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POLICY BRIEF

Antitrust Enforcement and the Rule of Law

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A just and efficient legal system respects what is called "the rule of law."[1] Scottish Presbyterian minister Samuel Rutherford coined this term[2] for a concept first articulated by Aristotle.[3] "Stripped of all technicalities," Friedrich A. Hayek argued, the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances . . . ."[4]

According to law professor Robert A. Stein, the rule of law means, in particular, "The law must be known and predictable so that persons will know the consequences of their actions."[5] Respecting the rule of law in this manner yields concrete benefits for individuals and businesses: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[6]

The US Constitution assigns the power to make laws to Congress, but the other branches of government help to make the law known and predictable. Indeed, courts did most of the work in developing antitrust law because Congress framed the early statutes in vague and undefined terms. As courts ruled in many antitrust cases, they articulated decision rationales intended to aid future compliance. To uphold the rule of law, Supreme Court Justice Antonin Scalia explained that the courts construct "a law of rules."[7]

The US Department of Justice (DOJ) had a major role in developing a law of rules for antitrust. Under the Expediting Act of 1903, the DOJ's antitrust cases were appealed directly to the Supreme Court (until 1975), resulting in more than 100 substantive decisions.[8] And under the Federal Trade Commission (FTC) Act of 1914, the DOJ generally took charge of FTC cases in the Supreme Court.[9] The DOJ also participated as amicus curiae in some private cases. Thus, the DOJ had a steady stream of opportunities to propose rules of antitrust law.

The Supreme Court took a less active role in antitrust law after 1980, and completely surrendered the development of merger law to the circuit courts of appeals. This surrender mattered because circuit courts can disagree with each other but cannot reject outdated Supreme Court precedent. Guidance from the federal enforcers, which began in the 1960s, became the only source of updated, nationwide rules of merger law. The remainder of this policy brief examines their merger guidance[10] through the lens of the rule of law.

THE 1968 MERGER GUIDELINES

Early antitrust statutes did not specifically address mergers,[11] and the infrequent challenges to mergers had limited success. In 1950, Congress amended section 7 of the Clayton Act of 1914 to prohibit mergers when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The DOJ and the FTC then began challenging mergers at a prodigious pace, racking up more than 100 challenges before the Supreme Court first interpreted the amended Section 7 in 1962.

In the Supreme Court's 1962 *Brown Shoe Co. v. United States* decision, the court explored the purpose and meaning of the amended Section 7 but did little to distinguish lawful and unlawful mergers.[12] In the 1963 *United States v. Philadelphia National Bank* decision, the court took a concrete step toward known and predictable merger law by creating a presumption of illegality for certain horizontal mergers (i.e., mergers between direct competitors).

In *Philadelphia National Bank*, the court declared that

> a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[13]

Philadelphia National Bank implied that the market shares and concentration associated with many mergers would be too low to trigger a presumption of illegality, but over the next few years, Supreme Court decisions identified no mergers that failed to trigger the presumption. Columbia University law professor Milton Handler declared that the court had given the DOJ and FTC a "[b]lank check," and he implored the agencies to "exercise their awesome administrative discretion with prudence and objectivity."[14]

Reportedly acting on instructions from President Lyndon B. Johnson, Attorney General (AG) Nicholas Katzenbach sought to reassure the business community in a speech on May 8, 1965.[15] Katzenbach observed that the DOJ challenged only about one percent of mergers, and he resolved to "clarify" which mergers were challenged. He announced that the DOJ had "begun seeking to shape policy guidelines" and hoped that this effort would be "accelerated" by Harvard Professor Donald Turner, who had been nominated as assistant attorney general (AAG) in charge of the DOJ's Antitrust Division.

On August 10, 1965, AAG Turner stated a compelling rationale for merger guidelines: "People wishing to comply with what the Government thinks the law is can only do so if the Government's views are made known."[16] Turner had trained in economics, but he did not seek to inject economic analysis into merger enforcement; rather, he preferred simple rules based on market shares. AG Ramsey Clark released the world's first Merger Guidelines (MGs) on May 30, 1968.

Using market share and market concentration thresholds, the 1968 MGs indicated which mergers the DOJ would challenge and which mergers it would not challenge. From a rule-of-law perspective, the latter arguably was more important, and Turner faced resistance from career staffers who relished the deterrent effect of legal uncertainty.

Drafting the MGs took more than three years, partly due to the long pendency merger cases decided by the Supreme Court in 1966 and 1967. In *United States v. Von's Grocery Co.*, the court found a horizontal merger unlawful even though the relevant market remained highly unconcentrated.[17] In *United States v. Pabst Brewing Co.*, the court suggested that the government need not actually prove the relevant market it alleges.[18] And in *FTC v. Procter & Gamble Co.*, the court held a merger unlawful, in part, because the merging firms might have competed.[19]

AAG Turner could have consolidated these court victories in enforcement guidelines. Over the opposition of career DOJ lawyers,[20] he instead forswore merger challenges that were apt to succeed. The 1968 MGs remain a shining example of promoting the rule of law by promising restraint,[21] but they did not make merger enforcement entirely predictable. The 1968 MGs did not usefully explain how the DOJ would define the "relevant market,"[22] the part of commerce within which competition was examined and shares were assessed. Consequently, merging firms could not know what market shares the DOJ would assert.

AAG Turner did not use the few remaining months of the Johnson administration to proselytize his MGs. And President Richard M. Nixon's first antitrust AAG, Richard McLaren, ignored the MGs when he launched a quixotic campaign against conglomerate mergers (i.e., mergers between firms with no marketplace relationship). In 1970s merger litigation, courts did not rely on the 1968 MGs because the DOJ was not bound to follow the MGs and because Supreme Court precedent was still fresh. The 1968 MGs were nearly forgotten within a decade.

THE 1982 AND 1984 MERGER GUIDELINES

The first antitrust AAG under President Ronald Reagan was Stanford law professor William Baxter. Issuing new MGs was among his priorities, and he did so on June 14, 1982. On the same day, the FTC released a statement explaining “why it supports changes” to the 1968 MGs. Baxter’s successor, J. Paul McGrath, issued a minor revision to the MGs exactly two years later. The 1982 MGs and their 1984 revision (1982/84 MGs) arguably were the most successful law enforcement guidelines ever.

The 1982 MGs were deeply rooted in the structural approach developed by the Supreme Court and crystalized in the 1968 MGs. As applied to horizontal mergers, the 1982 MGs added a modicum of economics, updated the thresholds, and constrained the definition of the relevant market. Courts treated the 1982/84 MGs as persuasive authority and deferred on the market share and market concentration thresholds, likely because the Supreme Court had not recently issued a merger decision.

For market delineation, the 1982 MGs adopted the hypothetical monopolist test (HMT), which the DOJ had first articulated four years earlier.[23] The HMT became universally accepted.[24] The 1982 MGs also adopted rules to limit agency discretion. Footnote 11 stated that the relevant market generally is the smallest one that satisfies the HMT, which is termed the “smallest market principle.” Footnotes 12 and 24 stated that the relevant market must include any product or location that is at least as good a substitute (for the product and location around which the market is defined) as any product or location that is included in the relevant market, which is termed the “circle principle.”

In addition, the 1982 MGs adopted the Herfindahl-Hirschman Index (HHI) of market concentration, constructed by summing the squared market shares of all competitors in the relevant market. Arithmetically, the HHI increase from a merger is twice the product of the merging firms’ market shares. The HHI increase is both the key determinant of the price impact of mergers in some economic models and the critical datum for the *Philadelphia National Bank* structural presumption.

DOJ enforcement under the 1982 MGs adhered strictly to the stated thresholds for the HHI and HHI increase. With strict thresholds applied to reproducible relevant markets, the 1982 MGs did more to make merger law known and predictable than did any other merger guidelines, before or since.

The 1984 revision was largely a response to controversy about the treatment of imports in the DOJ’s consideration of a steel industry merger, but the resulting change in the treatment of imports was not significant. The most significant change was the new statement that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger.” Paying less attention to the HHI and HHI-increase thresholds, however, made merger law less known and predictable.

In Reagan’s second administration, merger enforcement was substantially less strict than in the first, and yet the same HHI and HHI-increase thresholds remained in force. Antitrust lawyers active in the merger area were well aware of the policy shift, and the DOJ was charged with applying "secret merger guidelines." Contrary to the rule of law, the public could no longer use the MGs to predict enforcement.

THE 1992/97 HORIZONTAL MERGER GUIDELINES

Early in the George H. W. Bush administration, FTC Chair Janet Steiger and AAG James Rill agreed that the federal antitrust enforcement agencies should have joint guidelines for horizontal mergers, which accounted for the vast majority of challenges. The Horizontal Merger Guidelines (HMGs), which were issued April 2, 1992, advanced the rule of law simply because the FTC had been enforcing merger law without formally stating its general standards.

The main impetus for new guidelines was that the assessment of horizontal mergers had evolved. The agencies were relying on particular theories of competition and on those theories' implications for the competitive effects of mergers. The 1992 HMGs sketched two categories of theories and how the agencies applied them. As language in the 1992 HMGs indicated, the HHI and HHI increases associated with proposed mergers had become even less important to decision-making, making enforcement less predictable, even if more accurate.

The 1992 HMGs promoted the rule of law by updating the description of merger assessment at the DOJ and the FTC and by aligning the agencies' stated enforcement policies. But the 1992 HMGs retained the 1982 MGs' HHI and HHI-increase thresholds despite a major shift in enforcement policy over the intervening decade. AAG Rill publicly denied the existence of "secret merger guidelines" and insisted that the 1982 thresholds remained salient. He privately indicated that raising the thresholds was politically problematic.

Merger benefits potentially relevant to legality are termed "efficiencies." The HMGs' efficiencies section was expanded in 1997 to add that the agencies would not challenge a merger if "cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." The text then stated that each agency "considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market." The inscrutability of this language reflected a lack of consensus on law and policy.

THE 2010 HORIZONTAL MERGER GUIDELINES

The HMGs were substantially revised early in the Barrack Obama administration, under FTC Chair Jon Leibowitz and AAG Christine Varney. In the August 19, 2010, press release announcing the new HMGs, AAG Varney declared that they "provide more clarity and transparency."[25] Chair Leibowitz added that "private parties and judges will be better equipped to understand how the agencies evaluate deals."[26] Although these were fair claims, the 2010 HMGs could have done more to promote the rule of law.

The main impetus for the 2010 HMGs was the desire of the DOJ and the FTC to elaborate how they assessed mergers under particular theories of anticompetitive effects. The agencies promoted the rule of law by updating the description of their evolving analytical process. Nevertheless, the agencies prioritized flexibility and provided only a general overview of their application of particular theories, with no theory-specific standards. Thus, the DOJ and the FTC did not make the law as known and predictable as they might have.

A year into the Obama administration, AAG Varney delivered a speech about revising the HMGs. She acknowledged "gaps" between the 1992 HMGs and agency practice,[27] citing data released by the George W. Bush administration on the HHI and HHI increase for the agencies' merger challenges during fiscal years 1999–2003.[28] To pinpoint the current gap, the DOJ had just compiled its data for fiscal years 2004–09, but those data were never released, and AAG Varney decided only to narrow the gap.

Some DOJ litigators preferred thresholds set so that the DOJ never had to concede that a challenged merger was a close case, and eliminating the gap between the HMGs and agency practice would have required a strikingly large increase in the thresholds. Although merger challenges were uncommon with HHI increases under 500, the 2010 HMGs stated, "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."

THE 2020 VERTICAL MERGER GUIDELINES

When the 1992 HMGs were released, the DOJ retained in force a section of the 1984 MGs, which was later posted on the DOJ website as the Non-Horizontal Merger Guidelines (NHMGs). For decades, the DOJ resisted calls to update them.[29] But after a court rebuffed a non-horizontal merger challenge, AAG Makan Delrahim declared his intention to issue new guidelines. The DOJ withdrew the NHMGs on January 10, 2020, when the DOJ and the FTC released draft Vertical Merger Guidelines (VMGs) for comment. FTC Chair Joseph Simons and AAG Delrahim released the final VMGs on June 30, 2020.

The VMGs relate the agencies' application of "vertical theories" of anticompetitive effects from mergers. In a vertical theory, one merging firm operates in the relevant market, where competition is lessened by conduct of the other merging firm in a related market. The markets and the merging firms are related in that the products complement each other. Typically, one merging firm supplies an input to the other merging firm.

The VMGs promoted the rule of law less than any prior merger guidelines because the VMGs did not limit agency discretion. They set out no conditions under which the agencies likely would challenge a merger, and no conditions under which the agencies normally would not challenge a merger. Nor did the VMGs state the agencies' legal analysis of how Section 7 applies when the merging firms do not compete. The VMGs did not even indicate the agencies' general attitude toward vertical theories.[30]

The VMGs also failed to promote the rule of law in other ways that prior merger guidelines had promoted the rule of law. The 1982/84 MGs and the 1992 HMGs had declared, "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise." This declaration promoted the rule of law by providing an assurance that market power was the agencies' sole concern in merger enforcement. The 2010 HMGs said much the same, but the VMGs made no comparable declaration.

In addition, the 1982/84 MGs and the 1992 HMGs stated that the agencies seek "to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral." This statement promoted the rule of law by providing an assurance that the agencies would confine their attention to competitively problematic mergers. Language in the 2010 HMGs was similar, but the VMGs said nothing comparable.

NEW MERGER GUIDELINES?

FTC Chair Lina Khan and AAG Jonathan Kanter can enforce merger law more strictly than their predecessors in the Obama administration without contradicting the 2020 VMGs or the 2010 HMGs. The 2020 VMGs did not constrain the agencies,[31] and the 2010 HMGs both maintained agency flexibility in merger assessment and retained a substantial gap between agency practice and the HMGs' HHI and HHI-increase thresholds.

Chair Khan and AAG Kanter nevertheless indicate that they are working on new guidelines to replace the 2020 VMGs and the 2010 HMGs. They have hinted at simpler guidelines that deemphasize economic analysis, but they also have hinted at adding considerations other than impact on competition. The former could promote the rule of law, but the latter could seriously undermine it.

Replacing the 2020 VMGs should be a low priority. The FTC determined that it has no need for VMGs when it repudiated them on September 14, 2021. Emulating the FTC is now the path of least resistance for the DOJ. Merger guidelines draw on experience, and the agencies have relatively little experience with non-horizontal mergers. Chair Khan and AAG Kanter are unlikely to have satisfactory answers for questions that their predecessors were unable to answer.

Chair Khan and AAG Kanter should issue merger guidelines if they are resolved to limit their own discretion. English legal scholar A. V. Dicey first wrote extensively about the rule of law, stressing that it "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government."[32] The rule of law is not served by merely cataloging relevant factors or analytical paths, and leaving options open.

Finally, Chair Khan and AAG Kanter should issue merger guidelines if they are resolved to disavow radical departure from Obama administration policies. Legal scholar Jeremy Waldron observed that the rule of law requires "that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."[33] Aspirational enforcement guidelines affront the rule of law.

ABOUT THE AUTHOR

Gregory J. Werden is a visiting scholar at the Mercatus Center at George Mason University. After earning a PhD in economics at the University of Wisconsin in 1977, he worked in the Antitrust Division of the US Department of Justice until 2019. He is the only Antitrust Division employee to be recognized with the department's Mary C. Lawton Lifetime Service Award. Werden helped prepare all the guidelines discussed in this policy brief, apart from those issued in 1968. He has nearly 200 published works, including *The Foundations of Antitrust: Events, Ideas, and Doctrines* (Carolina Academic Press 2020).

NOTES

1. Tom Bingham, *The Rule of Law* (London: Penguin, 2010).
2. Samuel Rutherford, *Lex, Rex: The Law and the Prince; A Dispute for the Just Prerogative of King and People* (London, 1644), 237.
3. "Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement." Aristotle, *Politics*, trans. Ernest Barker (Oxford: Oxford University Press, 1946), bk. III, ch. xi, § 19.
4. F. A. Hayek, *The Road to Serfdom: Text and Documents: The Definitive Edition*, ed. Bruce Caldwell (London: Routledge, 1944; Chicago: University of Chicago Press, 2007), 112.
5. Robert A. Stein, "What Exactly Is the Rule of Law?," *Houston Law Review* 57 (2019): 185–201, 194.
6. Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994).
7. Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175–88.
8. See W. Wallace Kirkpatrick, "Antitrust to the Supreme Court: The Expediting Act," *George Washington Law Review* 37 (1969): 746–87.

9. On the complex and changing control of the solicitor general over the litigation of the FTC and other agencies, see Neal Devins, "Unitariness and Independence: Solicitor General Control over Independent Agency Litigation," *California Law Review* 82 (1994): 255–327.

10. All of the guidelines discussed can be found on the DOJ's website, https://www.justice.gov/atr/merger-enforcement.

11. Section 1 of the Sherman Act of 1890 prohibited "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade." Section 2 of the Sherman Act made it unlawful "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." Section 5 of the 1914 FTC Act prohibited "[u]nfair methods of competition" and "unfair or deceptive acts or practices." The Clayton Act of 1914 prohibited specific practices, including price discrimination, conditioned sales, holding companies, and interlocking directorates.

12. Brown Shoe Co. v. United States, 370 U.S. 294, 311–23 (1962).

13. United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).

14. Milton Handler, "Some Misadventures in Antitrust Policy Making—Nineteenth Annual Review," *Yale Law Journal* 76 (1966), 92–126, 108 (address delivered September 27, 1966).

15. Remarks by Attorney General Nicholas deB. Katzenbach, Prepared for Delivery before the Business Council, The Homestead, Hot Springs, Virginia, Saturday, May 8, 1965, https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/05-08-1965.pdf; see also "Business Assured on Trust Actions," *New York Times*, May 9, 1965, 36.

16. Donald F. Turner, "Antitrust Enforcement Policy," *ABA Section of Antitrust Law* 29 (1965): 187–94, 190.

17. 384 U.S. 270 (1966) (case filed in 1960).

18. 384 U.S. 546 (1966) (case filed in 1959).

19. 386 U.S. 568 (1967) (case filed in 1957).

20. See Mark J. Green, Beverly C. Moore, Jr., and Bruce Wasserstein, *The Closed Enterprise System* (New York: Grossman, 1972): 86–87.

21. See Gregory J. Werden, "The 1968 Merger Guidelines: In Praise of Committing to Restraint," *Review of Industrial Organization* 53 (2018): 445–52.

22. The 1968 MGs stated that:

> A market is any grouping of sales (or other commercial transactions) in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included. The advantage need not be great, for so long as it is significant it defines an area of effective competition among the included sellers in which the competition of the excluded sellers is, *ex hypothesi*, less effective.

23. See US Department of Justice, Antitrust Division, *Competition in the Coal Industry*, May 1978, 26–27 (report to Congress required by the Federal Coal Leasing Amendments Act of 1975). The idea of the hypothetical monopolist test is that a relevant market must be sufficiently broad so that a monopolist over it would possess significant market power.

24. See Gregory J. Werden, "The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm," *Antitrust Law Journal* 71 (2003): 253–75.

25. US Department of Justice, "Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines: 2010 Guidelines More Accurately Represent Agencies' Merger Review Process" (press release), August 19, 2010, https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-issue-revised-horizontal-merger-guidelines.

26. US Department of Justice, "Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines."

27. Christine A. Varney, "An Update on the Review of the Horizontal Merger Guidelines," Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, Washington, D.C., January 26, 2010, https://www.justice.gov/atr/file/518236/download.

28. Federal Trade Commission and US Department of Justice, "Merger Challenges Data, Fiscal Years 1999–2003," December 18, 2003, https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/201898.pdf.

29. For an opposing view, see Gregory J. Werden, "Should the Agencies Issue New Merger Guidelines?: Learning from Experience," *George Mason Law Review* 16 (2009): 839–49, 847–49.

30. See Gregory J. Werden, "Vertical Merger Guidelines and the Rule of Law," *Antitrust Bulletin* 67 (2022): 406–23.

31. Chair Khan was mistaken when she asserted that the treatment of efficiencies in the 2020 VMGs is inconsistent with both economics and law. Werden, "Vertical Merger Guidelines," 419–21.

32. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 198.

33. Jeremy Waldron, "The Concept of the Rule of Law," Sibley Lecture Series, *Georgia Law Review* 43 (2008): 1–61, 6.