

Responding to the Reaction: The Draftsman's View

William F. Baxter†

When the Antitrust Division of the United States Department of Justice undertook to update the 1968 Merger Guidelines,¹ two goals were set: first, to bring the Guidelines into line with subsequent developments in antitrust law and economics; and second, to reduce the uncertainty surrounding the evaluation of mergers and acquisitions by the Department. At the time the revised Guidelines were issued in June 1982, the Department felt that it had met those goals. Today, after extensive public scrutiny and debate and after using the Guidelines to review a number of proposed mergers, the Department, or at least the head of the Antitrust Division, remains convinced that the Guidelines meet these objectives. As evidenced by this Symposium, however, there are some—although apparently a minority—who remain skeptical of, if not hostile to, the Guidelines.

Most, if not all, of the criticisms were foreseen at the time the Guidelines were released. One's evaluation of those criticisms depends primarily on the philosophical and economic assumptions with which one approaches the Guidelines. To those who view with approval the current trend in antitrust jurisprudence toward a focus on economic efficiency and consumer welfare, many of the criticisms of the Guidelines are unlikely to be persuasive. A number of the other criticisms reflect the debates among economists on relatively minor points, such as the extent to which the Herfindahl-Hirschman Index (HHI) is superior to concentration ratios as a measure of concentration.² Still other criticisms reflect differing opinions as to the choice of the precise rules with which to implement the Guidelines' goals.³ The Guidelines themselves generally discuss the rationale underlying the various rules, making it unnecessary to address many of these criticisms. Furthermore, several of the participants in this Symposium who are sympathetic to

† Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice. A.B. 1951, J.D. 1956, Stanford University.

1. U.S. Dep't of Justice, Merger Guidelines—1968 (May 30, 1968), *reprinted in* 2 TRADE REG. REP. (CCH) ¶ 4510 (Aug. 9, 1982) [hereinafter cited as 1968 Guidelines].

2. *E.g.*, Calkins, *The New Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402 (1983).

3. *E.g.*, Davidson, *The Competitive Significance of Segmented Markets*, 71 CALIF. L. REV. 445 (1983).

the Guidelines have already ably explained and defended many aspects of the Guidelines.⁴

Rather than providing an unneeded defense of the Guidelines, this Article briefly describes their underlying assumptions and provides several prominent examples of the way in which those assumptions have been translated into the Guidelines' rules. Consequently, this Article addresses, at least indirectly, many of the issues raised by the commentators. The discussion also should promote a better understanding of the Guidelines and the way the Antitrust Division is using them.

I

CONSUMER WELFARE AS THE GOAL OF ANTITRUST LAW

Since enactment of the Sherman Act⁵ in 1890, commentators have identified numerous goals for the antitrust laws. In recent years, a broad consensus has developed that the antitrust laws are a "consumer welfare prescription"—that is, they are intended to promote economic efficiency, broadly defined.⁶ Nevertheless, a minority continues to insist that antitrust law should reflect more than efficiency concerns.⁷ Primarily, these commentators argue that antitrust jurisprudence should also seek to advance social and political goals. Although the precise concerns vary widely and often are vaguely defined, they include, among others, the deconcentration of economic power, the promotion of small businesses, and the reallocation of wealth.

Frequently, the antitrust laws' concern for protecting and improving economic efficiency also serves to further social and political goals. However, where there is a conflict, social and political goals should yield to economic considerations primarily for two reasons: first, the statutes themselves focus on efficiency; and second, nonefficiency goals are too intractable to be used as enforcement standards.

A. *The Focus of the Statutes*

An examination of the language and legislative histories of section 1 of the Sherman Act and section 7 of the Clayton Act strongly suggests

4. *E.g.*, Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311 (1983).

5. Ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1976)).

6. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *THE ANTITRUST PARADOX* 66 (1978)). *See also* R. POSNER, *ANTITRUST LAW* 23, 99-100 (1976); 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 103-113 (1978); 4 *id.* ¶ 906 (1980).

7. *See, e.g.*, Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?*, 71 CALIF. L. REV. 348, 362 (1983); Harris & Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CALIF. L. REV. 464, 465-68 (1983); Schwartz, *New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 602 (1983).

a focus on economic efficiency. Section 1 of the Sherman Act prohibits unreasonable "restraint[s] of trade."⁸ Section 7 of the Clayton Act prohibits inergers, the effect of which "in any line of commerce or in any activity affecting commerce in any section of the country . . . may be substantially to lessen competition, or to tend to create a inonopoly."⁹ The section 1 standard condemns agreements that restrain output—precisely the consumer welfare concerns embodied by the Guidelines. Similarly, Robert Bork has argued persuasively that "competition" and "inonopoly" in section 7 are used as shorthand expressions for effects on consumer welfare.¹⁰ Section 7 also expressly limits the inquiry into a merger's likely effects by requiring that those effects be judged within "a line of commerce in any section of the country"—language that focuses the relevant inquiry on the merger's effects within the context of economically defined markets.

The legislative histories of the two Acts support this interpretation of their language.¹¹ It is true that the legislative history of the Cellar-Kefauver Amendment,¹² which strengthened the antimerger provisions of section 7 of the Clayton Act, contains several statements suggesting that at least some members of Congress believed the Clayton Act would serve objectives in addition to that of the protection and enhancement of economic efficiency.¹³ This does not require a revised interpretation of the statutes, however. As pointed out above, objectives other than consumer welfare frequently can be achieved at the same time economic efficiency is enhanced, and it is not surprising that the political debates surrounding the passage of the amendment reflect this fact. On the other hand, nowhere does the legislative history indicate that when amorphous social and political goals can only be achieved at the cost of economic efficiency, economic efficiency should be sacrificed.

8. 15 U.S.C. § 1 (1976).

9. Ch. 323, § 7, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 18 (1976 & Supp. V 1981)). Section 1 of the Sherman Act and § 7 of the Clayton Act embody the same prohibition. Although there has been some confusion in the past, the standards for evaluating mergers under both statutes are the same. *See* *United States v. First Nat'l Bank & Trust*, 376 U.S. 665 (1964) (using a Clayton Act standard to evaluate the legality of a merger challenged under the Sherman Act); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 354-55 (1963); 4 P. AREEDA & D. TURNER, *supra* note 6, ¶ 906.

10. *See, e.g.*, R. BORK, *supra* note 6, at 57-61.

11. *Id.* at 61-66; R. POSNER, *supra* note 6, at 23, 99-100. *But see* 1 P. AREEDA & D. TURNER, *supra* note 6, ¶ 106.

12. Ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (1976 & Supp. V 1981)).

13. *See generally* *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-23 (1962); R. POSNER, *supra* note 6, at 99-100.

B. Intractability of Nonefficiency Goals

Even if the Sherman and Clayton Acts and their legislative histories may be interpreted to allow antitrust policy to be guided by considerations other than economic efficiency, economic efficiency provides the only workable standard from which to derive operational rules and by which the effectiveness of such rules can be judged.¹⁴ Efficiency gains or losses from mergers are at least theoretically calculable, and economic theory provides a basis for making a priori determinations as to the circumstances under which mergers are likely to reduce economic efficiency. The same cannot be said for social and political standards.¹⁵ Generally, noneconomic standards are stated in vague, subjective terms. As a result, it is impossible to articulate well-defined operational rules based on such standards and to evaluate the success or failure of the rules in achieving their objectives.¹⁶ That is, while one can estimate the approximate economic costs and benefits of a merger and readily compare the two, there is no objective measure for valuing social and political costs and benefits.

Furthermore, if there were operational rules for promoting some well-defined social or political goal, it would still be unclear whether those benefits were worth the economic costs. First, because it may be difficult to convert noneconomic benefits into economic terms, it is impossible to compare those benefits to the economic costs that must be incurred to achieve them. Second, although real and generally estimable, the economic costs of achieving those noneconomic goals would not be explicit. Direct taxes and subsidies would be less costly (and politically more honest) methods for achieving social and political goals.¹⁷ Congress is far better suited politically than courts and prosecutors to determine whether or not the benefits of social and political engineering (such as that contemplated by Professor Schwartz¹⁸ and others¹⁹) are worth the toll on economic efficiency.²⁰

14. See Baxter, *Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 693 (1982).

15. 1 P. AREEDA & D. TURNER, *supra* note 6, ¶¶ 111-112.

16. It is ironic that those commentators who condemn the Guidelines for their exclusive focus on economic concerns are frequently the same ones who criticize the Guidelines for being too indefinite. See Harris & Jorde, *supra* note 7, at 485; Schwartz, *supra* note 7, at 595. It is difficult to square these two criticisms.

17. See, e.g., R. POSNER, *supra* note 6, at 19-20.

18. Schwartz, *supra* note 7, at 602.

19. E.g., Harris & Jorde, *supra* note 7, at 465-68.

20. The failing firm doctrine is potentially one exception, however, to the rule that merger analysis focuses solely on economic efficiency. See Baxter, *Remarks: The Failing Firm Doctrine*, 50 ANTITRUST L.J. 247, 251-52 (1981); R. POSNER, *supra* note 6, at 20-22. As indicated in the Guidelines, some have described the doctrine as a balancing of competitive and noncompetitive concerns. U.S. Dep't of Justice, Merger Guidelines § V(B) n.54, 47 Fed. Reg. 28,493, 28,502 n.54 (1982), reprinted in 71 CALIF. L. REV. 649, 665 n.54 (1983) [hereinafter cited without cross-refer-

II

THE GUIDELINES AND ECONOMIC ANALYSIS

Operational rules grounded in a concern for economic efficiency are tractable as well as consistent with the spirit and letter of the anti-trust laws. The "unifying theme" of the revised Guidelines is that "mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."²¹ Market power is the ability of a seller or group of sellers acting in concert profitably to raise prices above competitive levels. By raising prices above competitive levels, the exercise of market power generates allocative inefficiencies.²²

Mergers can create, enhance, or facilitate market power by: (1) creating or enlarging a single dominant firm that, acting alone, is able to raise price profitably;²³ (2) altering the size distribution of firms in the market (i.e., increasing concentration), which may increase the ability of a small number of firms acting in concert to raise price profitably;²⁴ (3) eliminating a potential competitor that otherwise would act as a restraint on the exercise of market power;²⁵ (4) increasing the difficulty of entry to future entrants;²⁶ and (5) facilitating collusive pricing by members of the market in ways other than by reducing their number.²⁷ To evaluate a given merger then, one should be able directly or indirectly to measure market power. As has been explained in several articles, direct measurement is extremely impractical, if theoretically possible.²⁸ As an alternative the law has developed, and the Guidelines have refined, the concept of market definition which provides an indirect measure of market power.

A. Market Definition

The most innovative and controversial aspect of the Guidelines is their approach to market definition. As defined by the Guidelines:²⁹

ence as Guidelines]. Nevertheless, by limiting the availability of the defense to situations in which the only alternative to the merger is the exit of a competitor, the Guidelines attempt to assure that the defense will not reduce consumer welfare.

21. Guidelines § I, 47 Fed. Reg. at 28,493, 71 CALIF. L. REV. at 649.

22. For a standard textbook treatment, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 14-20 (2d ed. 1980).

23. Guidelines § III(A)(2), 47 Fed. Reg. at 28,497, 71 CALIF. L. REV. at 657.

24. *Id.* § III(A), 47 Fed. Reg. at 28,497, 71 CALIF. L. REV. at 655.

25. *Id.* § IV(A), 47 Fed. Reg. at 28,499, 71 CALIF. L. REV. at 660.

26. *Id.* § IV(B), 47 Fed. Reg. at 28,500, 71 CALIF. L. REV. at 662.

27. *Id.* § IV(B)(3), 47 Fed. Reg. at 28,501, 71 CALIF. L. REV. at 664-65.

28. See Ordovery & Willig, *The 1982 Department of Justice Merger Guidelines: An Economic Assessment*, 71 CALIF. L. REV. 535 (1983); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

29. Guidelines § II m.6 & 11, 47 Fed. Reg. at 28,494 n.6, 28,495 n.11, 71 CALIF. L. REV. at 650 n.6, 651 n.11.

a market consists of a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and nontransitory increase in price (above prevailing or likely future levels).

The idea behind this rather imposing definition is quite simple. The merger of two sellers of a product in an area can create a significant danger of collusive price increases only if the merger of all sellers of that product in that area would cause price to rise significantly. If the only seller (i.e., a monopolist) of that product in that area would not have market power, then reducing the number of sellers cannot pose a problem.³⁰

Under the Guidelines, a market is defined by considering a series of concentric groups of products and areas and determining, as to each group, whether a single seller of the group of products in the area would find it profitable to increase price significantly. If the answer is yes, then the group of products and the area are considered to be a market. While this inquiry may produce a number of markets from which one must be chosen as the *relevant* market, the Guidelines indicate that the smallest market generally is to be considered the relevant one.³¹

Commentators have criticized the Guidelines' approach to market definition on the ground that it is too theoretical and is therefore of no practical value in merger cases.³² Similarly, it has been charged that because the Guidelines' approach to market definition is so theoretical, it will be difficult to determine a priori whether the Division will challenge a merger.³³ Finally, some charge that the Guidelines are arbitrary in their choice of a one year, 5% price increase as the first approximation of whether a significant and nontransitory increase in the price of a group of products in an area would be profitable.³⁴ None of these criticisms is persuasive.³⁵

30. Williamson, *Vertical Merger Guidelines: Interpreting the 1982 Reforms*, 71 CALIF. L. REV. 604, 614-15 (1983).

31. For an example involving the coal industry, see U.S. DEP'T OF JUSTICE, COMPETITION IN THE COAL INDUSTRY ch. 3 (December 1982) [hereinafter cited as THE COAL REPORT]. For a discussion of how this can be done, see Werden, *Market Delineation and the Justice Department's Merger Guidelines* (forthcoming in 1983 DUKE L.J.).

32. *E.g.*, Harris & Jorde, *supra* note 7, at 476.

33. *E.g.*, Schwartz, *supra* note 7, at 587.

34. *E.g.*, Areeda, *Justice's Merger Guidelines: The General Theory*, 71 CALIF. L. REV. 303, 307-08 (1983).

35. Several commentators have also noted that the Guidelines seem to make the same mistake as that made in *United States v. E.I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956). See, *e.g.*, Baker & Blumenthal, *supra* note 4, at 322 n.54. These commentators note that if one applies the Guidelines' approach (which basically attempts to gauge market elasticity) in a context where market power is already being exercised, there will be a tendency to define the

First, one of the greatest problems with the courts' approach to market definition in the past has been its ad hoc character. Frequently, the courts have analyzed a number of factors without understanding why those factors and not some others are relevant. On the other hand, the Guidelines provide, arguably for the first time, an analytical framework for defining markets. It will of course be true that available data may not allow a direct determination of whether a significant, nontransitory increase in price would be profitable. However, where such data are not available, there is at least a theoretical framework for analyzing the relevance of indirect or second-best evidence.

Similarly, by illuminating the overall process of market definition, the Guidelines should increase certainty for firms contemplating mergers. No one can argue that the approach to market definition employed by the courts is any clearer than the Guidelines' approach. In addition, the Guidelines themselves provide an illustrative list of relevant evidence that the Division will use to determine indirectly whether an increase in price will engender significant substitution.³⁶

It also should be pointed out that the costs of absolute certainty would be too high. In drafting guidelines, one must balance the benefits of certainty against the loss in robust analysis. The Guidelines were intended to clarify, and have in fact clarified, the Division's approach to market definition; nevertheless, because the definition of *relevant* markets depends so much on the facts of a given case, it would be impossible to state the Division's approach to market definition in sufficient detail so that everyone could predict with certainty the way in which the Division will define a market under every possible scenario.

Finally, the criticism of the Guidelines' use of "5%, one year" to

market too broadly. It can be shown that a firm or firms effectively exercising market power will set price in the elastic region of their demand curve, and intuitively, one can posit that if the firms exercising market power could raise price profitably, they would already have done so.

The Division was aware of this problem in drafting the Guidelines; however, it was not clear that anything needed to be done about it. The problem in the *Cellophane* case can lead to erroneous analysis under § 2 of the Sherman Act because in such a case it is necessary to determine whether a firm is presently exercising market power in order to determine whether corrective action is necessary to reduce that power. On the other hand, horizontal merger analysis under § 7 of the Clayton Act is concerned with the probability that a merger will decrease competition in the future. If the firms in the market are colluding before the merger but are exercising their market power imperfectly, then a 5% price increase may still be profitable for a hypothetical monopolist and so the Guidelines' approach frequently will define a market within which to evaluate a merger effectively. If the firm or firms are exercising their market power imperfectly so that a 5% price increase will not be profitable, however, it may be inappropriate to challenge the merger. Prohibiting the merger likely will have no effect on the exercise of market power, but the prohibition will eliminate any possibility that the merger may disturb the status quo and invigorate competition or that the merger will achieve efficiencies which can reduce the monopoly price. Moreover, if indirect evidence indicates that a merger is likely to prevent prices from falling for a longer period than otherwise would be the case, the merger still could be challenged.

36. Guidelines § II(A), 47 Fed. Reg. at 28,495, 71 CALIF. L. REV. at 651.

determine the relevant markets is unwarranted. As the Guidelines note, those numbers are used only as a "first approximation." Generally, if a price increase of that magnitude is profitable, one can be confident that the product and area constitute a market. While those numbers represent the general standard, the Division may determine that because of peculiar facts in a given case some other numbers will provide a more accurate standard for defining the market.³⁷ The selection of any numbers is inherently arbitrary (there is no reason that 6% and ten months would be inherently less reasonable); however, given the flexibility of the Guidelines, the use of the first approximation should not lead to arbitrary results.

B. The Herfindahl-Hirschman Index and the Thresholds

After having defined the relevant market, the Division must analyze the effect of the merger in that market. The primary, though by no means exclusive, predictor of the likelihood of collusion in a market is the size distribution of sellers' market shares. Tacit or explicit collusion is unlikely to occur unless a relatively small number of sellers account for a relatively large portion of the market.³⁸ Accordingly, the Guidelines first consider the size distribution of firms after a merger and the change in size distribution brought about by the merger. The Guidelines use the Herfindahl-Hirschman Index (HHI) (the sum of the squares of the market shares of sellers in the market) to summarize size distribution or concentration.³⁹

A great deal of attention has been paid to the fact that the Guidelines use the HHI, rather than the 4-firm concentration ratio (CR4) to measure concentration. The intensity of the furor, however, is greatly disproportionate to the significance of the choice. The HHI and the CR4 are highly correlated,⁴⁰ and the choice between the two generally will not make much difference. Moreover, no summary measure of market structure can claim to be the only theoretically or empirically correct measure. Understanding that the HHI is no panacea, the Division nevertheless chose the HHI over the CR4 for three reasons.

First and most important, the CR4 ignores the size of fifth and smaller firms as well as the relative size of the top four, and both of these factors can have an important effect on the likelihood of collusion. Unless the four largest firms control a very large proportion of

37. See, e.g., THE COAL REPORT, *supra* note 31, at 22-24.

38. See, e.g., Fraas & Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. INDUS. ECON. 21 (1977); Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13 (1974).

39. Guidelines § III(A), 47 Fed. Reg. at 28,497, 71 CALIF. L. REV. at 655.

40. See, e.g., F. SCHERER, *supra* note 22, at 58 & n.52 (and sources cited therein).

the market, firms other than the top four would be involved in any successful agreement.⁴¹ There is also some reason to believe that collusive agreements are easier to maintain if one or two of the participants are significantly larger than others.⁴² The HHI is sensitive to this factor, while the CR4 is not. Second, the HHI is a very simple and convenient tool for measuring the effect of a merger on market structure and the likelihood of collusion. A merger increases the HHI by an amount equal to twice the product of the shares of the merging firms, and the product of the shares is an informative and convenient way in which to assess that effect. Finally, the theoretical foundation of the HHI is the most solid of any summary measure of market structure. While theoretical work on collusion has not progressed to the point that it offers compelling support for any particular measure of market concentration, it does suggest use of the HHI.⁴³

Given the extensive nature of market definition under the Guidelines, the magnitude of the postmerger HHI and of the change wrought in HHI provide a very informative, although indirect, measure of the likelihood of collusion in a market. It is appropriate then to use that measure as a "first cut" in merger analysis: the HHI without more may indicate that further inquiry is not warranted. As a result, the Guidelines establish postmerger HHI thresholds as trigger points.

The selection of thresholds has itself been the subject of controversy. One concern is that in establishing thresholds at all, the Division may be relying excessively on small numerical differences that are not very important.⁴⁴ This concern is wholly unjustified. The Guidelines specifically state that "cases falling just above and just below a threshold present comparable competitive concerns."⁴⁵ The difference between an HHI of 950 and 1050 is slight, and the Division will treat it as such. In such a marginal case, the Division will not necessarily rest its decisions on whether the merger falls above or below the threshold. As the Guidelines make clear, numerical measures of concentration are not their sole focus.

In addition, some have taken issue with the particular HHI thresholds chosen. The present state of the theoretical and empirical literature on collusion precludes a rigorous basis for any particular thresholds. Those used in the Guidelines were adopted because they were consistent with the experience of those in the Division and also

41. Conspiracies that have been detected and prosecuted generally have involved more than four firms. See, e.g., Fraas & Greer, *supra* note 38, at 34; Hay & Kelley, *supra* note 38, at 22.

42. See, e.g., Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

43. See Ordover, Sykes & Willig, *Herfindahl Concentration, Rivalry, and Mergers*, 95 HARV. L. REV. 1857 (1982); Stigler, *supra* note 42.

44. Calkins, *supra* note 2, at 404.

45. Guidelines § III(A), 47 Fed. Reg. at 28,497, 71 CALIF. L. REV. at 656.

with empirical literature. The thresholds of 1000 and 1800 in the Guidelines correspond *roughly* to CR4's of 50 and 70.⁴⁶ Economists have frequently identified a CR4 of about 50 as the point at which the likelihood of anticompetitive behavior becomes significant, and a considerable amount of empirical work lends support for this threshold.⁴⁷ A CR4 of 70 or 75 has often been used as the point at which the likelihood of anticompetitive conduct becomes very significant, and the latter figure was used in the 1968 Guidelines.⁴⁸ There also is some empirical support for this figure.⁴⁹ However, the Division does not consider the thresholds of 1000 and 1800 to be magic numbers. Slightly different thresholds would have been equally reasonable.

The Guidelines also have a leading firm proviso to catch mergers that may create a danger of market power but that do not reach the HHI thresholds. As indicated above, in addition to making the collective exercise of market power easier, mergers also can increase a single competitor's ability to exercise market power unilaterally by increasing his size. Some would argue that this is the only time one should be concerned with mergers between horizontal competitors.⁵⁰ The leading-firm proviso, then, is designed to prevent the possibility of enhancing single-firm market power that has no effective competitive check from small rivals. The proviso indicates that the Division will challenge the acquisition of a firm with a 1% market share when the acquiring firm has at least a 35% share and has a market share at least twice as large as the next largest competitor.

Again, the Guidelines have been criticized for the choice of the 35% threshold.⁵¹ Generally, this percentage is criticized as too large because a smaller percentage may also create a danger of market power. As with the selection of HHI thresholds in those cases involving

46. Under certain assumptions about the distribution of market shares, the CR4's that correspond to HHI's of 1000 and 1800 would be 50.8 and 67.3. See Scarbrough & Pfunder, *New Merger Guidelines Not Always Less Restrictive*, Legal Times (Washington), Jan. 10, 1983, at 19, 27.

47. There is an extremely large body of empirical work relating market performance, measured by profits, to market concentration. Although the data used has serious limitations and the implications of the studies are open to dispute, these studies generally have been argued to establish that high levels of concentration lead to collusion. For an excellent summary, see Weiss, *The Concentration-Profits Relationship and Antitrust* in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 184 (H. Goldschmid, H. Mann & J. Weston eds. 1974). Some studies have attempted to identify a single critical level of concentration at which collusion occurs. They generally have found a critical CR4 in the 50's. See, e.g., White, *Searching for the Critical Industrial Concentration Ratio: An Application of the "Switching of Regimes" Technique*, in STUDIES IN NONLINEAR ESTIMATION 61, 71-72 (S. Goldfeld & J. Quandt eds. 1976). A recent study found two critical levels of concentration: CR4's of 46 and 68. Bradburd & Over, *Organizational Costs, "Sticky Equilibria," and Critical Levels of Concentration*, 64 REV. ECON. & STAT. 50 (1982).

48. 1968 Guidelines, *supra* note 1, para. 6, 2 TRADE REG. REP. (CCH) at 6884.

49. See *id.*

50. See, e.g., R. BORK, *supra* note 6.

51. E.g., Calkins, *supra* note 2, at 421-22.

the danger of collusion, the selection of a threshold for the leading-firm proviso was somewhat arbitrary. However, the Division decided that danger from slight increases in single-firm market power was not significant when a single firm held less than 35% of the market. Furthermore, limiting growth through merger at market share levels below 35% might result in the sacrifice of efficiencies in some markets. It was the judgment of the Division that at about 35%, the danger of market power becomes sufficiently great to overwhelm any concern for the potential efficiencies that might be lost from prohibiting a leading firm merger.

C. *The Other Factors*

While the degree of concentration in a market provides a great deal of information concerning the probability that a merger will create or enhance market power, a number of other variables affect the ability of firms to exercise market power.⁵² These variables, discussed in the Guidelines under the topic "Other Factors,"⁵³ relate to the ease with which sellers can reach and maintain collusive agreements. The individual factors listed are fairly standard and generally uncontroversial. Nevertheless, two frequent criticisms are that the Guidelines fail to assign relative weights to the factors⁵⁴ and that the list of factors has excluded economically relevant factors.⁵⁵

Certainly the assignment of relative weights would have been desirable if it had been feasible. However, after the Division had extensively analyzed all of the factors affecting the likelihood of collusion, it ultimately decided that the Guidelines could do little more than provide an illustrative list of the most significant factors and discuss the Division's analysis of those factors. Apart from market concentration,

52. Guidelines § III(C), 47 Fed. Reg. at 28,498-99, 71 CALIF. L. REV. at 657-60. In addition to these "other factors," the Guidelines pay particular attention to the extent to which collusion would be rendered unprofitable by the actions of firms not currently selling in the relevant market. Such firms are divided into two categories by the Guidelines—those that could begin selling quickly and easily using existing facilities and those that could begin selling fairly quickly and easily by constructing new facilities. The influence of the former type of firms is addressed under the heading "production substitution." The Guidelines indicate that firms that are not presently selling the relevant product in the relevant area will nevertheless be considered to be in the relevant market if they have "existing productive and distributive facilities that could easily and economically be used to produce and sell the relevant product" in a short period of time in response to a small increase in price. *Id.* § II(B)(1), 47 Fed. Reg. at 28,495, 71 CALIF. L. REV. at 652. The second category is called "entry" and the Guidelines indicate that "[i]f entry into a market is so easy that existing competitors could not succeed in raising price for a significant period of time, the Department is unlikely to challenge mergers in that market. *Id.* § III(B), 47 Fed. Reg. at 28,498, 71 CALIF. L. REV. at 657.

53. *Id.* § III(C), 47 Fed. Reg. at 28,498-99, 71 CALIF. L. REV. at 657-60.

54. *E.g.*, Schwartz, *supra* note 7, at 595.

55. *E.g.*, Davidson, *supra* note 3, at 445-47.

the factors that affect the likelihood of collusion are unquantifiable in any apparent way, and their effect on the probability of collusion will vary greatly depending on the particular circumstances. Indeed, while one of the factors may increase the danger of collusion under certain circumstances, the same factor may make collusion less likely under other circumstances.⁵⁶ Thus, the Division ultimately concluded that there was no alternative to a careful, case-by-case analysis of these factors.

Although the Division assigns no particular weight to any or even to all of these factors, it should be understood that they may be important in a significant fraction of cases. The Division is unlikely to challenge mergers in markets with an HHI just above 1000 unless other factors indicate that collusion is significantly probable. Moreover, even if the postmerger HHI will exceed 1800 and will be increased by more than 100, the Division may not challenge the merger if these other factors indicate that collusion would be clearly implausible. In assessing the probability of collusion, it may turn out that factors other than those listed in the Guidelines are significant.⁵⁷ Several factors that could be important in particular cases were not included in the Guidelines because they were not of sufficiently general importance.

On the other hand, this should not be taken to mean that *any* factor will be considered by the Division in analyzing mergers. One of the primary weaknesses of early section 7 jurisprudence was the use of numerous, frequently irrelevant factors in analyzing mergers. A review of the Report of the Attorney General's National Committee to Study the Antitrust Laws reveals the rather diffuse nature of early analysis under

56. For example, similarities or differences in the products and locations of the merging firms may increase or decrease the likelihood of collusion depending on other factors in the case. Guidelines § III(C)(1)(c), 47 Fed. Reg. at 28,498, 71 CALIF. L. REV. at 658.

57. One of the factors that several of the Symposium's participants have alluded to is the rate of growth of demand. *E.g.*, Baker & Blumenthal, *supra* note 4, at 336 n.93. Related to demand growth is the rate of technological change in the market. Although the Division considered including both factors in the list, neither ultimately was included. There is a significant relationship between product heterogeneity, cost differences among firms in the market, growth in market demand, and technological change in the market. If there is rapid technological change, the market is likely to experience rapid growth in demand, and to be composed of heterogeneous products and of firms having different cost structures. If all four of these factors were included in the list, the Guidelines might have created a misimpression that the Division would necessarily analyze the merger differently if several of these related factors were present rather than only one. Furthermore, there are problems associated with identifying and measuring future technological change and differences in cost structures. As a result, the Division decided to include only one factor, product heterogeneity, in the list. However, where there is substantial, clear evidence of rapid technological change in the processes by which a homogeneous product is made, or of significant growth in demand for a homogeneous product, that evidence may be considered relevant in the analysis of a merger.

section 7.⁵⁸ As with the Supreme Court's analysis in *Brown Shoe Co. v. United States*,⁵⁹ the legality of a merger was to be judged on the basis of an open-ended list of factors without any central theme. Conceivably anything, including perhaps the psychic health of other sellers, could be considered.

The fact that other factors can be considered does not mean that the Guidelines will permit an unfocused inquiry. The Division will consider only those factors that, according to economic theory or empirical evidence, relate to the ease and profitability of collusion.⁶⁰ An industry trend toward concentration is not a factor that will be considered, even though it has been used in the past. First, the trends cited by the courts in the past often have been illusory or misleading.⁶¹ A trend (for example, that in the grocery retailing industry) may reflect changes in technology or in tastes rather than the likelihood of collusive conduct. If those changes are fundamental and if mergers are prohibited, the industry may be forced to adjust to those changes in ways that are less efficient than through inergers. This would be particularly unfortunate if the trend toward concentration, even though accomplished through mergers, would not result in a level of concentration high enough to make collusion a concern. Second, there is no evidence that the failure to consider trends may stampede firms into merging at the earliest possible time lest they delay until concentration has reached a level which would prevent further inergers in that market. Finally, if there is no indication that a particular proposed inerger creates a significant likelihood of lessening competition, it is unacceptable to sacrifice the potential efficiencies associated with the merger based solely on mere speculation that other inergers in the future might lessen competition. The presumption that market transactions are efficient should be abandoned only when likelihood of collusion is clear and proximate, not when it is speculative and remote.

CONCLUSION

This Article has touched only briefly on a few of the issues raised by this Symposium. The Guidelines themselves deal with most of those issues either explicitly or implicitly. Many involve judgment calls that are defensible, but at the same time are inherently open to second-guessing. A few of the issues go to the very foundation of the antitrust laws, and thus are beyond the scope of this Article.

58. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 115-28 (S. Barnes & S. Oppenheim co-chairs 1955).

59. 370 U.S. 294 (1962).

60. Guidelines § III(C), 47 Fed. Reg. at 28,498, 71 CALIF. L. REV. at 658.

61. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 273-74, 277-78 (1966).

Although none of the criticisms made by other authors in this Symposium seriously threaten the viability of the Guidelines, or even come as a surprise, symposia such as this are healthy. They reflect an appropriate scrutinizing of government policy and its underlying assumptions. It is hoped that further study and deeper understanding of industrial organization will result. Guided by such advances in the understanding of markets, mergers, and concentration, future revisions of the Guidelines will be able even more effectively to promote and protect consumer welfare.