

This article originally appeared in Antitrust magazine, Vol. 25, No. 3 (Summer 2011), an online magazine published by the Antitrust Law Section of the American Bar Association.

The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective

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In August 2010, the U.S. Department of Justice and the U.S. Federal Trade Commission issued the first comprehensive revision to the U.S. Horizontal Merger Guidelines in eighteen years.¹ That revision occurred in an international competition world that is markedly different than it was eighteen years earlier in 1992, when few jurisdictions actively reviewed mergers under merger guidelines.

The proliferation of merger guidelines around the world since 1992 afforded the Department and the FTC valuable examples to draw upon in drafting the 2010 U.S. Guidelines. Guidelines are an important tool through which those jurisdictions that regularly conduct merger reviews can explain their intentions to the business community, advisors, courts, and the public. Guidelines also provide an avenue for competition agencies to communicate with one another and seek mutual understanding of one another's policies and practices. Such understanding promotes predictability of decision-making and enhances the ability of competition agencies to learn from one another how best to protect competition and consumers. In today's globalizing, multilateral world,² we are experiencing a continually evolving process of learning and development among the world's competition authorities as they strive to catch up or leapfrog each other and generally move forward in the context of developments in their own jurisdictions and others around the globe.

There are, of course, differences among the competition regimes across the world, emanating in part from different legal traditions and economic histories. But surveying the world's horizontal merger guidelines today, considerable consensus emerges. Protecting competition and consumers is the generally accepted touchstone, and it is common ground that a horizontal merger's potential for harmful unilateral or coordinated effects is the focus of competitive concern. In addition, the factors set out in the various guidelines to assess a merger's likely competitive effects are also similar. These shared concerns and approaches indicate the generally convergent state of merger policy around the world.³

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 U.S. Guidelines], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

² See, e.g., Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., International Cooperation: Preparing for the Future (Sept. 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.pdf>; Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.pdf>; Rachel Brandenburger, U.S. Dep't of Justice, Antitrust Div., International Competition Policy and Practice: New Perspectives? (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>; Rachel Brandenburger, U.S. Dep't of Justice, Antitrust Div., Transatlantic Antitrust: Past and Present (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.pdf>.

³ Facilitating general agreement on these sorts of approaches has been a chief accomplishment of both the Organisation for Economic Development (OECD) and the International Competition Network (ICN). For

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This article reviews the current state of the world's horizontal merger guidelines. Particular focus is given to development of the U.S. Guidelines since their first adoption in 1968, the 2010 revisions, and how they compare to the guidelines of Australia, Canada, the European Union, and the United Kingdom, which are four of the jurisdictions with which the Department has frequently collaborated on merger investigations.⁴

Development of Merger Guidelines around the World

In the United States, merger guidelines were first introduced in 1968. Major revisions occurred in 1982 and 1992, and relatively minor adjustments were released in 1984 and 1997.⁵

Several non-U.S. jurisdictions have issued or reissued horizontal merger guidelines as well. For instance, Australia issued draft guidelines for comment in 1992, which were finalized in 1996 and revised in 1999, 1999, and 2008.⁶ In 1998, Japan issued merger guidelines that have been revised several times since.⁷ In 2002, the European Union issued draft horizontal merger guidelines,⁸ which were finalized in 2004.⁹ The UK Competition Commission and Office of Fair Trading issued joint guidelines in September 2010, replacing separate guidelines the two agencies had previously issued in 2003.¹⁰

instance, OECD members' papers outlining their approaches to merger issues, as well as the OECD secretariat's publications, have contributed to a shared understanding of approaches and experiences and have informed members' efforts in revising their own policies. Similarly, the ICN issues recommendations on substantive merger analysis, see ICN Recommended Practices for Merger Analysis, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>, and issued a 2006 workbook designed as a sourcebook on a framework for analyzing the competitive effects of mergers. See ICN Merger Working Group: Analytical Framework Subgroup, ICN Merger Guidelines Workbook (Apr. 2006), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>.

⁴ For a detailed discussion of the 2010 U.S. Guidelines, particularly their economic principles, see Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49 (2010). For an additional perspective on the 2010 U.S. Guidelines and convergence in the international arena, see Alden F. Abbott & Samuel N. Weinstein, The New U.S. Horizontal Merger Guidelines and International Competition Policy Convergence, ANTITRUST, Fall 2010, at 39.

⁵ The 1968, 1982, 1984, 1992, and 1997 editions of the U.S. Merger Guidelines are available on the Department's website at <http://www.justice.gov/atr/hmerger.htm>.

⁶ Australian Competition & Consumer Comm'n, Merger Guidelines (Nov. 2008) [hereinafter Australian Guidelines], available at <http://www.accc.gov.au>.

⁷ Japan Fair Trade Comm'n, Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (rev. Jan. 1, 2010), available at <http://www.jftc.go.jp/en/pressreleases/uploads/090729-5.pdf>.

⁸ European Comm'n, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1856&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁹ European Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (2004) [hereinafter EU Guidelines], available at http://eurlex.europa.eu/LexUriServ/site/en/oj/2004/c_031/c_03120040205en00050018.pdf.

¹⁰ UK Competition Comm'n & Office of Fair Trading, Merger Assessment Guidelines (Sept. 2010) [hereinafter UK Guidelines], available at <http://www.competition->

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France revised its guidelines in December 2009 upon transferring merger control from the Ministry of the Economy to the Autorité de la Concurrence.¹¹

Canada first issued guidelines in 1991 and revised them in 2004.¹² In February 2011, the Canadian Competition Bureau announced that, following public consultations, consultations with non-Canadian agencies, and a focused internal review, it plans to “undertake moderate revisions to the Merger Enforcement Guidelines.”¹³ The German Bundeskartellamt is also reviewing its Merger Guidelines, whose last substantial update occurred in 2000, and expects to publish a draft of the new version for consultation very soon.

Revision of the U.S. Guidelines

In 2009, the U.S. agencies announced a series of public workshops designed to explore whether and how the U.S. agencies should update the U.S. Guidelines in light of changes in economic learning, the development of the case law, and agency practice.¹⁴ Those workshops confirmed that there were gaps between the 1992 U.S. Guidelines and the actual practice of the U.S. agencies—gaps in the sense of omissions of important factors that help predict the competitive effects of mergers and statements that were either misleading or inaccurate.¹⁵ A primary goal in issuing revised guidelines in August 2010 was correcting those gaps and ensuring that the guidelines accurately reflect actual practice at the U.S. agencies.¹⁶

The process of drafting the 2010 U.S. Guidelines was open and collaborative, involving public workshops and multiple rounds of public comments, including an opportunity to comment on a draft revision before it was finalized.¹⁷ The rise of merger guidelines in jurisdictions around the world, as described above, also affected the U.S. agencies’

commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/100916_merger_assessment_guidelines.pdf.

¹¹ Autorité de la Concurrence, Merger Control Guidelines [hereinafter French Guidelines] (2009), available at http://www.autoritedelaconcurrence.fr/doc/ld_mergers_final.pdf.

¹² Competition Bureau, Canada, Merger Enforcement Guidelines, Part 10 (Sept. 2004) [hereinafter Canadian Guidelines], available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/\\$file/2004%20MEGs.Final.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf).

¹³ Competition Bureau, Canada, Bureau Announces Plans to Revise the Merger Enforcement Guidelines (Feb. 25, 2011), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03350.html>.

¹⁴ Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Merger Guidelines Workshops (Sept. 22, 2009), available at <http://www.justice.gov/atr/public/speeches/250238.pdf>.

¹⁵ Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., An Update on the Review of the Horizontal Merger Guidelines (Jan. 26, 2010), available at <http://www.justice.gov/atr/public/speeches/254577.pdf>.

¹⁶ See, e.g., U.S. Dep’t of Justice and Fed. Trade Comm’n Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/261642.pdf (“They are not intended to represent a change in the direction of merger review policy, but to offer more clarity on the merger review process to better assist the business community and, in particular, parties to mergers and acquisitions.”).

¹⁷ The U.S. agencies’ request for comments, transcripts of the public workshops, draft guidelines issued for public comment, and copies of all public comments are available on the FTC’s website at <http://www.ftc.gov/bc/workshops/hmg/index.shtml>.

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approach to revising the guidelines. For instance, representatives of four non-U.S. agencies traveled to the United States to serve as expert panelists during the workshops. Those officials provided insights regarding their experiences with their own guidelines. There were also informal discussions with other agencies and experts around the world, including meetings in Europe attended by representatives of the U.S. agencies. These consultations afforded the U.S. agencies the benefit of the experiences and insights of non-U.S. jurisdictions from around the world.

Similarities Between the 2010 U.S. Guidelines and Non-U.S. Guidelines¹⁸

Overarching Purposes. As the U.S. Guidelines have since 1982, the 2010 U.S. Guidelines provide that their “unifying theme . . . is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.”¹⁹ That theme derives from an overarching concern with consumers: the 2010 U.S. Guidelines explain that “[r]egardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers.”²⁰

This basic focus on customers and market power is shared in the guidelines of non-U.S. jurisdictions, as the following examples illustrate. For instance, the 2004 EU Guidelines state that “[e]ffective competition brings benefits to consumers” and that “[t]hrough its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms.”²¹ The 2010 UK Guidelines require the competition agencies to determine whether a merger will lead to a substantial lessening of competition,²² and note that a “merger that gives rise to a [substantial lessening of competition] will be expected to lead to an adverse effect for customers.”²³ The 2008 Australian Guidelines prohibit mergers that “would have the effect, or be likely to have the effect, of substantially lessening competition in a market.”²⁴ They advise that, generally, the Australian Competition and Consumer Commission will view a lessening of competition as substantial “if it confers an increase in market power on the merged firm that is significant and sustainable,”²⁵ and they observe that “[m]ergers that increase the market power of one or more market participants may be detrimental to consumers.”²⁶ The 2004 Canadian Guidelines state

¹⁸ An overview article like this one necessarily contains elements of generalization and simplification; there are many commonalities, differences, and shades of nuance among the world’s horizontal merger guidelines that are not detailed here. For instance, we do not discuss efficiencies, entry, and other important areas of horizontal merger analysis in this article.

¹⁹ 2010 U.S. Guidelines § 1. In contrast, the 1968 U.S. Guidelines state that “the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition.” 1968 U.S. Guidelines ¶ 2.

²⁰ *Id.*

²¹ EU Guidelines ¶ 8.

²² UK Guidelines § 2.1.

²³ *Id.* § 4.1.3.

²⁴ Australian Guidelines ¶ 1.3.

²⁵ *Id.* ¶ 3.5.

²⁶ *Id.* ¶ 3.3.

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that the Competition Tribunal may block mergers that are likely to cause a “substantial prevention or lessening of competition,” which will result “only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.”²⁷ The 2010 French Guidelines similarly indicate that their focus is protecting competition and its positive effects on welfare and consumers.²⁸

Types of Evidence. One innovation in the 2010 U.S. Guidelines is a new, separate section at the start of the document on the types and sources of evidence the U.S. agencies consider in reviewing mergers. These types of evidence include the “Actual Effects Observed in Consummated Mergers,”²⁹ “Direct Comparisons Based on Experience,”³⁰ and “Market Shares and Concentration in a Relevant Market.”³¹ Although new in its location in the Guidelines (previous versions of the U.S. Guidelines, and the guidelines of other, non-U.S. jurisdictions, largely address these kinds of issues in the course of their explication of competitive effects), this section nonetheless is not revolutionary—it simply sets out, in one place, the practice of the U.S. agencies.

Unilateral Effects. Concern that a merger would facilitate harmful coordination among post-merger market participants formed the analytical backbone of the first iterations of the U.S. Merger Guidelines. But the U.S. Guidelines have also consistently voiced concern over the ability of a merger to create or enhance an individual firm’s market power—a concern described as unilateral effects under the U.S. Guidelines since 1992. The articulation of that concern, however, has evolved considerably. The 1968 U.S. Guidelines succinctly explain that “[t]he larger the market share held by the acquiring firm, the more likely it is that an acquisition will move it toward, or further entrench it in, a position of dominance.”³² In keeping with that concern, the 1968 U.S. Guidelines offer that, in highly concentrated markets where the collective market shares of the four largest firms exceed 75 percent, the Department “will ordinarily challenge” any attempt by a firm with more than a 15 percent market share to acquire any firm with more than a 1 percent market share.³³

Because the key concentration metric under the 1968 U.S. Guidelines is the four-firm concentration ratio, concern about unilateral effects was analytically linked to concern about coordinated interaction, since it was the size of the four largest firms in the market, rather than the size of the largest, triggering concern. That link was broken in the 1982 and 1984 U.S. Guidelines, which contain expanded discussion of potentially harmful unilateral effects in sections entitled “Leading Firm Proviso.”³⁴ In both 1982 and 1984,

²⁷ Canadian Guidelines ¶ 2.1.

²⁸ French Guidelines ¶ 283.

²⁹ 2010 U.S. Guidelines § 2.1.1.

³⁰ *Id.* § 2.1.2.

³¹ *Id.* § 2.1.3.

³² 1968 U.S. Guidelines ¶ 4.

³³ *Id.* ¶ 5.

³⁴ 1982 U.S. Guidelines § III.A.2; 1984 U.S. Guidelines § 3.12.

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the Department voiced concern over transactions under which “the leading firm in the market” with over a 35 percent market share would acquire any firm with more than a 1 percent market share. In both versions, the Department explained that this concern was unrelated to concerns over coordinated effects “[b]ecause the ease and profitability of collusion are of little relevance to the ability of a single dominant firm to exercise market power.”³⁵

The 1992 U.S. Guidelines—which are the first U.S. Guide lines to use the phrase “unilateral effects”—contain a more detailed and nuanced description of the kinds of concerns that would lead the U.S. agencies to conclude that a merger had the potential to lead to adverse unilateral effects. In the 1992 Guidelines, the U.S. agencies explained that adverse unilateral effects can arise when the merger creates the opportunity for the merged firm to raise the price of one of its products and thereby “divert[]” customers to one of the acquired firm’s products.³⁶ Market share was described as a relevant consideration insofar as it reflected the product’s “relative appeal as a second choice”³⁷—that is, a useful tool for estimating the potential for a rise in the price of one firm’s products to divert customers to another firm’s products.

Building on the 1992 U.S. Guidelines, the 2010 U.S. Guidelines contain a greatly expanded discussion of how the U.S. agencies analyze different types of unilateral effects on competition, in addition to price effects. The discussion is broken into four parts concerning (1) pricing of differentiated products, (2) bargaining and auctions, (3) capacity and output for homogeneous products, and (4) innovation and product variety.³⁸ Also new to the 2010 U.S. Guidelines is a detailed description of the economic evidence considered by the U.S. agencies in assessing the likelihood of unilateral effects.³⁹

The fundamental concern over a merger’s potential to lead to adverse unilateral effects is shared in the guidelines of several non-U.S. jurisdictions. For example, the Canadian, UK, and Australian Guidelines all have separate sections dealing expressly with unilateral effects,⁴⁰ and the EU Guidelines have a section dealing with non-coordinated effects.⁴¹ Moreover, the general approach to unilateral effects in the 2010 U.S. Guidelines is similar to the approaches in other jurisdictions. For instance, the key concept of whether a price increase would divert customers from dealing with one of the merging parties to dealing with the other—that is, assessing the closeness of the competition

³⁵ *Id.*

³⁶ 1992 U.S. Guidelines § 2.21.

³⁷ *Id.* § 2.211.

³⁸ 2010 U.S. Guidelines § 6.

³⁹ See, e.g., *id.* § 6.1 (“The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.”). For a detailed discussion of the economic tools used by the agencies when assessing unilateral effects, see Shapiro, *supra* note 4.

⁴⁰ Canadian Guidelines pt. 5; UK Guidelines § 5.4; Australian Guidelines ch. 5.

⁴¹ EU Guidelines § IV; French Guidelines § V.D.

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between the merging firms—is shared in, for example, the EU,⁴² Canada,⁴³ the UK,⁴⁴ France,⁴⁵ and Australia.⁴⁶

Significant similarity also exists regarding other factors used to assess the likelihood of adverse unilateral effects, particularly with regard to the kinds of economic evidence that are relevant. The EU Guidelines, for instance, discuss the significance of “pre-merger margins,”⁴⁷ “cross-price elasticities,”⁴⁸ and “diversion ratios.”⁴⁹ The UK Guidelines similarly discuss the importance of “variable profit margins” and describe the “diversion ratio” as “a useful indicator of the ability of the second product to constrain the prices of the first product.”⁵⁰ The Canadian Guidelines discuss the relevance of “past buyer-switching behaviour in response to changes in relative prices . . . including information based on buyer preference surveys, own-price and cross-price elasticities, purchasing patterns and diversion ratios.”⁵¹ In general, the guidelines that have been issued most recently, specifically the U.S. and UK Guidelines, tend to have a greater level of detail about the use of economics in unilateral effects analysis.

Market Definition and the Sequencing of Steps in a Merger Review. In contrast to the sequential process set forth in the previous versions of the U.S. Guidelines, the 2010 U.S. Guidelines now make clear that market definition need not be the first step of the U.S. agencies’ review.⁵² This has been the practice at the U.S. agencies for some time, as reflected in, for instance, the Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006.⁵³ Other jurisdictions share this approach to market definition.

For instance, the EU has noted in connection with its notice on market definition, which applies to mergers,⁵⁴ that “what is needed is a structured analysis which is also flexible enough to take individual circumstances into account,”⁵⁵ and the EU Guidelines themselves describe market shares and concentration as “useful first indications” of

⁴² EU Guidelines ¶ 24 (“if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firms”).

⁴³ Canadian Guidelines ¶ 5.12 (“When two firms in a market merge and the price of one firm’s product(s) rises, some demand may be diverted to product(s) of the firm’s merger partner”).

⁴⁴ UK Guidelines § 5.4.7 (focusing on “profit on diverted sales”).

⁴⁵ French Guidelines ¶¶ 365–367.

⁴⁶ Australian Guidelines ¶ 5.5 (noting significant of “transfer of sales” from one merging party to the other).

⁴⁷ EU Guidelines ¶ 28.

⁴⁸ *Id.* ¶ 29.

⁴⁹ *Id.* ¶ 29.

⁵⁰ UK Guidelines § 5.4.9.

⁵¹ Canadian Guidelines ¶ 5.15.

⁵² 2010 U.S. Guidelines § 4.

⁵³ U.S. Dep’t of Justice & Fed. Trade Comm’n, Commentary on the Horizontal Merger Guidelines 5 (2006) [hereinafter 2006 Commentary], available at <http://www.justice.gov/atr/public/guidelines/215247.htm>.

⁵⁴ Comm’n Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) (Dec. 9, 1997), available at [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:HTML](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML).

⁵⁵ European Comm’n, EU Notice Summary, Definition of Relevant Market (last modified Apr. 20, 2011), available at http://europa.eu/legislation_summaries/competition/firms/126073_en.htm.

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market structure.⁵⁶ The Canadian Guidelines similarly describe market definition as the “typical[]” first stage of its review but expressly note that “[i]n some circumstances, particularly where empirical methods are used, [the Bureau] may define relevant markets concurrently with analyzing competitive effects.”⁵⁷ The Australian Guidelines classify the market definition process as “a useful tool for merger analysis” but note that “by itself it cannot determine or establish a merger’s impact on competition,”⁵⁸ and go on to observe that “a conclusive view on the relevant market may not be necessary” when it is clear that the merger is unlikely to have adverse competitive effects.⁵⁹ Similarly, the French Guidelines state that, while market definition is an “essential step” in merger review,⁶⁰ delineation of a market may be left “open” when market definition “is not indispensable for reaching a conclusion.”⁶¹ The UK Guidelines also refer to market definition as “a useful tool, not an end in itself.”⁶²

Market Concentration Screens. In 2003, the U.S. agencies published statistics showing that they only infrequently challenged mergers that resulted in HHI concentration levels below 2000.⁶³ In an effort to conform the Guidelines to practice, the 2010 U.S. Guidelines raised the HHI thresholds to align with those figures. Specifically, the 2010 U.S. Guide - lines provide that “[b]ased on their experience, the Agencies generally classify markets into three types:” “Unconcentrated Markets” (HHI below 1500), “Moderately Concentrated Markets” (HHI between 1500 and 2500), and “Highly Concentrated Markets” (HHI above 2500).⁶⁴ The 2010 U.S. Guidelines state that mergers resulting in unconcentrated markets and mergers involving an increase in the HHI of less than 100 points “are unlikely to have adverse anticompetitive effects and ordinarily require no further analysis.”⁶⁵ Mergers resulting in moderately concentrated markets where the increase in the HHI is greater than 100 points “potentially raise significant competitive concerns and often warrant scrutiny,” as do mergers in highly concentrated markets that involve an increase in the HHI of between 100 and 200 points.⁶⁶ Mergers resulting in highly concentrated markets involving an increase in the HHI of over 200 points “will be presumed to be likely to enhance market power,” but this presumption

⁵⁶ EU Guidelines ¶ 14.

⁵⁷ Canadian Guidelines ¶ 3.1 & n.23. In its February 2011 announcement respecting its plans to revise the Merger Enforcement Guidelines, the Bureau noted that its revisions will “clarify that merger review is not a linear process that must start with market definition, but rather an iterative process in which evidence of market concentration is considered alongside other evidence of competitive effects.” Canadian Competition Bureau, *supra* note 13, at 1.

⁵⁸ Australian Guidelines ¶ 4.3.

⁵⁹ *Id.*

⁶⁰ French Guidelines ¶ 301.

⁶¹ *Id.* ¶ 306.

⁶² UK Guidelines § 5.2.2.

⁶³ Merger Challenge Data, Fiscal years 1999–2003, available at <http://www.justice.gov/atr/public/201898.pdf>.

⁶⁴ 2010 U.S. Guidelines § 5.3.

⁶⁵ *Id.*

⁶⁶ *Id.*

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“may be rebutted” by “persuasive evidence” showing why the merger is unlikely to have that result.⁶⁷

Other jurisdictions also employ market concentration screens or thresholds. For example, the EU Guidelines state that the Commission is “unlikely to identify horizontal competition concerns” with transactions that result in an HHI below 1000, an HHI between 1000 and 2000 where the change in HHI is less than 250, or an HHI greater than 2000 where the change in HHI is less than 150.⁶⁸ The Australian Guidelines rely on a single HHI threshold, stating that the agency will be “less likely to identify horizontal competition concerns” where the post-merger HHI is less than 2000, or greater than 2000 where the change in the HHI is less than 100.⁶⁹ Similarly, the UK Guidelines state that competitive concerns are “less likely” when either (1) the merger increases the HHI by less than 250 when the post-merger HHI is between 1000 and 2000 or (2) the merger increases the HHI by less than 150 when the post-merger HHI exceeds 2000.⁷⁰ The Canadian Guidelines employ the four-firm concentration ratio as their relevant measure of market concentration in coordinated effects cases, indicating that competitive concerns are “generally” absent when the post-merger share of the four largest firms is less than 65 percent.⁷¹ In unilateral effects cases, the Canadian Guidelines provide that the Bureau will generally not challenge a merger where the post-merger market share of the merged entity is less than 35 percent.⁷²

Coordinated Effects. Concern over a merger’s potential to lead to harmful coordinated effects among remaining market participants is the cornerstone of the 1968 U.S. Guidelines, emanating from the principle that “a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, of an economically undesirable nature.”⁷³ Thus, the 1968 U.S. Guidelines explain that “enforcement activity under Section 7 is directed primarily toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct.”⁷⁴

The 1982 U.S. Guidelines gave more structure to the inquiry regarding a merger’s potential to facilitate the ability of remaining market participants to “coordinate, explicitly or implicitly.”⁷⁵ In particular, the 1982 U.S. Guidelines replaced a four-firm

⁶⁷ *Id.*

⁶⁸ EU Guidelines ¶¶ 19–20. The French Guidelines suggest that they would apply the EU’s HHI thresholds. French Guidelines ¶¶ 344–345.

⁶⁹ Australian Guidelines ¶ 7.14.

⁷⁰ UK Guidelines § 5.3.5.

⁷¹ Canadian Guidelines ¶ 4.12.

⁷² *Id.*

⁷³ 1968 U.S. Guidelines ¶ 2.

⁷⁴ *Id.*

⁷⁵ 1982 U.S. Guidelines § I.

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concentration ratio with the HHI as the relevant measure of a market's concentration, retaining, however, the core principle that coordinated effects become more likely as a market becomes more concentrated. Importantly, the 1982 U.S. Guidelines introduced several considerations regarding a merger's effect on "the ease and profitability of collusion," including (1) the ability of market participants to "reach consensus," (2) the ability of parties to that consensus to "detect[] deviation" from it, and (3) the ability of parties to that consensus to "retaliate against deviations from the agreed prices or other conditions."⁷⁶ The 1984, 1992, 1997, and 2010 U.S. Guidelines all reiterate the relevance of those three considerations to the likelihood of a merger to result in harmful coordinated effects, a phrase expressly introduced in the 1992 U.S. Guidelines.

As the 2006 Commentary mentioned, all three of those factors "typically"—but not always—are present when the U.S. Agencies determine to challenge a case on a coordinated effects theory of harm.⁷⁷ Building on that observation, the 2010 Guidelines describe some considerations relevant to those situations. Specifically, the 2010 U.S. Guidelines discuss the U.S. agencies' concern about mergers likely to enhance the potential for "parallel accommodating conduct not pursuant to a prior understanding," including situations where "each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."⁷⁸

The 1982 U.S. Guidelines provided some details about the specific circumstances that indicate the potential for adverse coordinated effects, other than market concentration. The 2010 U.S. Guidelines similarly discuss factors relevant to the potential for adverse coordinated effects, including (1) a history of express collusion, (2) transparency of competitive activity, (3) the frequency of sales, (4) demand elasticities, and (5) the presence of large buyers who can resist coordinated tactics.⁷⁹

A merger's potential to lead to adverse coordinated effects is a central concern of non-U.S. jurisdictions as well. As the U.S. Guidelines have since 1992, the EU, Canadian, UK, French, and Australian Guidelines, for example, all have separate sections dealing expressly with "coordinated effects."⁸⁰

The concepts used by the U.S. agencies to assess the likelihood of adverse coordinated effects are also shared in the guidelines of other jurisdictions. For instance, the EU, Can -

⁷⁶ *Id.* § III.C.

⁷⁷ 2006 Commentary at 18.

⁷⁸ 2010 U.S. Guidelines § 7.

⁷⁹ *Id.* § 7.2.

⁸⁰ EU Guidelines § 4; Canadian Guidelines pt. 5; UK Guidelines § 5.5; French Guidelines § V.I; Australian Guidelines ch. 6.

This article originally appeared in *Antitrust* magazine, Vol. 25, No. 3 (Summer 2011), an online magazine published by the Antitrust Law Section of the American Bar Association.

adian, UK, French, and Australian Guidelines all consider market concentration in assessing the likelihood of coordinated effects.⁸¹

Similarly, the three factors stressed in the U.S. Guidelines regarding coordinated effects—consensus, detection, and punishment—have similar importance in the guidelines of non-U.S. jurisdictions. Canada, for instance, states that coordinated behavior is “only likely to be sustainable” when all three conditions are met.⁸² The UK Guidelines discuss all three concerns and state that firms will “generally need” to be able to monitor deviations from a common understanding for adverse coordinated effects to be likely,⁸³ and the Australian Guidelines state that “the potential for sustainable coordination is greatest where” all three factors exist and consensus is not undermined by other competitive constraints.⁸⁴ The EU Guidelines state that all three conditions “are necessary” for the EU to conclude that coordination is sustainable.⁸⁵ The French Guidelines also consider the three conditions necessary,⁸⁶ and add that coordinated effects are all the more likely when market participants are able to understand the modalities of coordination.⁸⁷

Significant similarities among the other factors relevant to the assessment of potential coordinated effects exist as well. For instance, the EU Guidelines list the concepts of “a ‘maverick’ firm,” “evidence of past coordination,” and the “effects of entry and countervailing buyer power” as factors relevant to the likelihood of coordinated effects.⁸⁸ The concept of a maverick firm is also important under the Canadian Guidelines.⁸⁹

Powerful Buyers. The 2010 U.S. Guidelines also added several new sections, including a section addressing the role of powerful buyers in potentially limiting the adverse impact of an otherwise competitively harmful merger. That section states that the U.S. agencies will consider the “possibility that” powerful buyers might “constrain the ability of the merging parties to raise prices,” but cautions that the U.S. agencies will not “presume that the presence of powerful buyers alone” will prevent anticompetitive effects flowing from a merger.⁹⁰

Other jurisdictions already had taken note of the ability of powerful buyers to negotiate favorable terms with merging entities, even if the resulting business has a significant amount of market power. The EU, Canada, the UK, France, and Australia, for example,

⁸¹ See, e.g., EU Guidelines ¶¶ 42, 45; Canadian Guidelines ¶¶ 4.12; UK Guidelines §§ 5.5.11, 5.5.13; French Guidelines ¶¶ 454, 460; Australian Guidelines ¶¶ 6.3, 6.4.

⁸² Canadian Guidelines ¶ 5.20.

⁸³ UK Guidelines § 5.5.12.

⁸⁴ Australian Guidelines ¶ 6.5.

⁸⁵ EU Guidelines ¶ 41.

⁸⁶ French Guidelines, ¶¶ 455, 462, 464, 467.

⁸⁷ *Id.* ¶ 460.

⁸⁸ EU Guidelines ¶¶ 42, 43, 57.

⁸⁹ Canadian Guidelines ¶¶ 5.31–5.32.

⁹⁰ 2010 U.S. Guidelines § 8.

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all have provisions addressing the role of the powerful buyer in merger review.⁹¹ The EU Guidelines explain that even firms “with very high market shares” postmerger may not be able to “significantly impede effective competition, in particular by acting to an appreciable extent independently of their own customers,” if those customers have “countervailing buyer power.”⁹² Indeed, for the EU, buyer power is mentioned as an “element” of merger review at the start of its guidelines.⁹³ The Australian Guidelines similarly discuss “whether one or more buyers would have sufficient countervailing power to constrain any attempted increase in market power by a supplier.”⁹⁴ The UK Guidelines observe that the “existence of countervailing buyer power will be a factor in making” a finding of a substantial lessening of competition “less likely” and note that if “all customers of the merged firm possess countervailing buyer power postmerger, then an SLC is unlikely to arise.”⁹⁵ And the Canadian Guidelines explain that “in determining whether a merger is likely to result in a material price increase,” the Competition Bureau will analyze whether “one or more buyers have a countervailing ability to constrain an exercise of market power.”⁹⁶

Conclusion

The process of reviewing the U.S. Guidelines and the new 2010 U.S. Guidelines themselves have attracted considerable interest and comment not only within the United States but also from around the world. As this article demonstrates, the 2010 U.S. Guidelines both represent an evolution—rather than a revolution—in merger analysis and are consistent with other merger guidelines around the world. Viewed in a historical and international context, the 2010 U.S. Guidelines contribute to the developments in convergence and transparency in merger analysis that are being made by competition agencies around the world.

⁹¹ See EU Guidelines ¶¶ 64–67; Canadian Guidelines ¶¶ 7.1–7.3; UK Guidelines ¶¶ 4.175–4.182; French Guidelines at ¶¶ 374–376, 411–412; Australian Guidelines ¶¶ 7.48–7.51.

⁹² EU Guidelines ¶ 64.

⁹³ *Id.* ¶ 11.

⁹⁴ Australian Guidelines ¶ 7.48; see also *id.* ¶ 7.50 (addressing other issues relevant to whether competitive effects are unlikely in light of buyer power).

⁹⁵ UK Guidelines ¶ 5.9.1.

⁹⁶ Canadian Guidelines ¶ 7.1.