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Lawyers React To Proposed New Merger Guidelines

Law360, New York (April 20, 2010) -- U.S. antitrust regulators on Tuesday unveiled proposed new guidelines outlining how deals between competitors are scrutinized by the agencies. Law360 asked leading antitrust attorneys what impact the revised guidelines, if adopted, will have on future mergers.

Philip Bartz

McKenna Long & Aldridge LLP, partner

The proposed guidelines are not likely to have a large impact on M&A from an antitrust perspective. The guidelines mostly reflect a codification of the enforcement agencies' evolved thinking on mergers over the past 18 years. Basic Section 7 analytical theory remains the same, however, and the most important emphasis in the new guidelines is that evidence and real world effect are as, or more, important than theory in evaluating a merger. This may mean a bit less certainty for merging parties, but likely sounder decision making from the agencies on enforcement matters.

Andrew G. Berg

Greenberg Traurig LLP, shareholder in the litigation practice group

The proposed revised horizontal merger guidelines are a credible and informative attempt to explain the merger review policy at the FTC and DOJ. The current guidelines do not fully explain the practical analysis that the FTC and DOJ follow in assessing the competitive effects of a proposed transaction under the federal merger laws. The proposed revised guidelines make a compelling effort to correct this, and in the process add needed transparency to the merger review process. In doing so, this can only enhance the M&A market by ensuring that merger parties and their advisers (counsel and investment bankers) have a better understanding as to how — and when — mergers will be challenged. This diminishes uncertainty and thereby enables the parties to better quantify the contingencies — including time to closing--to getting a deal done. A very positive development from my perspective.

Joel Grosberg

McDermott Will & Emery LLP

The new guidelines largely codify the enforcement policy of the current administration. The new guidelines provide much more detail on competitive effects and deemphasize the importance of market definition. There is some good news for clients (higher HHI thresholds), but also some challenges relating to different theories the agencies can use to challenge transactions, with a focus on how a transaction may hurt different types or sizes of customers.

D. Bruce Hoffman

Hunton & Williams LLP, head of the global competition practice, and former deputy director, Bureau of Competition, at the FTC

The proposed revisions substantially change the text of the 1992 guidelines, but in most respects appear to embody existing agency practice rather than indicating a significant change in merger enforcement policy. Notably, the revisions raise the concentration thresholds at which mergers are considered likely to create anti-competitive effects to more closely track actual agency practice, de-emphasize market definition, and provide more specific guidance on the fact-specific analysis the agencies actually use in merger review. The revisions also introduce concepts not previously covered in the guidelines (or not covered to any significant extent), but which have developed in enforcement practice over time, such as mergers' effects on innovation and product variety, and the analysis of mergers among buyers (such as agricultural buyers).

Finally, the revisions propose some concepts that are largely new, such as using merger review to enforce Section 2 of the Sherman Act's prohibition on the unlawful acquisition or maintenance of monopoly power. Overall, the proposed revisions do not appear to signify a major change in enforcement, but rather shed more light on current enforcement practices. However, some of the changes may alter merger review over time by increasing its complexity.

Jeff Jaeckel

Morrison & Foerster LLP, partner

The proposed revisions clearly reflect a lot of work and careful thought, and on balance, are nicely done. The proposed revisions have to be viewed in light of the purposes that the merger guidelines serve: The first (and principal) purpose of the guidelines is to describe the way the antitrust enforcement agencies analyze the likely competitive effects (and hence lawfulness under Section 7) of transactions. In this context, the proposed revisions are unremarkable as they largely bring the guidelines into conformity with existing agency practice rather than set out a dramatic departure. That being said, it is always better for guidelines to accurately reflect the process, and the existing guidelines do not always do so.

The second purpose of the guidelines is to influence the way courts think about Section 7 analysis. The proposed revisions, if followed by the courts, would materially change existing Section 7 law, especially with regard to market definition. No one knows at this point whether and to what extent the courts will embrace the more flexible analytical model of the proposed revisions.

The third purpose of the guidelines is to influence antitrust enforcement agencies in other nations. For this purpose, the proposed revisions may play a major role — and may have the most impact — as many nations look to the U.S. for guidance in implementing their own competition laws."

Elai Katz

Cahill Gordon & Reindel LLP, partner and head of the antitrust group

It remains to be seen how the courts will react to the proposed guidelines' relegation of market definition to the role of a potentially "useful tool" rather than the starting point of merger review (as it was in the 1992 guidelines) in light of Supreme Court rulings that "determination of a relevant market is the necessary predicate" to a merger challenge under Section 7 of the Clayton Act.

Michael L. Keeley

Axinn Veltrop & Harkrider LLP partner

It is quite possible that the biggest impact of the new guidelines will be in the courts when a controversial merger is challenged. The new guidelines could make it harder for the DOJ and FTC to block mergers for a while. The courts had almost 20 years to develop familiarity with the 1992 guidelines. There likely will be a period of transition as the courts sort out how the new approach can be reconciled with the case law.

Chris Kelly

Mayer Brown LLP, antitrust partner

Overall. The draft guidelines are not just bigger and more detailed (more on that below), but adopt a noticeably more enforcement-oriented tone. This shouldn't be a surprise, but still, it's a little startling to see some of the changes. Parties to consummated deals are put on notice that the fact that prices haven't gone up won't help them much. Market definition, formerly the guidelines' centerpiece, is now just "one of the tools."

There's now a placeholder for the agencies' aversion to competitors taking minority interests in each other. Prices substantially above marginal cost "normally indicate[]" either collusion or price-insensitive customers — a pretty crabby way of treating innovators who can price above marginal cost because they're able to do something no one else has done, or done as well. Beyond this apparent shift in orientation, the draft guidelines are denser — just about every topic is discussed in greater detail and complexity than before, offering more information, but arguably raising more questions and uncertainty at the same time.

Bigger than ever. The most surprising message from the draft guidelines is one that doesn't require you to read a single word — it's that bigger is better. While the current guidelines come in just under 13,000 words, this draft hits 17,000. That's partly because the draft adds entirely new topics — power buyers, innovation effects, auction markets, and minority stakes, among other things — and adds refinements based on the agencies' experience since they issued the current guidelines in 1997. But the new material increases the guidelines' complexity, and is going to make them more difficult to navigate, at least for a while.

De-emphasizing market definition. Another immediately obvious change is the new structure, which pretty obviously gives market definition a much less prominent role. Whereas market definition leads off the current guidelines — and is really the analytical centerpiece — now, a catalogue of potential anti-competitive effects comes first, followed by a section on price discrimination. Only then does the draft turn to market definition, and it quickly points out that "[m]arket definition is not an end in itself": Instead, it's just "one of the tools."

This is certainly consistent with the FTC's belief that market definition isn't necessary where it can show an anti-competitive effect, but it would be too bad if this signaled the return of the I-smell-a-rat approach to enforcement of decades ago.

Of course, there's not too much reason to expect that courts will be very hospitable to merger challenges in which the agencies can't articulate the market in which competition and consumers are going to be harmed.

Market concentration levels played down. As expected, the draft ratchets up the HHI concentration thresholds to levels that are closer to everyone's actual experience. So now a market is highly concentrated if its HHI is above

2500 instead of 1800, and a merger resulting in a highly concentrated market won't be presumed to be anti-competitive unless it increases the HHI by more than 200 points (instead of 100). Even with these adjustments, though, it will be interesting to see how close the guidelines come to describing the agencies' actual behavior, let alone how the courts analyze mergers.

Unilateral effects played up. The prominence of unilateral-effects theory in the agencies' thinking is evident not only from the greatly increased size and breadth of the section on the subject, but also on its placement: this time around, it takes pride of place over coordinated effects; unilateral effects come first and take up almost twice as much space. The discussions of both differentiated-product price effects and unilateral output reductions are considerably more detailed than before, reflecting both greater experience and heightened interest in bringing cases based on these theories. Interestingly, the Upward Pricing Pressure test that the agencies' head economists have proposed as a way of predicting unilateral price increases appears here only in a generic form, possibly reflecting a sense that the specific formula Carl Shapiro and Joe Farrell have put forward still needs more road testing and perhaps peer review."

Mark Kovner

Kirkland & Ellis LLP, partner

"The proposed new guidelines better hew to actual agency practice, but they are a step backward in terms of offering sharp guidance to merging parties. They stress assessing likely price effects without offering practical means by which parties can efficiently or effectively do this at the outset of considering a combination.

They also deliberately downplay the importance of market definition, which is unfortunate. This puts the guidelines at odds with the language of Clayton Act Section 7 and Supreme Court precedent, which require proof of product and geographic markets as a threshold matter."

Robert A. Lipstein

Crowell & Moring LLP, partner and co-chair of the antitrust group

Given the initial set of questions posed by the agencies at the start of the guidelines revision process, the draft guidelines contain few surprises. As expected, the market share screens have been raised to more closely correspond with actual agency practice. At the same time, and also as expected, the draft guidelines downplay the importance of market definition in the merger review process, and emphasize that the agencies will apply a number of tests to assess more directly the competitive effects of transactions.

As an example, the draft guidelines in several places make explicit that the agencies will consider competitive harm to a subset of customers a sufficient basis for challenging a merger, even if a majority of customers in a market are not harmed by the transaction."

Thomas McGrath

Linklaters LLP, head of the U.S. antitrust practice

The proposed guidelines provide the agencies with more flexibility to present a range of evidence in court to block transactions that are seen as likely to harm consumers. At the same time, the revisions more clearly explain the agencies' evidence-based approach, in a way that is more relevant and predictable to dealmakers and counsel. Also, given the work that has been done throughout the workshops, it's very likely that they will be adopted in substantially the same form.

Greg Neppl

Foley & Lardner LLP, partner

The proposed changes to the horizontal merger guidelines contain some significant revisions designed to conform the guidelines to current enforcement practices. For example, recognizing a "highly concentrated market" at an HHI level of 2500, as opposed to 1800, makes sense. However, the proposed changes raise a variety of questions.

For example, the proposal appears to increase the role of competitive effects analysis and downplay the importance of relevant market definition, suggesting, among other things, that precise "metes and bounds" are not required and that relevant markets may be as narrow as individual customers. While the antitrust agencies may indeed focus on the competitive effects analysis, Clayton Act, Section 7 case law still recognizes an important role for relevant market definition, and the agencies cannot simply change that precedent though revisions to their guidelines. Moreover, the significance of entry to the agencies' merger analysis may have changed from prior guidelines, as there no longer appears to be a two year period for recognizing such entry.

Rufus W. Oliver III

Baker Botts LLP, partner

Both of the federal antitrust enforcement agencies have stated previously that any changes they proposed in the guidelines would reflect actual agency practice in analyzing mergers and acquisitions, rather than signaling any change in enforcement philosophy. Based on my reading of the draft released this morning, I would agree that all the agencies have done here is update the guidelines to make them more accurately reflect how they actually decide whether to challenge mergers and acquisitions.

For example, the guidelines characterize mergers on the basis of a numerical index called the Herfindahl-Hirschman Index ("HHI"), a measure of market concentration. Mergers that produce what the guidelines call Highly Concentrated markets are considered most likely to have serious anti-competitive effects. Under the old guidelines, Highly Concentrated markets were those with HHIs in excess of 1800. Under the revised guidelines , the "Highly Concentrated" label is applied to markets with HHIs in excess of 2500. This change does not mean that the agencies will be more "lenient" in their review of mergers, however, because in practice they have, for some time, reserved their most stringent review for mergers producing HHIs significantly higher than 1800.

For this reason, I do not read the revised guidelines as indicating any real change in merger enforcement philosophy. The agencies will continue analyzing each transaction on the basis of its own facts, using legal and economic principles that they have been using for some time and that are widely accepted in the antitrust community.

Bernard (Barry) Nigro Jr.

Fried Frank Harris Shriver & Jacobson LLP, chair of the antitrust department

Many of the proposed changes to the guidelines are designed to reflect more closely the agencies' actual practices and policies. It is interesting that the proposed guidelines no longer start with market definition and, instead emphasize competitive effects. This reflects a trend toward more flexible, fact-based, merger analysis.

Jeffrey S. Spigel

King & Spalding LLP, head of the antitrust practice

While generally these guidelines formalize the approach that has been taken by the FTC and DOJ over the last decade when investigating and challenging transactions, the concern is that the draft guidelines are structured in a way to make it easier for them to challenge a merger without the agencies having to prove a ‘relevant market’ in the first instance, which is the step that is not only envisioned by the ‘in any line of commerce’ language of Section 7 of the Clayton Act, but is also the approach taken by federal courts today (i.e., if the agencies are unable to prove a relevant market, they are unlikely to convince a judge to enjoin a proposed transaction).

What I fear is that the agencies are trying to write around the market definition impediments that they encountered in their unsuccessful attempts to challenge Oracle's acquisition of PeopleSoft (DOJ) and the Western Refining/Giant Industries merger (FTC) by relying on customer complaints and some bad documents produced by the parties in response to a Second Request to block a transaction.

That said, these draft guidelines are just another reminder for companies that for strategic transactions in concentrated markets, it is imperative that the merging parties have a compelling pro-competitive rationale/merger specific synergies for the transaction along with strong customer support. Further, if merging parties want to avoid any antitrust investigation, they need to make sure that customers are not going to voice concerns with the agencies.

Patricia Wagner

EpsteinBeckerGreen, member of the firm in the health care and life sciences practice.

The proposed revised guidelines are potentially extremely important to health care and could be the basis for increased enforcement by the agencies, which have already shown themselves to be increasingly aggressive in enforcement.

Phillip C. Zane

Baker Donelson Bearman Caldwell & Berkowitz LLP, antitrust attorney

Although in certain respects the draft guidelines mark a departure from the 1992/1997 guidelines, they don't mark a change in the analysis that the agencies actually use. The 1992 guidelines focused on market shares and measuring market concentration. The emphasis now is on evidence of price effects that result from changes in the market. This reflects the way the agencies have been analyzing mergers for quite some time, at least since the late 1990s, so the draft guidelines are a better statement of how the agencies actually examine mergers than the 1992 guidelines came to be.

The draft guidelines keep the Hypothetical Monopolist Test to determine whether a group of products is sufficiently broad to constitute a relevant antitrust market. The test asks whether a hypothetical monopolist likely would impose at least a small but significant and non-transitory increase in price ("SSNIP"), usually 5 percent. The draft makes clear that the SSNIP test is an analytical tool, not a tolerance threshold.

The 1992 guidelines ignored the role that innovation plays in market behavior, a failing partly remedied by the 1995 guidelines for the licensing of intellectual property and the 2007 policy statement on antitrust enforcement and intellectual property rights. The draft guidelines formally incorporate innovation and product variety, as did the 2006 commentary on the horizontal merger guidelines.

The draft guidelines, as the 2006 commentary before them, show an increasing sophistication of the agencies' merger analysis. But bear in mind that this is not a sudden change. Much of the focus of the new draft could have been predicted from the 2006 commentary, and the agencies have long considered more than just the measures of concentration on which the original guidelines focused.

Jeffrey Zuckerman

Curtis Mallet-Prevost Colt & Mosle LLP, chair of the antitrust/competition group

The Obama administration antitrust law enforcers made it clear from the beginning that they wanted to challenge mergers and acquisitions that would not have been challenged by any previous administration in the past 30 years. This was simply a matter of political ideology: No one from this administration has ever identified even one transaction from the last 30 years that could have been challenged by the Antitrust Division or FTC, was not challenged, and had anti-competitive consequences.

The administration's antitrust law enforcers have now published draft Horizontal merger guidelines to support their political ideology. By (among other flaws) mentioning dozens of factors to be considered, with little attention to their relative importance, de-emphasizing rigorous market definition, and raising the bugaboo of price discrimination to new heights, this draft could (and probably will) be used to justify challenging any number of transactions that would not have been challenged by any other administration during the last 30 years, and (more importantly) that probably would not have anti-competitive consequences.

It is appropriate that this draft was published on the same day that the Antitrust Division presented its John Sherman Award to Professor Robert Pitofsky, because not since he was the Carter administration's FTC Chairman has there been such a politically based, anti-competitive, anti-consumer approach to antitrust law enforcement. Lawyers are likely to benefit greatly from the new merger guidelines, so few of us are likely to criticize them, but consumers may pay a heavy price by being denied the benefits of market restructuring. Consumers can only hope that the courts will see through the politics of this administration's approach, and refuse to enjoin transactions that are not likely to have anti-competitive effects even if these draft guidelines justify a challenge.