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CRITIQUE OF THE ANTITRUST GUIDE:
A REJOINDER

Donald I. Baker†

I am perplexed by Mr. Griffin's review of the Antitrust Guide to International Operations (the Guide) because it seems so completely devoid of philosophical focus. Is his thesis simply that the international antitrust area is complex? Is he saying merely that the Guide discusses many issues on which reasonable men may differ? Is he saying that businesses should be wary of using the Guide as a substitute for experienced antitrust counsel, such as himself? The answer to each of these questions is of course "yes." If Mr. Griffin has a general message beyond these points, I am not quite sure what it is.

The Guide does not purport to solve every single international antitrust problem. What it does attempt to do, however, is to examine in a coherent philosophical way an area of the law that has been characterized by much mechanistic lawyering and academic quibbling. The Guide is intended to give the business community, the bar, and the Antitrust Division's own staff some sense of the Division's priorities and concerns—to paint a more comprehensive picture than is possible from the somewhat random process of prosecuting violations that happen to be discovered and that are documented by enough evidence to proceed. It is a very deliberate attempt to make the subject less arcane, less technical, and less mysterious, and to inject a broader view into the field. In this sense, the Guide is similar to the


The Merger Guidelines consisted largely of a set of formulas that were used to identify those mergers the Government would "ordinarily challenge" under the antitrust laws. The Guide goes a step further since it exposes the thought process employed by the Antitrust Division in making prosecutorial decisions. That process is very fact-oriented, as the Guide periodically reemphasizes by suggesting that slightly different facts might produce a different result. The Antitrust Division's internal deliberations focus much more acutely upon the facts of particular investigations than upon a mechanical parsing of old cases. In sum, the Antitrust Division does not view itself as a policeman on the beat enforcing "the law" in a mechanical way. Rather, it likes to regard itself as a thoughtful champion of competitive policy. In some instances, for example, the Division will decline to enforce sweeping Supreme Court doctrines that make little economic sense. At other times it will seek to extend the law beyond its present boundaries—as a result of old, ambiguous, or simply wrongly decided cases. Especially in the latter instance, the Division should maintain a policy of openness—and the Guide reflects this in several key areas—rather than allowing the business community to be lulled into a sense of comfort by relying on old precedents that the Division no longer considers valid.

Mr. Griffin criticizes the Guide as not being a precise statement of the
law in a number of respects. Of course he is right. The Guide does not purport to state the law exactly and completely. Rather, it elucidates an intelligent enforcement program which is intended to be consistent with the law generally but not necessarily in every respect. Reading the Guide is not a substitute for reading old precedents; but lawyers who read only the old precedents may find that some of their clients are in court litigating with the Government over an old precedent thought by the Government to be outdated, inapplicable, or wrong. To the lawyer or client who wishes to avoid this risk, the Guide should prove helpful.

Mr. Griffin makes a great deal out of those who are not bound by the Guide. Of course, in a legal sense the Guide does not bind the courts, or the Federal Trade Commission (FTC), or even a future Assistant Attorney General. The attitude of the FTC in completely disassociating itself from the Guide demonstrates a certain lack of concern about the problems of business planning. Further, this attitude highlights the fact that the FTC, although it has played a relatively minor role in international antitrust enforcement, is definitely a "wild card," probably contributing more confusion to this specialized area than its performance justifies. Partly for this reason, I would favor eliminating FTC jurisdiction over international antitrust violations. In addition to the FTC, the International Trade Commission continues to add a factor of uncertainty to the international antitrust field. Only experience will show whether serious conflicts on antitrust enforcement questions develop between it and the Antitrust Division.

Private plaintiffs—those much exalted "private attorneys general"—are a third "wild card" in the international antitrust field because they bring cases, some sound and some irrational, based purely on their own private interests. An important test of the Guide will be the extent to which it influences judicial decisionmaking in these "wild card" private cases; to the extent that it does so, it may contribute to a greater sense of order than exists now in the field. I would hope that the Department of Justice, armed with the Guide, would play a more active role as amicus in private litigation than it has in the past. There are still few enough cases in the international field so that an individual case can have an influence disproportionate to its initial facts. Only time will tell whether the Guide in fact has a significant influence in the necessarily unpredictable world of private antitrust litigation.

One point is worth stressing: the Department of Justice has a monopoly over criminal law enforcement under the antitrust laws. The Guide in-

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7. *Id.* at 217-22.
evitably will influence to some degree the Government's criminal enforcement program, and hence will also influence businessmen's sometimes erratic fears of being subjected to criminal prosecution under what is now a felony statute. It would be difficult indeed for the Antitrust Division to bring a criminal prosecution against conduct that it had suggested in the Guide was permissible, or even against conduct that the Guide suggests should be subject to a rule of reason analysis. Mr. Griffin's review would have been a little more balanced had he made this point.

Mr. Griffin has obviously read the Guide carefully, and has produced pages and pages of detailed criticism on particular issues. Many of the points he makes were considered and rejected in drafting the Guide because we could come up with no more constructive—let alone coherent—alternative to what we already had. In still other cases, we simply never resolved the issues that Mr. Griffin brings up. Yet I get very little overall message from Mr. Griffin, other than that he would have come out somewhat differently on some issues and would have included a great deal more exposition of hypothetical alternatives in a broader range of circumstances. This course of action, however, would necessarily have compromised the brevity of the Guide and hence would have made it less useful to the ordinary person involved in an ordinary case (if such a thing really exists).

For example, in discussing the interesting question of intraenterprise conspiracy in Case A, the Department makes a serious effort to bring some order to the *Timken* doctrine, using the test of "effective working control" as a basis for drawing the line between (1) arrangements among subsidiaries for which the parent enterprise can allocate markets, and (2) agreements among competitors for which such allocations are per se illegal. Mr. Griffin finds that this approach is in some cases "too narrow and inflexible," especially in cases involving minority positions compelled by foreign state action. Meanwhile, in dealing with the difficult question of the length of time a know-how license can be used to justify a territorial restraint, the Guide develops a concept of "reverse engineering," which is defined as the time period that a qualified competitor would need to develop a product independently. Mr. Griffin finds reverse engineering to be a "helpful concept" but "imprecise."

Of course, neither of these concepts—effective working control or reverse engineering—provides an automatic test for resolving tough cases. But they do represent a significant step forward in the analysis, even if they may prove too "inflexible" or too "im-

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10. ANTITRUST GUIDE, supra note 1, at 10 (Case A).
11. Griffin, supra note 6, at 229.
12. Id. at 236.
precise" in the context of a particular case. Fortunately, the Guide is not a statute. Such shortcomings can be overcome with experience.

In places, Mr. Griffin criticizes the Guide for not putting particular situations into neat pigeonholes which he believes the courts have created. For example, he finds that the Guide's treatment of a hypothetical foreign acquisition "oversimplifies the potential competition doctrine by failing to explain its two different branches." One of these branches involves a "perceived potential entrant" (who in fact may not be likely to enter the market); the other involves a "probable potential entrant" (who may not be perceived by those in the market as such). My own view is that this court-created dichotomy is in fact somewhat artificial. Although it has used the doctrine from time to time in litigating cases, the Department generally tends not to divide the potential competition doctrine into these two precise categories in conducting investigations. Rather, the normal question is: "Is this firm likely to enter the market?" This is measured by evidence of both (1) the firm's own incentives, opportunities, and internal documents, and (2) the perceptions of the people in the market. For the Department to stress this dichotomy when it in fact does not use it regularly in analyzing cases would be disingenuous.

I could give other illustrations of what I regard as "pigeonholing" errors in Mr. Griffin's analysis. For example, he seems to assume that section 1 of the Sherman Act is in reality divided into a strict binary choice between full per se on the one hand and full rule of reason on the other. As a result, when he finds that the Guide treats patent licenses under the rule of reason for many purposes and that it subjects know-how licenses to "antitrust standards which, if anything, are stricter than those applied to patent licenses," he jumps to the rhetorical conclusion that the Department is likely to apply a per se rule. He returns to the same theme in discussing Case G, involving mandatory package licensing, which the Guide suggests will be subject to "something less than a per se prohibition." This he concludes is unnecessarily confusing. Quite the contrary; the Guide is not at all confusing. In the real world, there is indeed a never-never land between strict per se and full rule of reason, which is well recognized by experienced antitrust counsel. For lack of a better term, I have labelled this as "soft core" per se—to distinguish it from "hard core" per se rules, which apply in

13. Id. at 232.
16. ANTITRUST GUIDE, supra note 1, at 34.
17. Id. at 38 (footnote omitted).
18. Mr. Griffin concludes: "As in the discussion of the know-how licensing case, the Guide is unnecessarily confusing, since this statement could easily be read to indicate that there is some unstated test of legality, stricter than the rule of reason, yet less strict than a per se prohibition." Griffin, supra note 6, at 239 (footnote omitted).
such areas as price fixing.\textsuperscript{19} In a strict “hard core” situation, no consideration is given to motives, surrounding circumstances, or potential competitive benefits. Where a “soft core” per se rule applies—as, for example, with a tie-in or a noncoercive boycott—a court takes a general look at the conduct nominally subject to the per se prohibition and its surrounding circumstances. If the circumstances suggest that the scheme is anticompetitive, the court pronounces the conduct illegal per se and solemnly announces that no inquiry is warranted. But if the court finds the conduct in question innocent or potentially procompetitive, it pronounces the conduct as being outside the per se category and as a matter of definition subjects it to a full rule of reason inquiry.

What emerged as the most controversial issue in the Guide, at least in the discussion in the public press, was the Department’s position that the \textit{Noerr-Pennington} doctrine\textsuperscript{20} applied to petitions to foreign governments.\textsuperscript{21} The original \textit{Noerr} opinion rested in part on first amendment grounds and in part on the idea that the Sherman Act was not intended to apply to governmental restraints. Thus there has been considerable uncertainty in this area. The Guide has the virtue of taking a firm position on this point. Because of the importance of the issue and its controversial nature, Mr. Griffin might have devoted more attention to the question of governmental restraints. Instead, he rehashes the debate very briefly and then criticizes the Guide for being unclear as to whether the \textit{Noerr} doctrine would protect a petition to a government “commercial enterprise.” The answer to this query seems clear: the Guide takes the view that the antitrust laws do apply to “commercial” actions of foreign governments or instrumentalities, a view subsequently sustained by the Supreme Court in \textit{City of Lafayette v. Louisiana Power \\& Light Co.}\textsuperscript{22} If government “commercial” activities are not exempt, petitioning a government “commercial” enterprise for anticompetitive action would clearly not be protected from antitrust prosecution by the enterprise’s “governmental” ownership.\textsuperscript{23}

Like Mr. Griffin, I can regret that the Guide in Case J does not reflect the teaching of the Supreme Court’s landmark decision in \textit{Continental T.V., Inc. v. GTE Sylvania Inc.}\textsuperscript{24} If the drafters of the Guide were omniscient, they could have anticipated precisely what the Supreme Court would say in an opinion issued five months after the Guide was issued! Of course, Case J

\begin{footnotes}
\item[19]\textit{See} Baker, supra note 9, at 407-08 n.20.
\item[21]\textit{See} ANTI\textit{TRUST GUIDE}, supra note 1, at 62 (Case N). This discussion relies on dicta in Continental Ore Co. v. Union Carbide \\& Carbon Corp., 370 U.S. 690, 707-08 (1962).
\item[22]98 S. Ct. 1123 (1978).
\item[23]Mr. Griffin also criticizes the Guide for its application of antitrust laws to foreign “commercial” entities. Griffin, supra note 6, at 247.
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must be used with caution in view of this important subsequent development.

Mr. Griffin concludes with the cheering thought that the Guide represents a “laudable intent to give guidance in a complex area” and that it embodies “[m]uch careful thought and analysis.”25 One can readily agree with him that “the Guide does not resolve all confusion and fears concerning the application of American antitrust laws to international business operations.”26 But if it simply reduces some substantial part of the confusions and fears in this area, it will have succeeded in all that its creators could have hoped for.

25. Griffin, supra note 6, at 254.
26. Id. (footnote omitted).