Horizontal merger guidelines 1997

On August 24, 2010, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued revised Horizontal Integration Guidelines (2010 Guidelines). The release of the 2010 directive marks the first major changes to the guidelines in more than 18 years; They will replace the 1992 guidelines (subsequently amended in 1997). A copy of the 2010 guidelines was published on the Ministry of Http://www.justice.gov/atr/public/guidelines/hmg-2010.html website and on the FTC . In announcing the release of the 2010 guidelines, Assistant Attorney General Christine Varney, assistant attorney general in charge of the U.S. Department of Defense's antitrust division, explained that the revisions meant providing more clarity and clarity on how federal antitrust agencies would assess the possible competitive impact of mergers and intended to provide businesses with an even greater understanding of how [agencies] are investigating transactions. The new guidelines provide a clearer and more detailed explanation for the integration of parties, courts and antitrust those involved in how agencies review transactions, Chief Leibowitz noted in a written statement, explicitly predicting that revisions would be needed every now and then to reflect changes in the implementation policy or clarify aspects of existing policy. There has never been such a long gap between updating major guidelines since they were first issued in 1968. So, it came as little surprise when, in September 2009, the Department of Defence and the FTC announced that they jointly discovered whether the guidelines should be revised. A series of workshops followed, and the FTC issued proposed revisions for public comment on April 20, 2010. As with previous guidelines, the 2010 guidelines claim to describe the analytical process that U.S. antitrust enforcement agencies have to review and decide whether to challenge proposed horizontal mergers and acquisitions. As the title shows, the guidelines only served horizontal mergers (as one, transactions between competitors or potential competitors). They do not address possible vertical issues that may arise in mergers between firms that do not compete, but at different levels within the same supply chain. Nor address the 2010 directive or change potential reporting requirements under the Hart Scott Rodino Act (HSR). [1] As was the case with previous versions of the directive, the 2010 directive applies regardless of whether the HSR transaction is reported and whether or not the transaction is closed. The highlights of the 2010 directive differ from the 1992 directive in a few important ways. In terms of excessive thematic changes, the 2010 guidelines reject a rigid analytical framework for reviewing integration. Instead, they emphasize that integration analysis does not include the uniform application of a single methodology but a particular fact. Through which agencies, guided by their extensive experience, apply a range of analytical tools. Another major and widely incorporated change is that the 2010 guidelines increase the use of economic analysis in the integration review. In fact, FTC Commissioner J. Thomas Roche issued a separate statement that aligned with their adoption but criticized too much on the economic formula and models based on price theory guidelines. Some of the specific differences between the 1992 and 2010 guidelines include: evidence of competitive effects: a significant shift in the addition of a new sector that describes several categories and sources of evidence - beyond the usual market share and focus statistics - that agencies have found instructive in predicting the possible competitive effects of a merger. Such evidence includes price increases after mergers (for consumer mergers), econometric studies, head-to-head competition between merger parties, disrupting pre-merger behaviour by a maverick merger party (such as the introduction of a new technology), and information collected from merger parties, customers and competitors. Changing the role of market definition and impeachment by calculating market share: Quoting the Mod press release, the 2010 guidelines follow [e]xplain that define the market itself not the end or a necessary starting point of merger analysis. This is a change from the 1992 guidelines that treat the definition of the market as the first step in analyzing the competitive implications of a horizontal merger. In addition, the 2010 guidelines provide more details about the methodologies used by agencies to define the relevant product and geographic markets and calculate market focus. Impeachments to the hypothetical monopoly test: The 2010 directive generally maintains the traditional hypothetical monopoly test to define markets (meaning whether a hypothetical firm that controlled all products in a putty market will likely be able to maintain at least a small but significant, non-transient price increase). But it does explain more explicitly that agencies will consider the proximity of competition among potential alternatives as part of an analysis at this point that could lead to narrower market definitions where there are different products or the potential to discriminate prices. Assumptions based on market focus: The 2010 guidelines maintain the traditional way to measure market concentration changes based on the Herfindahl-Hirschmann Index (HHI), but raise the thresholds for applying anticompetitive damage assumptions based on market concentration levels before and after integration. The 2010 directive considers the market unconcentrated with HHI below 1500 - up from HHI of 1000 in previous guidelines. A concentrated medium market is defined as one with one Between 1500 and 2500, there was a significant increase from the 1992 guidelines ranged from 1,000 to 1800. And a market with HHI above 2500 is considered highly concentrated, compared to HHI from 1800 in the 1992 guidelines. The 2010 guidelines note that these thresholds are not a rigid plate and are just one of many ways agencies use it to identify potentially anti-competitive mergers. Unilateral Effects: The 2010 directive includes a significantly expanded discussion on how to assess the unilateral competitive effects of antitrust agencies (as meaning the ability and motivation of the merged entity to increase market prices or reduce market output without coordination with competitors), including effects on innovation. For example, the 2010 directive describes how agencies assess the possibility that mergers between firms that sell nearby alternatives will lead to higher prices and lower innovation. Reflecting the overall de-emphasis on market definition, the 2010 guidelines explain that [d]iagnosing unilateral price effects.. The need to define the market does not rely or focus. The 2010 directive abandons the assumption in previous guidelines that a merger is likely to lead to unilateral effects in which the combined market share of the parties is 35 percent or more. Harmonious effects: As in the past, the 2010 directive describes the conditions under which agencies believe that the proposed merger will facilitate coordinated engagement - namely, increase the ability and incentives of the merged entity and its competitors to take adaptive action to coordinate prices or outputs. Key factors for assessing coordinated effects are likely to be unchanged, but the guidelines state that agencies may challenge integration even if they lack evidence that shows exactly how alleged coordination will occur after the merger. The 2010 directive also note that harmonious effects can include behavior that would otherwise not be condemned by antitrust laws. Entry: The 2010 purported directive to [p]rovide simplified discussion of how agencies evaluate whether entering the relevant market is so easy that integration is not likely to enhance market strength. Like previous guidelines, the 2010 guidelines project factors that agencies consider in determining whether entry is timely and adequate to counter any anticompetitive effects of the proposed merger. In the 2010 guidelines, agencies reduced a two-year timeframe during which new arrivals will be considered on time and instead declare that arrivals should be fast enough to avoid significant harm to consumers. In addition, a new article states that [e]ntry is sufficient by a single firm that will replicate the minimum scale and power of one of the merger firms. These topics, including the following, are long An integral part of the analytical process of agencies but has not been addressed squarely in the guidelines: Innovation: As noted, the 2010 guidelines include the language of addressing the innovation competition. They provide that integration may harm innovation competition by reducing incentives from both sides or to continue existing product development efforts or initiate the development of new products. Using language that is sure to be invoked by merging parties, the guidelines state that agencies should also consider whether integration will likely enable innovation that would not otherwise take place, by bringing together complementary capabilities.. Partial acquisition: Courts and antitrust enforcement agencies have long recognized that partial acquisition -- the acquisition of a minority (non-controlling) ownership interest in a competitor -- may raise issues under Section 7 of the Clayton Act and Section 1 of the Sherman Act. The 2010 directive deals with specific issues that may arise in connection with partial acquisitions, explaining whether agencies will assess whether a partial acquisition will harm competition by: (i) giving the ability to influence the competitive behavior of the acquired enterprise, (ii) reducing the acquired enterprise's financial incentives to compete, or (third) allowing the acquired enterprise to access sensitive competitive information (e.m., prices) from. Acquired Company. Potential competition: The 2010 guidelines state that a merger between an official and a potential participant could raise significant competitive concerns depending on the position's market share and the competitive importance of the potential participant. In such cases, the new guidelines state that agencies will use projected earnings and market shares to predict the competitive impact of the potential participant's future. Merger of rival buyers: The 2010 guidelines include a new sector addressing concerns that may arise on the buy side of the market (as such, where firms compete for resale to buy inputs, logistics, or goods). In such cases the new guidelines state that agencies will essentially use the same analytical framework that applies to mergers involving rival vendors. The role of powerful buyers: A new, separate sector on powerful buyers explains that agencies will assume that the presence of large and powerful buyers will counter any anti-competitive impact of integration between upstream suppliers. Such buyers, according to the 2010 directive, do not always have enough leverage against the merger of parties, and other less powerful buyers may still be vulnerable to rising prices. The potential implications of the 2010 guidelines mark an important development in the practice of reviewing U.S. integration. It remains to be seen how agencies will apply the 2010 guidelines in practice and whether they will succeed in seeing the gaps that have long existed between the guidelines letter and how Actually practice reviewing integration. But the prevailing view is that the guidelines come much closer than the 1992 guidelines for getting accurate agency review methodology. It is even harder to predict how the courts will reconcile conclusions in the 2010 guidelines with the well-developed merger case law body, which relies partly on the framework contained in the previous guidelines. It is by no means clear that the new guidelines of this law will make a previous case in which it will be uncoordinated or in Trump's tension. In fact, a number of claims and analytical methods described in the new guidelines have never been tested in merger litigation before. In this connection Bear noted that a recent decision by the Southern District of New York (SDNY) may portend the courts' reluctance to accept certain elements of the 2010 guidelines. In New York v. Group Health Inc., 2010 U.S. Dist. LEXIS 60196, No. 06-Civ. 13122 (S.D.N.Y. May 11, 2010), SDNY requested plaintiffs to amend their complaint to include upward pricing pressure (UPP) as a way to prove the merger was challenged anti-competitive. The UPP test was incorporated into the guidelines and purports of 2010 to predict the competitive impact of a merger by examining the deviant ratio between the enterprises' products (meaning, the number of units with which the sale of the merger partner product decreases when the sale of the desired product of a unit increases) and the variable margin obtained on the merger partner product. The court at Health Group, Inc. expressed doubts about whether such a model could be used instead of analyzing traditional market definitions to assess the competitive effects of integration. Of course, we should be careful not to exaggerate the importance of the group's health file. It may be years before the courts review various changes to the new guidelines and before any determination is made about judicial acceptance of the guidelines. Another open question is whether changes to the 2010 guidelines will open flood gates and allow more challenges for proposed transactions. Some of the tone and language embraced by the guidelines mirror the aggressive antitrust enforcement agenda of the current administration. The wider array of analytical tools available to agencies, along with emphasizing the definition of the market and adopting a none-size-fits-all methodology to assess the competitive effects of mergers, may allow agencies to be more creative and flexible to define a competitive problem. In addition, the language used in the guidelines expresses more skepticism in describing entry defenses and efficiency. That said, these changes may simply be a more accurate reflection of the current state of procedures for reviewing the merger of agencies, and not a meaningful policy change. In any case, due to the ongoing uncertainty regarding the use of the 2010 directive, companies The merger or acquisition of a competitor should review and consider the 2010 guidelines with the help of an experienced antitrust consultant. As the new guidelines note, the integration review process is a specific reality query and the implementation results may vary significantly. More than ever it is vital that companies consider the merger review process, possible sources of relevant evidence under guidelines and a potential judicial response to the application of new doctrines well in advance of the launch of a new deal. Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact Gibson Dunn's attorney you're working with, any members of the company's anti-trust practice and business regulation group, or any of the following: New York John A. Herfort (212-351-3832, jherfort@gibsondunn.com)Peter Sullivan (212-351-5370, psullivan@gibsondunn.com) Los Angeles Daniel J. Swanson (213-229-7430, dswanson@gibsondunn.com) San Francisco Joel S. Sanders (415-393-8268, jsanders@gibsondunn.com)Trey Nicoud (415-393-8308, tnicoud@gibsondunn.com)Rachel S. 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