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The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?

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Abstract

This article reviews the new Horizontal Merger Guidelines released on August 19, 2010, by the United States Department of Justice, through its Antitrust Division, and the Federal Trade Commission. The United States' New Horizontal Merger Guidelines converge towards and closely mimic their European counterparts. Indeed, the New Guidelines differ dramatically from their 1992 predecessors, and signal an American competition theory counterrevolution. First, they reveal a commitment towards more aggressive horizontal merger enforcement driven by a renewed emphasis on the incipiency standard. Second, they set out a less formulaic and rigid review methodology, which the Agencies hope will prove to be more litigation friendly, as they pursue enforcement cases in American courts. And third, they indicate heightened concerns about potential unilateral effects, including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation. When the New Guidelines are systematically compared side by side to the EC's, the resemblances are striking. Indeed, the New Guidelines more closely resemble the EC's than they do their 1992 predecessors. It can be fairly concluded that the New Guidelines' drafters were heavily influenced by, and paid close attention to, the EC's guidelines. However, it is unclear whether the New Guidelines will survive a conservative administration, or how they will be accepted and interpreted by the American courts.

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The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?

Q1 Thomas J. [redacted]*

Legal Context

On 19 August 2010, the United States Department of Justice (DoJ), through its Antitrust Division, and the Federal Trade Commission (FTC), released comprehensive revisions (the 'New Guidelines') to their 1992 Horizontal Merger Guidelines (the '1992 Guidelines'), which had last been revised in April of 1997.[1] The ostensible purpose of the New Guidelines is simply to 'outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under [America's] Federal antitrust laws.' As discussed herein, however, the New Guidelines portend a potentially dramatic and perhaps even counterrevolutionary shift in the enforcement visions and goals of the current Agencies, and a pronounced convergence towards the EC's Guidelines on the assessment of horizontal mergers.[2]

I. Substantial material changes

The New Guidelines promulgate three sets of fairly dramatic changes from their 1992 predecessors. First, they signal a commitment towards more aggressive horizontal merger enforcement driven by a renewed emphasis on the Clayton Act's incipiency standard. Secondly, they set out a less formulaic and rigid review methodology, which the Agencies hope will prove to be more litigation-friendly, as they pursue enforcement cases in the US courts. And thirdly, they indicate heightened concerns about potential unilateral effects, including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation.

Key Points

- The United States' new horizontal merger guidelines converge towards and closely mimic their European counterparts.
- The New Guidelines differ dramatically from their 1992 predecessors, and signal an American competition theory counterrevolution.
- It is unclear whether the New Guidelines will survive a conservative administration, or how they will be accepted and interpreted by the American courts.

A. Commitment toward more aggressive enforcement

In the USA, the competitive effects of mergers and acquisitions are principally governed by Section 7 of the Clayton Act, 15 USC § 18. The Clayton Act was enacted by Congress in 1914, along with the Federal Trade Commission Act, as part of the nation's Progressive Era reforms. Section 7 of the Clayton Act prohibits mergers and acquisitions 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'

Experienced competition and merger lawyers will quickly perceive that the most important change in the

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1 The New Guidelines may be found at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> Q2

2 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (EC Guidelines), 2004/C 31/03.

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New Guidelines is their aggressive pro-enforcement tone. The earlier Guidelines were designed to subtly control and slow down aggressive merger enforcement by the government Agencies. The New Guidelines, however, quite visibly signal ~~on~~ intent to reverse that laissez-faire trend, which began under President Reagan in the 1980s.

First and foremost, the New Guidelines boldly state in the second paragraph of their Overview that: 'these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency, and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.' Similarly, in the second paragraph of section 7.1 (Impact of Merger on Coordinated Interaction), the New Guidelines emphasize that '[p]ursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.' Lest one contend that such statements hardly portend dramatic change, he or she would be wise to search for the word 'incipiency'[3] in the 1992 Guidelines, or for any indication that 'certainty about anticompetitive effect is seldom possible and not required . . .'

Furthermore, perhaps as a rebuke to recent court decisions and language in Section 0.1 of the 1992 Guidelines that the government must prove that a merger '*is likely* substantially to lessen competition', the New Guidelines elevate from a footnote to the body of their first paragraph the actual Clayton Section 7 standard prohibiting mergers where 'the effect of such acquisition *may* be substantially to lessen competition, or to tend to create a monopoly'. To further emphasize this shift, the New Guidelines subtly change the operative language in the first sentence under 'Evidence of Adverse Competitive Effects' to '[t]he Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger *may substantially lessen competition*'.

More subtly, the New Guidelines delete much of the 1992 Guidelines' pro-merger rhetoric, including their bold pronouncement that '[m]ergers are motivated by the prospects of financial gains'. The New Guidelines also substantially tone down pro-merger rhetoric in the early Efficiencies paragraphs of the 1992 Guidelines. Read together, these changes reveal a determination and commitment to more aggressively enforce Section 7 of the Clayton Act against horizontal mergers by emphasizing the original incipiency standard.

B. Adopting a less formulaic and more litigation-friendly approach

The 1992 Guidelines were adopted to state as 'simply and clearly as possible' a merger 'policy' and 'analytical framework' that would 'reduce the uncertainty associated with the enforcement of the antitrust laws in this area'. The 1992 Guidelines then laid down a mechanical five-step review process designed to curtail and limit the Agencies' discretion and ultimate aggressiveness.

The New Guidelines unabashedly reject and reverse the 1992 Guidelines' mechanistic formalism. For example, in the fourth paragraph of their Overview, the New Guidelines warn that '[t]hese Guidelines shall be read with the awareness that merger analysis does not consist of uniform application of a single methodology'. This point was further highlighted by Assistant Attorney General Christine Varney in a speech on 21 September 2010, at Georgetown University in Washington, DC, where she observed that the New Guidelines include 'a significant softening of the emphasis in the 1992 Guidelines on the sequential nature of merger review'.[4]

Rather than seeking to 'articulate the analytical framework the Agencies apply' in reviewing a merger, as set forth in the 1992 Guidelines, the New Guidelines are designed to 'assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions'. Even more importantly, the New Guidelines aspire to 'assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context'. In other words, they are designed to be litigation-friendly towards the Agencies with the ultimate unstated objective of helping the Agencies reverse a series of adverse court decisions on key merger issues, including most notably on market definition issues.[5]

3 Ironically, the word incipiency appears in the 1992 Guidelines in section 3.0 (Entry Analysis Overview) touting that 'such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.' One cannot but help believe that the neo-conservative drafters of the 1992 Guidelines saw their ironic use of the incipiency standard as a tongue in cheek bite at liberal enforcement standards.

4 29 September 2010 Speech of Christine Varney, available at <http://newsroom-magazine.com/2010/international/antitrust-enforcement-going-global/print/>

5 See e.g., *FTC v Arch Coal, Inc.*, 329 F.Supp.2d 109 (DDC 2004); and *United States v Oracle, Inc.*, 331 F.Supp.2d 1098 (ND Cal. 2004).

1. Product market issues

The biggest sea change appears in the Guidelines' new discussion of the mechanics and legal significance of product market determinations. In the 1992 Guidelines, section 1 covered 'Market Definition, Measurement, and Concentration'. The New Guidelines, on the other hand, do not reach the issue of 'Market Definition' until section 5, or the issues of 'Market Participants, Market Shares, and Market Concentration' until section 6. Under the 1992 Guidelines, 'the analytic process described ensure[d] that the Agency evaluate[d] the likely competitive impact of a merger within the context of economically meaningful markets—i.e., markets that could be subject to the exercise of market power.' In the New Guidelines, however, the 'measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.' Critically, under the New Guidelines, the 'Agencies' analysis need not start with market definition' (New Guidelines, Section 4).

Section 4 of the New Guidelines adds several other important caveats. First, '[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.' Secondly, '[w]here analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.' Perhaps most importantly, however, they dramatically add without legal citation that '[r]elevant markets need not have precise metes and bounds'. Such thinking represents a tectonic shift from the Old Guidelines' initial pronouncement in the first paragraph of their Market Overview that 'mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis' (1992 Guidelines, Section 1.0).

The New Guidelines maintain the hypothetical monopolist SSNIP market definition test prominent in the Old Guidelines. However, the New Guidelines' overall approach to market determination is much more evidentiary-based than formulaic. The New Guidelines change both the language and evidentiary-standard for judging 'customers' likely responses to higher prices' from 'relevant evidence' to 'reasonably available and reliable evidence' (New Guidelines, Section 4.1.3). The New Guidelines also substantially expand the types of potentially useful evidence set forth as examples, including adding surveys of buyers, objective evidence about product characteristics, 'evidence from other industry participants, such as sellers of complementary products', and legal or regulatory requirements. They also insert the notable new caveat that the 'Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.'

Somewhat surprisingly, and perhaps deferring to their economists, the Agencies add that '[w]hen the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates influences drawn from the evidence noted above.' Although the ultimate practical significance of this addition may be debatable, it provides another indication that the Agencies believe that they should be accorded wide discretion and latitude in alleging and proving relevant product markets.

2. Market concentration issues

Both the 1992 and the New Guidelines view market concentration as a 'useful indicator of the likely [potential] competitive effects of a merger' (1992 Guidelines, Section 1.51; New Guidelines, Section 5.3). Both also continue to assess market concentration by using the Herfindal-Hirschman Index (HHI), a mathematical formula which calculates concentration 'by summing the squares of the individual shares of all the participants' (1992 Guidelines, Section 1.5). Ironically, the New Guidelines actually set higher thresholds for: (1) unconcentrated markets (HHI below 1500 versus below 100); (2) moderately concentrated markets (HHI between 1500 and 2500 versus 1000 and 1800); and (3) highly concentrated (HHI above 2500 versus above 1800). These new higher thresholds, however, are unlikely to be substantially significant in actual practice, since the Agencies are likely to bring cases only at higher threshold levels, as they historically have done. Furthermore, consistent with their aim of promoting flexibility and being litigation-friendly, the New Guidelines add the caveat that the 'purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide *one way* to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration.'

3. Entry issues

'Entry analysis' is the third step in the 1992 Guidelines' five-step mechanical and formulaic analytical process. By contrast, 'entry' is not raised in the New Guidelines until Section 9. Unlike the 1992 Guidelines, the New Guidelines start out by observing that: '[t]he Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult' (New Guidelines, Section 9). The New Guidelines further warn that 'the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.'

Like the 1992 Guidelines, the New Guidelines contain standards relating to the timeliness, likelihood, and sufficiency of entry. However, consistent with their overall objective of being litigation-friendly, the New Guidelines' sections on each of these parameters are less mechanical and more demanding of reliable evidence than their 1992 Guidelines' counterparts. For example, the 1992 Guidelines on 'Timeliness of Entry' state that the 'Agency generally will consider timely only those committed entry alternatives that can be achieved within two years' (Section 3.2). Discarding the two-year standard, the New Guidelines state that '[i]n order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects . . .' The New Guidelines add that the 'Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices' (New Guidelines, Section 9.1).

Similarly, on 'sufficiency of entry', the 1992 Guidelines began by pro-actively stating that '[i]nasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern when entry is likely under the analysis of Section 3.3' (Section 3.4). Starting from the other end of the spectrum, the New Guidelines first warn that 'even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern' (New Guidelines, Section 9.3). The New Guidelines then provide several examples of situations where 'entry may be insufficient'.

Finally, further eschewing the mechanical and formulaic entry analysis of the 1992 Guidelines, the New Guidelines emphasize that the Agencies will flexibly look at a broad range of evidence. Even more importantly, the Agencies are not required to provide detailed proof for their findings. Instead, following their litigation-friendly lodestar, they announce:

> In assessing whether entry will be timely, likely and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency. (New Guidelines, Section 9).

Taken together, the New Guidelines' liberalized approaches to analysing product markets, market concentration, and entry issues signal a less formulaic and more flexible review methodology, which the Agencies hope will prove to be more litigation-friendly in their federal court challenges to horizontal mergers.

C. Heightened concerns about potential unilateral conduct and impacts on non-price competition

In terms of substantial theoretical and philosophical changes in enforcement priorities, the New Guidelines signal heightened concerns about potential anticompetitive unilateral effects including exclusionary conduct, and potential impacts on non-price competition such as quality, variety, and innovation.

1. Unilateral conduct

During the last several decades, the analysis of the potential competitive effects of mergers generally has coalesced around 'conditions conducive to reaching terms of [competitive] coordination' (1992 Guidelines, Section 2.11). While the 1992 Guidelines also addressed the potential 'lessening of competition through unilateral effects' (1992 Guidelines, Section 2.2), their formulaic and mechanistic methodology were applied infrequently in practice.

The New Guidelines unequivocally reveal an intent to more aggressively pursue potential anticompetitive unilateral effects analyses and theories. The clearest signal may come from the New Guidelines' notable shift of the discussion of unilateral effects to a separate section (Section 6), which has been moved ahead of the discussion of coordinated effects (Section 7). That signal is accented by subtly adding the verb 'entrench' in the introductory statement of Section 1: 'The unifying theme of these Guidelines is that mergers should

not be permitted to create, enhance, or *entrench* market power or to facilitate its exercise.' The New Guidelines additionally have removed without apology the 1992 Guidelines' 35 per cent market share safe harbour for potential unilateral effects, and have added a significantly expanded discussion as to how the Agencies may analyse unilateral effects.

The New Guidelines first present in Section 6 a bold and streamlined definition of unilateral effects: 'The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.' Leveraging their earlier emphasis on the reduced role of precise market definitions in merger analyses, the New Guidelines emphasize that:

> The agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. (New Guidelines, Section 6.1).

The New Guidelines do not stop at such a broad recitation of possible evidence. Instead, again pursuing their litigation-friendly agenda, they additionally present a detailed discussion of several creative types of economic evidence and analyses that the Agencies may rely upon, including diversion ratios, and '[w]here sufficient data are available, . . . economic models designed to quantify the unilateral price effects resulting from the merger.' Almost brazenly, the New Guidelines add in Section 6.1 that '[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration'; and that the 'merger simulation methods need not rely on market definition'. They also include a new Section 6.2 on industries involving 'bargaining and auctions'.

Somewhat ominously, in their unilateral effects introduction, the New Guidelines cryptically add without discussion that 'exclusionary unilateral effects also can arise'. This follows a strong statement in Section 1 of the New Guidelines that '[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct'. The 1992 Guidelines, by contrast, studiously avoided any meaningful discussion of possible exclusionary conduct. The New Guidelines' cryptic warning seems consistent with Assistant Attorney General Varney's vow in 2009 to increase the scrutiny of exclusionary practices by dominant firms and her well-publicized withdrawal of the DoJ's 2008 report on 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act'.[6] In any case, taken as a whole, the newly elevated and expanded unilateral effects section of the Guidelines indicates a strong intent to aggressively pursue more unilateral conduct and effects theories in horizontal merger cases going forward.

2. Non-price competition

Another heightened area of concern highlighted in the New Guidelines is 'non-price terms and conditions that adversely effect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation' (New Guidelines, Section 1). Section 1 notes that '[w]hen the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.'

Building on this, Section 6.4 of the unilateral effects section lays out detailed guidelines concerning 'innovation and product variety'. Reorienting the 1992 Guidelines' single-minded obsession with pricing competition,[7] the New Guidelines state in Section 6.4 that the 'Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.' The New Guidelines add that curtailed innovation could take the form of reduced incentives to continue with existing product-development efforts or the development of new products. Following this discussion, astute counsel representing merging parties before the Agencies would be well-counselled to discuss the potential pro-competitive benefits of their merger not just in terms of lower prices, but enhanced quality, innovation, service, or variety, as well.

Key issues

The New Guidelines raise three key issues. First, can they survive a conservative American administration? Second, how will the American courts react to and

6 See Christine Varney, 'Vigorous Antitrust Enforcement In This Challenging Era', 11 May 2009.

7 The 1992 Guidelines' discussion of non-price competition was relegated to footnote 6 of their Overview, which stated: 'Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.'

interpret them? And third, what will be their likely impact on European competition practice?

1. Can the New Guidelines survive?

Chicago School of Antitrust conservatives, whose views have been ascendant over the last three decades, are likely to view the current move to less formal and mechanical guidelines as devolutionary rather than evolutionary. For example, conservative economist Jerry Hausman quickly criticized the 'significant shortcoming[s] of the 2010 Guidelines approach'.[8] Even more drastically, however, many conservatives are likely to see the New Guidelines as an aggressive counterrevolutionary attempt to overthrow and reverse the gains they have made over the last three decades in influencing American and global competition policies. Should they regain power in 2012, American conservatives, therefore, are likely to seek to substantially modify or even jettison the New Guidelines.

2. How will the courts interpret the New Guidelines?

The New Guidelines are not law and the American courts are not therefore bound to follow or defer to them. Consequently, a key question is how deferential the courts will be to the Agencies' attempts to introduce more flexible and litigation-friendly standards and approaches.

Although the courts frequently have sought to follow the 1992 Guidelines, given the extreme conservatism of the current Supreme Court and many lower courts on antitrust issues, the New Guidelines may receive a chilly and even hostile judicial reception in the near term. This may prove to be especially so in cases where the Agencies seek to downplay traditional market definition issues. Indeed, in a recent decision in the Southern District of New York, a district court judge rejected a plaintiff's request to amend its complaint to include the upper pricing pressure test, which appears in the New Guidelines.[9] The court expressed substantial scepticism about using such a test in lieu of more traditional market definition analyses.

Likely impact on European competition practice

European Commission (EC) competition authorities and practitioners are likely to view the New Guidelines positively, and welcome them as a bold step by the American Agencies to bring their own horizontal merger policies closer to the EC's. In 2002, Dr Stefan Schmitz and this author predicted that '[t]hanks to the European Commission and several European States that follow the ECMR, ... the Antitrust Division and the FTC either will become more responsive to the new wave of economic liberalism in future antitrust enforcement effects, or risk losing their historical positions as the leaders of worldwide antitrust enforcement effects.'[10] Viewed from a lofty perspective, the New Guidelines represent a substantial progressive step by the American Agencies towards convergence with Europe on horizontal merger issues.

When the New Guidelines are systematically compared side by side to the EC's, the resemblances are striking. Indeed, the New Guidelines more closely resemble the EC's in many respects than they do their 1992 predecessors. When one further notes that AAG Christine Varney coupled her remarks introducing the New Guidelines with a lengthy discussion of the International Competition Network's (ICN) core goals of cooperation, convergence, and transparency, one can fairly conclude that the New Guidelines' drafters were heavily influenced by, and paid close attention to, the EC's Guidelines on the assessment of horizontal mergers.

First, and perhaps most importantly, the New Guidelines closely mimic their EC counterparts in seeking to establish a less rigid and more flexible analytical process. By way of example, para. 13 of the EC Guidelines' Overview emphasizes: 'It should be stressed that these factors are not a "checklist" to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment ...' The New Guidelines' Overview similarly observes:

> These guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence ...

8 Jerry Hausman, '2010 Merger Guidelines: Empirical Analysis', <www.antitrustsource.com> last accessed October 2010), at 2. In fairness, Dr Hausman described the New Guidelines' 'analysis of unilateral effects ... [as] a significant advance over the 1992 Guidelines.' '2010 Merger Guidelines', at 1.

9 *New York v Group Health, Inc.*, 2010 US Dist. Lexis 60196, No. 06-Civ. 13122 (SDNY 11 May 2010).

10 Thomas J. Horton and Dr Stefan Schmitz, 'A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States' (Spring 2002) 2 (1) ABA Section of Antitrust Law Economics Committee Newsletter 21, 24.

Both sets of guidelines also emphasize the predictive nature of blocking anticompetitive effects in their incipiency. The second paragraph of the New Guidelines' Overview, for instance, highlights that '[m]ost merger analysis is necessarily predictive...' This language closely parallels the language in para. 9 of the EC's Overview.

As one turns to the respective substantive sections, one can see that in section after section, the New Guidelines have converged towards the EC's. For example, the New Guidelines follow the EC's in moving unilateral or non-coordinated effects in front of coordinated effects. The New Guidelines' unilateral effects sections also substantially resemble their EC counterpart's. To illustrate, Section 6.2 on 'bargaining and auctions' mirrors para. 31 on 'customers have limited possibilities of switching suppliers'. Section 6.3 on 'capacity and output for homogenous products' parallels paras 32 et seq. on 'competitors are unlikely to increase supply if prices increase'. And Section 6.4 on 'innovation and product variety' follows paras 37 and 38 on the 'merger eliminates an important competitive force'.

Similar results can be seen when comparing the respective coordinated effects sections. For example, a number of the points discussed in Section 7.2 of the New Guidelines closely track paras 49 through 57 of the EC's. The New Guidelines' treatment of 'powerful buyers' in Section 8 and 'mergers of competing buyers' in Section 12 also parallel the EC's guidelines on 'mergers creating or strengthening buyer power in upstream markets' and 'countervailing buyer power'.

Of course, the New Guidelines and the EC's include various differences. For example, the New Guidelines set the HHI for 'highly concentrated markets' above 2,500 (Section 5.3), while the EC's set it at 2000 (para. 20). However, such minor differences actually emphasize and highlight how remarkably similar the two sets now are. Indeed, it is fair to conclude that the New Guidelines are patterned from and closely resemble the EC's in most material respects.

Conclusion

The New Horizontal Merger Guidelines substantially mimic the EC's, and differ dramatically from their 1992 predecessors. Importantly, they signal a brewing American counterrevolution against many of the currently ascendant Chicago School of Antitrust theories, which heavily influenced the 1992 Guidelines, but have not been readily accepted in Europe.

European competition authorities and practitioners should take great pride in the American Agencies' formal decision to converge towards the EC's horizontal merger guidelines. It seems that America is coming more and more to realize, in the words of DoJ special adviser for international competition matters, Rachel Brandenburger, that '[i]n today's multi-polar world, no one entity or individual, whether public, private, or academic, has a monopoly on good ideas.'[11] Lest one get too excited, however, it would be wise to keep a close eye on developments concerning the acceptance and interpretation of the New Guidelines by American courts and future administrations. In the short term, however, given the recent conservatism of some European judicial decisions concerning horizontal mergers, one must wonder whether one ironic result of the American Agencies' convergence toward the EC's guidelines might be a reverse-GM/Honeywell situation,[12] where the European authorities approve a major international merger, which ultimately is blocked in the USA.

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11 Rachel Brandenburger, 'Transatlantic Antitrust: Past and Present Remarks as Prepared for St. Gallen International Competition Law Forum' (21 May 2010) Journal of European Competition Law & Practice 6.

12 See European Commission, Case COMP/M. 2220, General Electric/Honeywell.