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PUBLIC INTEREST COMMENT

DRAFT MERGER GUIDELINES JOINTLY PROPOSED BY THE U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION ARE SERIOUSLY FLAWED IN THEIR DISCUSSION OF MERGER CASE LAW

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INTRODUCTION

I am pleased to respond to the request for comments on Draft Merger Guidelines ("DMG") issued jointly by the U.S. Department of Justice and the Federal Trade Commission (collectively, "the Agencies"). I trust that the views I express may prove helpful to the Agencies.

Founded in 1980, the Mercatus Center at George Mason University is the world's premier university-based source for market-oriented ideas—bridging the gap between academic ideas and real-world problems. The Mercatus Center advances knowledge about how markets work to improve people's lives by training graduate students, conducting research, and applying economics to offer solutions to society's most pressing problems. Our mission is to generate knowledge and understanding of the institutions that affect the freedom to prosper and to find sustainable solutions that overcome the barriers preventing individuals from living free, prosperous, and peaceful lives. This comment, therefore, does not represent the views of any particular affected party or special interest group; it is intended to assist the Agencies in their decision-making.

I raise one key point[1] for the Agencies' consideration: The DMG seriously misrepresent the import of merger case law in support of their approach to mergers.

[1] I strongly endorse (but do not herein address) all of the critiques of the DMG made by Dr. Gregory J. Werden on August 12, 2023. See Gregory J. Werden, "Comments on Draft Merger Guidelines," August 12, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540166. Dr. Werden, who submitted these comments on his own behalf, is a visiting scholar at the Mercatus Center at George Mason University. His comments discuss at some length the serious deficiencies in the DMG's treatment of case law, among other topics. Dr. Werden's comments may be expected to

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The Agencies cite a host of Supreme Court decisions (primarily from the 1960s and 1970s) to justify their concern that even relatively modest increases in concentration may justify an enforcement action. For example, under Guideline 8 ("Mergers Should Not Further a Trend Toward Concentration"), the Agencies prominently characterize the most recent non-bank-related substantive Supreme Court merger decision, *General Dynamics* (1974),[2] as supporting the proposition that "[t]he Supreme Court has . . 'adopt[ed] an approach to a determination of a 'substantial' lessening of competition [that] allow[s] the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing.'"

This DMG statement badly mischaracterizes the import of *General Dynamics*, which involved a merger of coal mining companies. The Supreme Court stated that "in the absence of other considerations," rising relevant market shares would have supported striking down the merger. Nevertheless, the Court rejected the challenge to the merger, stressing that (1) General Dynamics owned few reserves that were not committed to buyers under long term contracts; (2) General Dynamics' uncommitted coal reserves were being quickly depleted; and (3) the acquired company owned only one percent of market coal reserves and was not in a position to acquire more. In short, increasing concentration numbers did not reflect market realities, and the Court rejected the government's challenge to the merger. In other words, market concentration numbers alone should not condemn a merger, without a consideration of what case-specific market realities have to say about the merger's likely competitive effects.

More generally, as the leading US antitrust treatise writer, Herbert Hovenkamp, points out, the DMG's fixation on mere market concentration (structuralism), without more, is misplaced.[3] It ignores the key question of modern antitrust analysis, which is whether a merger "predictably leads to higher prices or lower output – that is, when it represents an exercise of market power." Professor Hovenkamp emphasizes that modern antitrust jurisprudence is driven by economic

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prove particularly influential with the judiciary, since he is the leading expert on the history and technical analysis of modern merger guidelines, having worked on the 1982, 1984, 1992, 1997, and 2010 versions as a senior DOJ antitrust economist. See Alden Abbott, "When Greg Werden Talks, the Courts May Be Expected to Listen," *Truth on the Market*, August 20, 2023, https://truthonthemarket.com/2023/08/29/when-greg-warden-talks-the-courts-may-be-expected-to-listen/.

[2] United States v. Gen. Dynamics Corp., 415 U.S. 486, at 497-98 nn. 7-8 (1974) (citing United States v. Continental Can Co., 378 U.S. 441, 458 (1974). The Supreme Court did decide two bank merger cases in 1974 and one in 1975. United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974) dealt with geographic market definition in banking; United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) addressed geographic market definition and entry questions; and United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975), discussed the significance of a merger-specific rise in market concentration that might have been problematic. Specifically, in *Citizens & Southern*, the Court held that market share statistics did not accurately portray the probable competitive effects of the proposed bank acquisitions under challenge. In particular, there was no elimination of present competition, nor was there any prospects that blocking the acquisitions would lead the various banks to compete against each other.

[3] Herbert Hovenkamp, "Herbert Hovenkamp: Competitive Harm and the 2023 Draft Merger Guidelines," *PROMARKET Merger Guidelines Symposium*, July 27, 2023, https://www.promarket.org/2023/07/27/herbert-hovenkamp-competitive-harm-and-the-2023-draft-merger-guidelines/. Professor Hovenkamp has been prominently cited in decisions by the Supreme Court and the lower federal courts.

science and fact-specific determinations. In line with that point, mere reliance on statements about market concentration from 1960s and 1970s as the key basis for challenging a merger is misplaced.

The unreliability of 1960s and 1970s merger decisions as a guide to current enforcement is underscored by the dramatic changes in non-merger antitrust jurisprudence. Beginning in 1977 with *GTE-Sylvania*,[4] the Supreme Court began to apply a modern economic approach in assessing contractual restrictions, and the Court proclaimed in its 1979 *Reiter v. Sonotone*[5] decision that the Sherman Antitrust Act is "a consumer welfare prescription."

Subsequent Supreme Court non-merger decisions reinforced the focus on consumer welfare and economic analysis. Venerable precedents have not been an obstacle to this trend. Thus, in its 2007 *Leegin*[6] decision, the Court employed economic reasoning in overruling a ninety-six year old precedent[7] and holding that minimum resale price maintenance is subject to the rule of reason, not illegal per se. And in 2006, in *Illinois Tool Works*,[8] a tying case, the Supreme Court rejected its 1947 *International Salt*[9] presumption that a patent necessarily confers market power on the patent holder. As such, the Court accepted modern economic analysis (reflected in patent law) in ruling that plaintiff must prove that a defendant has market power in a patented tying product.

Admittedly, the Supreme Court has not opined on substantive merger law since 1974. Nevertheless, there is no reason to believe that the Court's consistent emphasis since 1977 on actual economic effects in all other areas of antitrust would be jettisoned in the domain of merger assessment. The mechanistic application of a presumption that increased concentration equates to a violation of Clayton Act Section 7, and a rejection of efficiencies,[10] would fly in the face of sound economics.

Furthermore, as previously stated, the Supreme Court in its *General Dynamics* decision rejected a sole focus on increased market concentration in focusing on actual competitive effects in light of specific facts presented. *General Dynamics* was decided *before* the Supreme Court's pivot toward an economics-based approach, with consumer welfare as the lodestar of antitrust.[11]

It follows, *a fortiori*, that any future Supreme Court antitrust merger decisions would be informed by economic reasoning and consumer welfare considerations. As such, the Supreme Court most likely would accord no weight to any final Agency Guidelines that retained the current DMG case law perspective and rejected the economic approach found in non-merger Supreme Court opinions.

Likewise, one would expect that lower federal courts would accord zero weight to such final Agency Guidelines in their merger decisions. The many opinions by lower federal courts that

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[4] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[5] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).
[6] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[7] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
[8] Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).
[9] International Salt Co. v. United States, 332 U.S. 392 (1947).
[10] Professor Hovenkamp, note 3, *supra*, points out that the DMG's categorical preference for international growth over acquisitions is misplaced: "[A] merger reassigns assets to a different user and typically keeps them in production. Most successful mergers very likely create value, although some also create market power. Comparative effects cannot be evaluated categorically, once for all mergers."
[11] Moreover, Professor Hovenkamp, *supra* note 3, highlights the Supreme Court's recognition of economic considerations in rejecting a private merger challenge in Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), a case which is not cited in the DMG.

currently deploy sophisticated economics in assessing merger challenges further support this conclusion.[12] This could substantially undermine the litigation posture of the Agencies in merger challenges, to the detriment of the public antitrust enforcement enterprise.

CONCLUSION

The approach that the DMG takes to outdated Supreme Court merger decisions from the 1960s and 1970s is flawed. In viewing these cases as justifying a new structuralist, concentration-focused approach to merger enforcement, the DMG ignore modern Supreme Court non-merger antitrust holdings that emphasize economic analysis and consumer welfare. A failure to revise the DMG case law discussion appropriately would receive short shrift in the courts and tend to undermine the litigation posture of the Agencies in merger challenges brought before the courts.

[12] See generally Carl Shapiro and Howard Shelanski, "Judicial Response to the 2010 Horizontal Merger Guidelines," *Review of Industrial Organization* 58, no. 1 (2021): 51-79.