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Will the U.S. Draft Merger Guidelines Influence Merger Control in South Africa?

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I. Introduction

The new draft merger guidelines ("DMGs") are proposing major changes to merger policy in the United States and bringing underlying competition policy debates to a head. In the past, U.S. merger guidelines have been influential in other jurisdictions, South Africa included. For this reason, a prominent European commentator believes that "… *it is important for those outside the U.S. to understand what motivates them and place them in context*."[2] In this piece, we attempt to do this from a South African standpoint.

II. The DMGs Reflect Major Changes in Policy

The DMGs have sparked lively policy debates in the United States. Commentators have stated their views in blunt and simple terms. For example, Gregory Werden – a 42-year ex-U.S. DOJ veteran who worked on all but the first edition of the guidelines – has written that "*In some ways, the DMGs read as if the last half-century of antitrust evolution never happened.*"[3] Dennis Carlton has asked whether the DMGs have "demoted economics"[4] and Cristina Caffarra has described them as a "*… major break from "the way we have been doing things"— by which I mean not just the letter of the prior 2010 Guidelines, and every version of the Guidelines going back to 1982; but also the practice of merger control as I have experienced it*."

On the one hand, sweeping changes should not be surprising. The United States merger guidelines have changed radically in the past 55 years. Eric Posner tells us why – the guidelines have reflected the radical changes in economic policy and policy ideology since 1968.[5]

On the other hand, it is easy to understand why the DMGs are causing such sharp debates. They reflect a view that the "rise of economics" in antitrust has gone too far[6], and that it is time for the pendulum to start swinging back to the middle – perhaps even past the middle. Many disagree. For them, if the pendulum should move at all, it need not move much.

What does this mean in practical terms? Many in favor of the DMGs appear to accept or believe the following: first, they accept empirical research indicating that concentration and profit margins in the United States have risen significantly in the past 25 years or so - that U.S. markets are less competitive than they used to be and, in some areas, are also less competitive than currently in Europe.[7] Second, they also appear to accept or believe that rising concentration is associated with slower productivity growth and rising inequality, among other things.[8] Third, many argue that antitrust "under-enforcement" has been a major cause of rising concentration and that it is time for the United States to "modernize"

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[1] The authors are Associate Directors with Berkeley Research Group (BRG). Any views expressed are their own and do not reflect the views of BRG, nor any Expert associated with BRG.

[2] https://www.promarket.org/2023/08/17/what-signal-are-the-draft-merger-guidelines-sending-to-enforcers-elsewhere/.

[3] https://www.pymnts.com/cpi_posts/two-bridges-too-far-first-take-on-the-draft-merger-guidelines/#_ftn100.

[4] https://www.promarket.org/2023/08/04/have-the-draft-guidelines-demoted-economics/.

[5] https://www.promarket.org/2023/05/31/the-whig-history-of-the-merger-guidelines/.

[6] For a balanced overview of this debate, see Hovenkamp, H., 2021. The Looming Crisis in Antitrust Economics. Boston University Law Review Vol. 101:489. The abstract starts with the following statement: "*As in so many areas of law and politics in the United States, antitrust's center is at bay. On the right, it is besieged by those who would further limit its reach. On the left, it faces revisionists who propose significantly greater enforcement. One thing the two extremes share, however, is the denigration of the role of economics in antitrust analysis. Two of the Supreme Court's recent antitrust decisions at this writing reveal that economic analysis from the right no longer occupies the central role that it once had.*"

[7] Thomas Phillipon provides an example: https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration Hal Varian provides a counter: https://www.jstor.org/stable/f6ab2e79-ab13-3452-84e3-8fa71c2910d2?read-now=1&seq=2.

[8] See for example Joseph Stiglitz: https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03.

its antitrust regime.[9] Fourth, and perhaps most importantly, many share Posner's view that "*… [i]t is a real irony that the empirical literature indicates that the economic sophistication that has poured into the Guidelines appears to have resulted in dramatic under-enforcement of merger law.*"[10]

An eminent Unites States legal scholar has argued that it is appropriate for the guidelines to not just "*demote*" but to "*jettison*" neoclassical economics in favor of what she calls "*modern progressive economics built on realistic market assumptions*."[11] Professor Fox further argues that it is appropriate to move away from the "consumer welfare standard," towards "competition," which she describes as "a process and environment that is both valuable as process and likely to provide the best results for consumers and the other stakeholders in markets."[12] She believes it is time to (re)broaden the approach to merger control in the United States:[13]

> *"We have gone down a decades-long path of hinging violations to output-limiting results, and although this may be the economists' metric for identifying inefficiency, it does not capture the dynamic work of antitrust. Preserving the dynamic of modern markets defies output analysis … Competition lifts our gaze."*

III. The United States' Debates Reflect Broader Trends

The debates in the United States, over the DMGs and antitrust policy more broadly, are not unique or isolated. In some ways the United States is just catching up.

The editors of a new CPI book on competition economics say they compiled the volume because "*[t]he past few years have been a time of upheaval for competition policy on both sides of the Atlantic.*"[14] They argue that a "*free-market approach*" has dominated U.S. antitrust policy over the past few decades, although it is now being challenged.[15] The challenge is coming from a "*a more eclectic economic perspective,*" and the dominance of the free-market approach is being "*increasingly replaced by a more activist enforcement policy.*"

The editors also note that the changes in the United States are very recent. They emerged in the "early 2020s," partly due to the priorities of the Biden administration and the appointments it has made (e.g., to the leadership of the Federal Trade Commission and the Antitrust Division). The editors argue that this stands in contrast to the developments in Europe: "*European and British enforcement agencies never subscribed so fully to the free market approach."* A "*generally more aggressive attitude toward competition policy*" has been in place there for the past decade or so, and that "*practice there has always provided an instructive alternative model for competition policy*."

IV South Africa: A Fascinating Case

A key theme in the DMGs is concern over rising concentration and what to do about it in the merger control setting.[16] South Africa has long been a global pioneer in competition law, particularly in debates over how and why it should proactively tackle concentration. Nevertheless, these ongoing debates seem not to have recognized that merger policy since 1998 may have contributed to current levels of concentration, and amendments in 2018 did not

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[9] *Ibid*.

[10] https://www.promarket.org/2023/05/31/the-whig-history-of-the-merger-guidelines/.

[11] https://www.promarket.org/2023/09/05/eleanor-fox-tackling-the-critics-of-the-draft-merger-guidelines/?mc_cid=4eef999814&mc_eid=c6fb540f7d.

[12] *Ibid*.

[13] *Ibid*.

[14] Kwoka, Valetti, White (eds.) (2023). Antitrust Economics at a Time of Upheaval: Recent Competition Policy cases on Two Continents. https://www.competitionpolicyinternational.com/category/cpi-books/.

[15] The purpose of the book is to chronicle recent cases and court decisions that have contributed to the "upheaval."

[16] "*The draft is written to put forward a primary abstract goal, preventing the lessening of competition, and a primary empirical goal, deconcentration*." See https://www.promarket.org/2023/09/18/split-the-legal-economic-and-policy-arguments-of-the-draft-merger-guidelines/

fundamentally alter the architecture of South Africa's merger law. Substantive changes were made to the public interest provisions, but the competition assessment is largely the same as it was when the law was first developed in the late 1990s. On 28 September 2023, the Commission released draft revised public interest guidelines relating to merger control in South Africa[17], again emphasizing the focus on public interest.

The Preamble to the 1998 Competition Act recognized that Apartheid had left South Africa with an economy characterized by excessive levels of concentration of ownership and control, and highly unequal patterns of economic participation in parts of its population. The legislative drafters hoped that new competition laws, newly independent enforcement agencies, specialized competition courts, and a broader economic liberalization program, would lead to a decline in the concentration of ownership and markets and increased participation by historically disadvantaged persons ("HDPs").

A policy view emerged in the mid-2010s that, if anything, market and ownership concentration levels had worsened, as had market access for HDP-owned businesses (especially small ones).

This view partly reflected research from the early and mid-2010s on rising concentration in the United States, and partly reflected emerging debates on the challenges presented by highly concentrated digital markets.[18] But it was also a distinctly South African view. South Africa's recovery from the 2008-09 global financial crisis was slower and "lower" than that of many other economies. Our share of global exports continued to decline. Unemployment, poverty, and inequality were as pressing a set of challenges as ever. Small business failure rates were (and still are) high.[19]

The global financial crisis effectively brought an end to South Africa's post-1998 economic liberalization policy program, and industrial policy was back in fashion. More "activist" competition policies grew in popularity as policymakers decided that competition law and policy needed to do more to promote inclusive growth, economic and ownership transformation, HDP participation, and, most importantly, the "de-concentration" of the economy.

The process of amending the Competition Act commenced in the mid-2010s and was completed by 2018. A memorandum attached to all the amendment bills explained: "*The main objective of these amendments is to address two persistent structural constraints on the South African economy, namely, the high levels of economic concentration in the economy and the skewed ownership profile of the economy*."[20]

In 2018, the South African Competition Commission published a working paper assessing concentration levels in the South African economy.[21] In 2021, the Competition Commission followed up with its first "concentration tracker" report.[22] It should be noted that South Africa also entertained the idea of legislative limits on market concentration levels.[23]

The substantive amendments in the 2018 package focused on market inquiries and single firm conduct.[24] For merger control, the amendments mainly expanded the public interest assessment. They added two main grounds: the impact of a merger on the ability of small and medium enterprises ("SMEs") and HDP firms to participate in a market, and the promotion of a greater spread of ownership by HDPs and workers. These changes reflected judicial precedent and government policy as it had

[17] https://www.compcom.co.za/wp-content/uploads/2023/09/Draft-Revised-Guideline-on-Public-Interest-for-Publication-27092023ii.pdf

[18] https://www.pymnts.com/cpi_posts/identifying-barriers-to-entry-a-south-african-perspective/.

[19] In 2013, evidence showed between 70% to 80% of small businesses in South Africa failed within five years. See https://www.uwc.ac.za/news-and-announcements/news/how-can-south-african-entrepreneurs-succeed-897.

[20] See the final amendment bill: https://pmg.org.za/files/B23B-2018.pdf.

[21] Buthelezi, T., Mtani, T., Mncube, L., 2018. The extent of market concentration in South Africa's product markets. Competition Commission Working Paper CC2018/05.

[22] Competition Commission of South Africa, 2021. Measuring Concentration and Participation in the South African Economy: Levels and Trends: Summary Report of Findings and Recommendations, November 2021

[23] See Sutherland, P.J. (19 and 20 July 2018) Inquiries about market inquiries. *4th Annual Competition and Economic Regulation (ACER) 2018 Conference, IDC, Sandton.*

[24] They also introduced complex monopoly provisions, but these have not been enacted.

developed since the Walmart-Massmart merger in 2011.[25]

The amendments did not significantly alter the substantive *competition* assessment of mergers in South Africa and the approach remains that which has evolved since 1998.[26] This approach is largely predicated on what would have been considered "best practice" when the Competition Act was first developed in the late 1990s. The substantive test remains whether a merger is likely to significantly lessen or prevent competition in the relevant market. The (non-exhaustive) list of eleven factors that must be considered during the competition assessment includes nothing unusual or controversial. If anti-competitive effects are likely, merging parties have access to the "efficiency defense." A "failing firm" defense is also available.

V. The DMGs and South Africa

As we have noted here, U.S. scholars and practitioners are publishing strong views on the DMGs. As with most quasi-legislative processes, the final product will probably be more moderate. It seems unlikely that "*the last half-century of antitrust evolution*" will be entirely ignored. Economics has provided many lessons for merger control and those lessons are unlikely to be discarded. In any event, guidelines do not change the law. As Professor Fox explains:[27]

> *"An anti-market vision would not be accepted by the courts, which are charged with protecting competition. Such a dramatic shift could not be accomplished without legislative amendment. The critics seem to be equating the shift from "Don't intervene unless it is output-limiting" to "Intervene to protect competition" with "This is all about protecting inefficient competitors at the expense of consumers." It just isn't."*

Nevertheless, the approach towards merger control in the United States seems destined to change, perhaps significantly. It seems inevitable to us that the impact of this change will be felt in South Africa, along with several other jurisdictions. What remains unclear, however, is what form any potential future changes may take. Will the South African Competition Commission oppose more mergers under the current framework? Will it issue merger guidelines? Will South Africa at any future point look to enact further amendments? We will be watching this space closely – both locally and globally – as the years ahead unfold.

[25] This was a landmark case in South Africa. It was the first that saw a significant intervention by the government on public interest issues.

[26] Section 12A(2) added some factors to be considered in the competition assessment, but all were already part of competition assessments in practice.

[27] https://www.promarket.org/2023/09/05/eleanor-fox-tackling-the-critics-of-the-draft-merger-guidelines/?mc_cid=4eef999814&mc_eid=c6fb540f7d.