



# US antitrust authorities release new Horizontal Merger Guidelines

The United States antitrust agencies recently released the final version of the revised Horizontal Merger Guidelines (2010 Guidelines), issued first in draft form in April for public comment. The 2010 Guidelines are designed to better align with current agency practice, reflecting the fact-intensive, economically-driven, multi-faceted approach to merger review currently practiced by the Agencies.

On August 19 2010, the United States Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) (collectively, the Agencies) released the final version of the revised Horizontal Merger Guidelines (2010 Guidelines). The Horizontal Merger Guidelines, which were first adopted in 1968 (and revised in 1992), seek to provide guidance on the analytical framework and practice of the Agencies. The Agencies embarked on the revision process because of the belief that the 1992 Guidelines no longer matched the current practice of the Agencies. Thus, the Agencies insist that the 2010 Guidelines are not to be read as a change in horizontal merger enforcement policy but, instead, as a reflection of current standards and practices.

The primary purpose of the Guidelines is to make transparent the practice and analytical framework used by the Agencies to review horizontal mergers. Because the Guidelines historically have represented the analytical framework by which the Agencies review mergers, courts have relied on and used the Guidelines as a standard to evaluate merger challenges. One of the justifications for the recent revision process was that judges were still relying on the analytical framework described in the 1992 Guidelines even though the Agencies and modern scholarship had advanced since the 1992 revisions. Although it is clear that the Agencies will use the 2010 Guidelines as their basis for reviewing mergers moving forward, it remains to be seen whether the courts will similarly adopt the new framework and concepts.

## Departure from the 1992 Guidelines

The 2010 Guidelines were first released in draft form in April 2010 (proposed Guidelines) – as reported in our April 2010 client briefing *US Proposes new Horizontal Merger Guidelines*. Following their release, the Agencies held five public workshops to discuss potential revisions and received more than 40 written comments. Although some of the revisions to the proposed Guidelines are worth noting (and are therefore outlined below), the main changes from the 1992 Guidelines that appeared in the proposed Guidelines remain. As discussed in more detail in our earlier briefing, these changes are a material departure from the 1992 Guidelines and can be summarized as follows:

*The 2010 Guidelines instruct that horizontal merger analysis need not follow the formulaic approach defined in the 1992 Guidelines.* The 1992 Guidelines described a process in which the Agencies define a relevant market, evaluate the likely anticompetitive effect of the potential transaction on the relevant market, and analyze whether the potential transaction would lead to transaction-specific efficiencies. The 2010 Guidelines, however, state that merger analysis is not conducted in an identical fashion each time, because as a fact-driven process, it can be done in a plethora of different ways. Generally, the Agencies will evaluate the likely unilateral effects (ie, the ability of the merged firm to unilaterally raise prices profitably post-transaction) and coordinated effects (ie, the likelihood that

the merged firm would raise prices profitably in concert with other market participants post-transaction) of a transaction, but the method in which they will do so will be fluid across transactions.

*The 2010 Guidelines explain that numerous tools can be used and evidence considered to analyze a horizontal merger.* Although there is no set process that the Agencies must follow when evaluating a horizontal merger, there are a number of identifiable tools and types of evidence that the Agencies can use to assess the competitive effects of a transaction. For example, the Agencies can evaluate or use as evidence:

- the actual effects in consummated mergers;
- “natural experiments” where analogous events occurred;
- market shares and concentration, retaining use of the Herfindahl-Hirschman Index (HHI) measure of concentration, albeit at different thresholds;
- the extent of head-to-head competition between the parties; and
- whether one of the merging parties is a “maverick” firm that plays a key disruptive role in the market.

*The 2010 Guidelines reference economic concepts that can be used as part of the unilateral effects analysis but which were not included in the 1992 Guidelines.* The 2010 Guidelines discuss economic concepts such as “diversion ratios” (ie, evaluating closeness of competition of the merging parties’ products by measuring the number of sales that are diverted from one party’s product to the other’s in the event of a price increase) and the “upward pricing pressure” test and how they can be used to analyze whether a transaction will lead to unilateral effects. As a general matter, there is much more discussion of the use to which product margins can be put in the analysis, and for the first time explicit discussion of so-called “critical loss” analysis.

*The 2010 Guidelines eliminated the 35 percent safe harbor that was present in the 1992 Guidelines.* As part of the linear framework articulated in the 1992 Guidelines, parties in theory could take advantage of a “safe harbor” in unilateral effects analysis if their combined share in a properly defined market did not exceed 35 percent. In practice, that safe harbor has not recently existed as

econometric analysis has become more sophisticated, and therefore the 2010 Guidelines have now eliminated that concentration-based safe harbor.

*The 2010 Guidelines articulate important factors that the Agencies evaluate when analyzing coordinated effects.*

The 2010 Guidelines provide the following examples of evidence that the Agencies search for when analyzing the potential for adverse coordinated effects arising from a transaction:

- previous instances of collusion in the industry;
- transparency of competition on both price and non-price terms;
- product homogeneity;
- size and frequency of sales or contracts;
- market elasticity of demand; and
- characteristics of the buyers (including size).

Although none of these pieces of evidence is dispositive standing alone, the Agencies will look at the totality of such pieces of evidence to determine whether a transaction would increase the likelihood of coordinated behavior.

*The 2010 Guidelines include new sections on powerful buyers, mergers of competing buyers, and partial acquisitions.*

- The 2010 Guidelines explain that powerful buyers may constrain the ability of the merging parties profitably to increase prices if, for example, the powerful buyer was able to prevent coordinated effects. The presence of a powerful buyer alone, however, will not lead the Agencies to presume an absence of adverse competitive effects.
- The 2010 Guidelines explain that mergers of competing buyers potentially can lead to a reduction in competition because of “monopsony power.”
- The 2010 Guidelines explain that, when faced with a partial acquisition (ie, an acquisition of a minority interest), the Agencies will evaluate whether the acquisition will:
  - reduce the incentives of the parties to compete;
  - increase the probability of coordination between the parties; and/or
  - increase the risk of the exchange of sensitive information.

## Revisions to the proposed Guidelines

Although the public comments led to relatively minor changes throughout the 2010 Guidelines, there were two issues that received a heightened level of attention: some commentators believed that the proposed Guidelines (a) mischaracterized the implications of high margins; and (b) dismissed the practice of defining a market.

With regard to margins, the 2010 Guidelines were revised to make clear that “[h]igh margins can be consistent with incumbent firms earning competitive returns” and “[w]hile margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.” Nonetheless, as a general matter, “high pre-merger margins normally indicate that each firm’s product individually faces demand that is not highly sensitive to price.”

The 2010 Guidelines were also revised to make clear that market definition still plays an important role in horizontal merger analysis. Although the Agencies may not always begin their merger analysis by defining the relevant market as proscribed in the 1992 Guidelines, it often can be an important tool to assist in evaluating both the unilateral effects and coordinated effects of a transaction. Specifically, the 2010 Guidelines state that market definition is useful to identify:

- the line of commerce and area of the country in which competitive effects may occur; and
- market participants and market shares.

Thus, market definition is one of the tools that the Agencies will use as part of the effects analysis, rather than as a prerequisite for the effects analysis.

## Conclusion

The release of the 2010 Guidelines is a major step in US merger enforcement, because it aligns the Guidelines with current Agency practice. The new Guidelines make clearer than ever that antitrust merger analysis is a fact-intensive, economically-driven exercise, far more sophisticated than defining markets and calculating shares. It remains to be seen how courts will use the 2010 Guidelines in the face

of precedent created based on the 1992 Guidelines, and how the Agencies will deploy the new Guidelines in future merger litigation.

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