HMG Revision Project–Comment
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Comment On Proposed Horizontal Merger Guidelines of the Federal Trade Commission and the Department of Justice

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INTRODUCTION

The Proposed Horizontal Merger Guidelines (HMG) released by the Federal Trade Commission and the Department of Justice on April 20, 2010, are a welcome and useful updating of the Horizontal Merger Guidelines. The purpose of my comment at this time is to offer a proposal to enhance the effectiveness of these new Guidelines. Specifically, I would propose that any merger investigation henceforth should be accompanied by the requirement that the parties continue to provide data and information sufficient for the reviewing agency to evaluate its implementation of the Guidelines after the conclusion of any investigation raising significant competitive concerns.

MOTIVATION

Many areas of public policy are routinely subject to ex post evaluations. Such evaluations aid in understanding the effects of policy, and they also contribute to incremental improvements in policy over time. Antitrust policy is notable among important public policies in that it has not benefitted from systematic review of its effects. To be sure, there exist studies of individual mergers, but data, methodology, and certainly conclusions differ widely. The result is a lack of consistency and persuasiveness, which has in turn handicapped efforts at improving methods of analysis, enforcement techniques, and remedies. For these reasons many observers have long urged greater attention to evaluations of agency actions with respect to mergers.[1]

This dearth of ex post evaluations of antitrust policy contrasts sharply with another area of public policy toward industry, namely, economic regulation. In the case of regulatory policy, there is a large and informative literature examining the effects of policies on industry performance. There are three principle reasons why ex post evaluations of regulatory reform and deregulation are more feasible, and common, than are evaluations of the merger review process. First, economic models of firm behavior are less deterministic than are models of entire industries or sectors. Individual firms may exhibit behavior that corresponds to a variety of possible models, at least in the short run, whereas idiosyncratic behavior is less likely to persist at the level of the entire industry.

Second, at the level of the individual firm, there is generally a larger set of forces other than policy that affect performance in the post-merger period and that must be controlled for in order to discern the effects of merger policy. This makes it relatively more difficult to be certain

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[1] W. Kovacic, "Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy", 9 Geo. Mason Law Review 843 (2001). D. Carlton, "The Need to Measure the Effect of Merger Policy and How to Do It," Department of Justice EAG Discussion Paper 07-15 (2007). J. Farrell, P. Pautler, and M. Vita, "Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals," *Review of Industrial Organization* (2009).

of causation. In contrast, regulatory policy actions generally cover an entire industry or sector, and at that level other forces are more easily identified and accounted for.

The third reason is that the data necessary to conduct ex post evaluations are less readily available at the level of the individual firm than for entire industries. Crucial firm data are often confidential, beyond the reach of independent researchers and the agencies alike. More and better data are usually available at the industry level, and certainly in the case of recently deregulated industries.

The proposed revision of the Horizontal Merger Guidelines reinforces the need for ex post evaluations of mergers. Since these Guidelines represent a policy reform of substantial significance, evaluating their effectiveness and efficiency is especially important. Issuance of these new Guidelines also affords an opportunity to make ex post evaluations more feasible by instituting a process to make the necessary data available to the agencies. This opportunity should not be passed up.

PROPOSAL

It is my recommendation that the Horizontal Merger Guidelines state that merging parties henceforth will be required to provide data and information sufficient for the reviewing agency to evaluate its implementation of the Guidelines after the conclusion of any investigation raising significant competitive concerns. An "investigation raising significant competitive concerns" would be one that triggers a Second Request under the Hart-Scott-Rodino filing procedure. Tying the data production obligation to HSR will serve to limit the requirement to sizeable mergers. Limiting it to mergers warranting Second Requests will ensure that mergers raising no competitive concerns are not subject to on-going obligations.[2]

The requisite data and other information for an ex post evaluation would have the

[2] While there may be other methods of securing data production from the parties, each would seem to have limitations that render them less effective. For example, in cases where mergers go to settlement, a condition for settlement of the complaint could be such production. Clearly, however, this method does not address cases of mergers that, after investigation, are approved without conditions, are abandoned after investigation, or go to trial. Another possibility would be for the agencies to issue mandatory data requests to the parties subsequent to a merger for the purpose of conducting an ex post evaluation. The FTC could use its authority under Section 6(b) of the Federal Trade Commission Act, and the Justice Department might rely on CIDs. Both are investigative tools that in principle could be used to obtain the necessary data and other information, but they suffer from certain disadvantages. Each would require specific approval by the agency in each instance, raising the administrative costs of what should be a routine procedure. Moreover, 6(b) investigations and CIDs might seem to place the agencies in a more adversarial and investigative position with respect to consummated mergers.

following characteristics:[3]

(a) The data should correspond to what are required to implement an evaluation process or model. Broader data requests would not be justified on these grounds.

(b) The required data be nonpublic, or otherwise difficult or expensive for the agency to secure. Thus, the data requests to the parties would be motivated by efficiency of data acquisition.

(c) The required data would typically be a subset of that produced in the second request process.

(d) The data requirement would extend for an appropriate post-approval and post-merger period. This would likely be on the order of three years but would be tailored to the particular facts and circumstances of the merging firms and their industry.

And (e) the data requirements be the least burdensome consistent with the above.

Accordingly, I urge the adoption of a review procedure for investigations of mergers that raise significant competitive concern. This would be implemented by requiring production, subsequent to the disposition of the merger investigation, of data and other information that are necessary for an ex post evaluation of any merger that gets to the Second Request stage.

[3] There is precedent for this policy. A recent merger investigation conducted by a group of state attorneys general was concluded with such an arrangement with the parties.