Industrial Organization in Context

2010 HMGs

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June 2010

U.S. Merger Policy: 2010 Proposed Horizontal Merger Guidelines

- In April, 2010 the U.S. Department of Justice/Federal Trade Commission posted proposed revisions in the U.S. Horizontal Merger Guidelines for public comment.
- The proposed revisions
  - emphasize that the central question in merger evaluation is the competitive effects of the merger, not mechanical calculation of market share and concentration levels;
  - unilateral and coordinated effects expected to flow from the merger will be analyzed, as will entry conditions;
  - concentration levels and changes in concentration levels that raise concerns are increased;
  - the attitude of the agencies toward efficiency claims continues to be a cautious one.

- The proposed guidelines highlight that market definition is a means to an end, not an end in itself (p. 6):

  The Agencies define relevant markets to help analyze the competitive effects of a horizontal merger. Market definition is . . . one of the tools the Agencies use to assess whether a merger is likely to lessen competition. Market definition identifies an arena of competition and enables the identification of market participants and the measurement of market shares and market concentration. This exercise is useful to the extent it illuminates the merger's likely competitive effects.

and

> *The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.*

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Market definition

- Markets are defined from the perspective of demand; supply conditions play a different role:

  Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

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- The levels of concentration and the changes in the Herfindahl index that raise concerns are increased, compared with previous Guidelines (p. 18):

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

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Market concentration

- When using HHI measures, the Agencies employ the following general standards for the relevant markets they have defined:
  - Small Change in Concentration: Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
  - Unconcentrated Markets: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
  - Moderately Concentrated Markets: Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.

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Market concentration

- Highly Concentrated Markets. Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.
- These changes will bring the Guidelines into line with recent enforcement practice.

- The Guidelines indicate unilateral effects that may raise concern (p. 19):
  - unilateral price effects in markets with differentiated products.
  - unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions.
  - unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products.
  - unilateral effects arising from diminished innovation or reduced product variety.
- These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

as well as coordinated effects (p. 23):

> *A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.*

Entry conditions play a role in assessing the prospective effect of a merger (p. 26):

> *The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers. . . . Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger.*

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Efficiency

- The Guidelines maintain a cautious attitude toward efficiencies (p. 28, footnote omitted):

  The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.

and (p. 29)

> *Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.*