foods' CEO, including one e-mail to the board of directors in which the CEO claimed the deal would allow Whole Foods to "avoid nasty price wars" with Wild Oats. The FTC viewed this and related statements as direct evidence of the anticompetitive potential of the merger, but the case foundered at the preliminary injunction stage on the district court's rejection of the FTC's narrow proposed relevant market of "premium natural and organic supermarkets."

The *Whole Foods* district court decision noted that "[a]s with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market."[22] The court rejected the FTC's narrow market and instead found that the relevant market included all supermarkets, a much broader market not subject to potential anticompetitive effects from the merger. Two judges on a panel of the D.C. Circuit later reversed the district court, but did so in a famously fractured opinion (an opinion of the court, a concurrence, and a vigorous dissent) that, to the extent it can be cited at all, only established a low market-definition bar under the FTC Act's special rule of pleading for preliminary injunctions, Section 13(b).[23] The D.C. Circuit did not endorse the FTC's market definition as a substantive matter, and certainly did not do away with market definition entirely.

Similarly, in *Oracle/PeopleSoft*, the district court rejected the DOJ's proposed market of "high function" human relations management and financial management systems software. The DOJ case featured testimony from customers who said that they generally would not turn to products sold by vendors outside the DOJ's proposed market if the combined Oracle and PeopleSoft raised their prices. The court largely rejected the customer testimony, finding in essence that customers were describing mere preferences among different software platforms, not what they actually would do if presented with a price increase. "[T]he issue is not what solutions the customers would *like* or *prefer* for their data processing needs," wrote the court, but instead:

> the issue is what they *could* do in the event of an anticompetitive price increase by a post-merger Oracle. Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves

[22] Fed. Trade Comm'n v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 8 (D.D.C. 2007).

[23] *See* Opinion, Fed. Trade Comm'n v. Whole Foods Mkt., Inc., No. 07-5276 (D.C. Cir. July 29, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080729wholefoodsopinion.pdf.

> performed or evidence they presented … unsubstantiated customer apprehensions do not substitute for hard evidence."[24]

The court rejected the narrow proposed market, and found the larger market not subject to anticompetitive harm from the merger.

The 2010 Guidelines seemingly conflict with *Whole Foods*, *Oracle/PeopleSoft*, and other recent cases[25] in two ways. First, the 2010 Guidelines attempt to bolster the sort of direct evidence found unpersuasive in those cases. As to direct statements by the merging parties, the new Guidelines note that "[d]ocuments describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions."[26] As to customer testimony, the Guidelines state, "The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers."[27] The Agencies clearly will continue to rely on these types of evidence as part of their internal review even if, at least in the short run, the courts may not be receptive to the new approach.[28]

Second, as noted above, the 2010 Guidelines include tests that generally support narrower markets of the types proposed in these earlier cases. The new Guidelines state, "Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market."[29] The 2010 Guidelines suggest that the Agencies will continue to pursue narrow market theories at least during the internal phase of their review. Whether they will continue to do so in court is an open question.

IV. HOW THE 2010 GUIDELINES COULD CHANGE MERGER ADVOCACY

The new Guidelines appear indifferent, or even defiant, to the foregoing court losses. The Agencies claim to hope that they will change the courts' approach—the Guidelines mention "assist[ing] the courts in developing an appropriate framework for interpreting and analyzing the antitrust laws"[30]—but such "assistance" was attempted in the foregoing cases without success; it is not immediately apparent how codifying the Agencies' disagreement would make courts more receptive. Thus, merging firms may be confronted with a long-term divergence.

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[24] *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (emphasis in original).

[25] In particular, see FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 145-46 (D.D.C. 2004) ("In many contexts, however, antitrust authorities do not accord great weight to the subjective views of customers in the market.").

[26] 2010 Guidelines, § 2.2.1.

[27] *Id*., § 2.2.2.

[28] *New York v. Group Health Inc*. represents an early example of how this might play out in practice. New York City challenged the merger of two health plans. When faced with a summary judgment motion challenging the proposed structural market definition, the City sought to amend its complaint to include a reference to the GUPPI test as embraced by the then-draft Guidelines. The Court rejected the effort to amend, noting that "its research has not revealed a single decision of a federal court adopting this test. In light of the case law's clear requirement that a Plaintiff allege a particular product market in which competition will be harmed, this absence of authority is hardly surprising." City of New York v. Group Health Inc., 2010 WL 2132246, at *6, n.6 (S.D.N.Y. May 11, 2010).

[29] 2010 Guidelines, § 4.

[30] *Id*., §1.

In addition to that puzzling factor, firms must anticipate the use of broader types of evidence, economic tools that operate at a more minute level of detail (as GUPPI does), a greater focus on price discrimination, and identification of smaller or "targetable" groups of customers whom the Agencies will attempt to protect not only from pricing harm, but also from harm involving hard-to-quantify factors such as preferences over differentiated products (see *Whole Foods*). The Agencies call this "flexibility" but firms may wonder if it includes a higher risk of subjectivity and speculation. At the very least, there is this significant change in focus: Where the 1992 Guidelines came to be seen as a roadmap and a constraint on Agencies, the 2010 Guidelines are enabling—"flexibility"[31] means more Agency freedom.

Agency freedom is not necessarily a bad thing; the U.S. Agencies are world leaders in expertise and professionalism. Flexibility could lead them to get more merger decisions right, and getting them right is important to consumers and the economy as a whole. It is inevitable, however, that more flexibility means less predictability and, thus, the new Guidelines can only partially attain their "clarity and transparency" goal.

The 2010 Guidelines are still young but we can make a number of other predictions with confidence, and can identify a number of points where observers will wish to watch closely for impacts over time. These are:

Boom times for merger economists and other experts. The clearest winners in the 2010 Guidelines are merger economists, whose centrality to merger advocacy, already obvious, has been resoundingly confirmed. Analysis of critical loss, GUPPI, and similar tools newly-embraced by the Guidelines will require economic experts—these are not tools that senior executives and merger lawyers apply on their own. And merging parties may need to ask other types of experts to do more, in an attempt to anticipate the wider range of evidence and theories that Agency staff is now encouraged to explore.

We emphasize again: the new Guidelines' embrace of modern economics and actual economic effects is, generally speaking, good. But the greater emphasis on economic modeling (to say nothing of the other evidence discussed) is not costless, and the pursuit of economic perfection can be slow and expensive. With all due respect to our friends in the economics profession, the idea that increasing the scope of economic inquiry will also increase "clarity" to the merging parties is one that we regard with mirth.

Boom times for document review and bad emails. A side benefit of the 1992 Guidelines' focus on market definition was that, by placing objective measurements first in merger analysis, those Guidelines tended to reduce the impact of "bad" documents and emails. When confronted with an executive's statements that a merger would allow firms to "dominate" a market, or scribblings short of those by the Whole Foods CEO, Agency staff generally has been receptive to the argument that such statements are mere puffery, signifying little. The new Guidelines appear to give Agency staff license to rely on such material to a greater degree.

More transparency about Agency tools; less about Agency results. While the new Guidelines better explain the full range of tools the Agencies may use—a useful contribution—they do little to explain *which* tools will be used in any particular case or *how* those tools will be applied. Agency officials have acknowledged as much; for example, FTC Bureau of Competition Director Richard Feinstein recently stated, "We are not saying that any upward

[31] *See id.*, § 4.

pricing pressure, no matter how trivial, will lead to a challenge," and that the Agencies will use "a more holistic approach, and use every tool we have available."[32] "Transparency" may be found in that comment, but "clarity?" FTC Commissioner Tom Rosch, in a concurring statement released along with the new Guidelines, criticized them for "fail[ing] to offer a clear framework for analyzing non-price considerations."[33] He does have a point.

Erosion of the Guidelines' image as the state of the art in merger analysis? The evolution of the old Guidelines' market-definition approach into court doctrine was helped by two factors that will not benefit the 2010 version: Clayton Act § 7 specifically discusses analysis of "line[s] of commerce," which courts (even in 1992) had long interpreted as markets; and the old Guidelines were seen as a pre-commitment constraint on the Agencies—a promise that the Agencies would employ a predictable approach, not make it up as they go along. The new Guidelines do not always fit comfortably within § 7 and their emphasis on flexibility leaves them open to attack as imposing no real constraint on the Agencies. Courts may suspect that the new Guidelines are, in part, an attempt to re-litigate or justify the Agencies' past court losses. If they are perceived as in part a tactic, not as a pure teaching tool, the new Guidelines could lose their place in the minds of judges as representing the state of the art.

Possibility of court-required line-outs? It is even possible that courts could reject parts of the new Guidelines outright, forcing their explicit or tacit revision. The new Guidelines are more detailed than their predecessor, with 13 sections instead of 6 and with various tests and methods more clearly spelled out. The detail provides transparency but raises the likelihood that courts may identify specific items with which they disagree. If enough appellate courts criticize a specific item, that item will become a dead letter. One district court has already rejected an attempt to use GUPPI in a hospital merger case brought by the City of New York, which attempted to amend a complaint to add that test[34] (at the time, the new Guidelines were published as a draft, and still in their notice-and-comment period). And the increased flexibility of the Guidelines could run afoul of the Supreme Court's stated preference for antitrust standards that are predictable.[35]

International ramifications. International convergence in merger analysis over the past decade has been a great benefit to merging firms and the global economy. The European Commission's Chief Economist, however, recently raised fears of the old U.S.-EU divergence when he identified "missed opportunities" in the new U.S. Guidelines and criticized their shift away from market definition.[36] The economist stated that there is now a potential for "[d]ivergence [on] presumption of harm, coordinated effects, [and] anticompetitive buyer power," and he noted the point that we discuss above: that ordinarily, "Guidelines act mostly as

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[32] Cecile Kohrs Lindell, *Regulators Defend Revised Merger Guidelines*, THE DEAL PIPELINE (Sept. 21, 2010), *available at* http://pipeline.thedeal.com/tdd/ViewArticle.dl?id=10005477430.

[33] Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, *available at* http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf.

[34] *City of New York v. Group Health Inc*., 2010 WL 2132246, at *6, n.6 (S.D.N.Y. May 11, 2010). See discussion *supra* at n. 29.

[35] *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); Credit Suisse v. Billing, 551 U.S. 264 (2007).

[36] David Vascott, *Neven Criticizes New U.S. Guidelines*, GLOBAL COMPETITION REV. (Sept. 29, 2010), *available at* http://www.globalcompetitionreview.com/news/article/29112/neven-criticises-new-us-guidelines; *see also* Neven presentation, "First Impressions on the Revised US and UK Merger Guidelines," *available at* http://www.globalcompetitionreview.com/_files/DN_slides.pdf.

an intellectual discipline on the authority"[37]—a pre-commitment constraint on the Agencies. As discussed, these new Guidelines' constraint is much reduced. The economist seemed puzzled by the new Guidelines but he noted that whether divergence actually occurs will depend on specific case decisions.

"Litigation Mulligan" for aggressive merging firms. Finally, the difference likely will continue to grow between merger advocacy at the agency level and merger litigation in the courts. Of course, there has always been a difference. Savvy lawyers long have recognized that while the Agency bears the burden of proof in court and a purely defensive strategy is often successful before judges, winning at the Agency level is what merging firms prefer, and the quickest way to win there is to make an affirmative case about pro-competitive benefits. The new Guidelines, however, make it even more likely that Agency presentations and litigation work will proceed on different tracks.

Trial court work always favors a simple presentation (the three rules of successful litigation are simplicity, clarity, and brevity) and, as to substance, will continue to follow court precedent and the market definition paradigm, with an emphasis on common sense market descriptions. The Agencies' attempts to define as relevant markets certain "high function" enterprise software (Oracle/PeopleSoft) and "premium natural and organic supermarkets" (Whole Foods)—neither being a term used in the relevant industry—are now recognized as litigation mistakes. Yet delving into complexity and minutiae—defining narrowly-sliced markets, postponing market definition or eschewing it altogether, and identifying small groups of customers defined by preferences and hard-to-quantify non-price harms—may be exactly what the Agencies wish merging parties to do.

If trial and Agency decisions do continue to diverge, the consequences for Agency work will be confusing. If merging parties are not willing to litigate, the path is clear: do what the Agencies ask them to do. But if the parties are willing to litigate the merger or aspects of a proposed remedy (or merely want to give that impression), then advocates need to present to the Agencies both a "new Guidelines"-style argument and, concurrently, a traditional courtroom case. The Agencies may ignore the courtroom case in the early going but they will need to consider it at least at the end, as negotiations over a consent remedy conclude. Not only a different final decision in the courts, but also a totally different path to that decision—a "litigation mulligan," if you will—may be available to merging firms that can afford to fight.

[37] Neven presentation, *id*, at 4, 2.