

U.S. Antitrust Agencies Finalize Updates to Horizontal Merger Guidelines

August 26, 2010

On August 19, the Antitrust Division of the Department of Justice and the Federal Trade Commission (together, the agencies) issued new Horizontal Merger Guidelines (the Guidelines) to explain and clarify their current enforcement philosophy.

The new Guidelines much more closely reflect actual agency policy, which has evolved substantially since the agencies issued the last version of the Guidelines in 1992. They reflect the continuing evolution away from an emphasis on market shares and concentration to an examination of the likely competitive effects of a transaction. As we explained in our April 26 LawFlash,¹ issued shortly after the agencies issued the new Guidelines in draft form, the new Guidelines set out the variety of analytic methodologies that the agencies employ, and explain how they will analyze competitive effects.

The final Guidelines changed little from the April draft. Three of these changes highlight the agencies' emphasis on fact-specific analysis. The first sets out a flexible approach to the core test for market definition. Instead of including in the relevant market any product that a consumer would purchase in response to a 10% increase in the price of the merging parties' products, the Guidelines now state that the size of the hypothetical price increase should be determined by the facts of the particular market.

The second change makes it clear that the prospective small-scale entry of a new competitor could be sufficient to prevent a supra-competitive price increase. The final change clarifies the analytic framework the agencies use to examine unilateral effects—that is, the potential for a price increase when merging companies sell similar products—and how the agencies consider whether the merged firm could benefit by raising the price of one company's product because the other company's product would capture most of the lost sales. The Guidelines now state that “[i]f the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.”

The new Guidelines have already generated some controversy. Although Commissioner J. Thomas Rosch voted to adopt the Guidelines, he also issued a statement criticizing the Guidelines and calling them “flawed” because they suffer from “overemphasis on economic formulae and models based on price theory.” He went on to condemn the Guidelines for failing to offer a “clear framework for

¹ See Morgan Lewis's April 26, 2010 LawFlash, “U.S. Antitrust Agencies Propose Updates to Horizontal Merger Guidelines,” available at http://www.morganlewis.com/pubs/ATR_HorizontalMergerGuidelines_LF_26apr10.pdf.

analyzing non-price consideration[s]” such as how a transaction affects “quality, service, innovation, and product variety.” Rosch contends that this leaves the “misimpression that non-price factors are far less significant than price factors to the Commission.” Rosch nonetheless voted to issue the Guidelines because he views them as an improvement over their predecessor.

The new Guidelines accurately reflect the agencies’ current enforcement philosophies. Practitioners and clients should expect each case to turn on its own unique facts and on an analytic framework built on those facts. Market definition, market shares, and concentration, while still important, will only be the starting point of an analysis that will try to determine the likely competitive effects of a transaction.

The Guidelines can be found at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

New York

| | | |
|-------------------------|--------------|--|
| Harry T. Robins | 212.309.6728 | hrobins@morganlewis.com |
| Tee St. Matthew Daniel | 212.309.7156 | tstmatthew-daniel@morganlewis.com |
| Sarah Sandok Rabinovici | 212.309.7101 | srabinovici@morganlewis.com |
| Heather E. Fuentes | 212.309.6695 | hfuentes@morganlewis.com |

Washington, D.C.

| | | |
|-------------------------|--------------|--|
| Scott A. Stempel | 202.739.5211 | sstempel@morganlewis.com |
| Jonathan M. Rich | 202.739.5433 | jrich@morganlewis.com |
| Thomas J. Lang | 202.739.5609 | tlang@morganlewis.com |
| J. Clayton Everett, Jr. | 202.739.5860 | jeverett@morganlewis.com |
| Peter E. Halle | 202.739.5225 | phalle@morganlewis.com |
| David R. Brenneman | 202.739.5056 | dbrenneman@morganlewis.com |

Philadelphia

| | | |
|-----------------|--------------|--|
| Mark P. Edwards | 215.963.5769 | medwards@morganlewis.com |
| R. Brendan Fee | 215.963.5136 | bfee@morganlewis.com |

Brussels

| | | |
|----------------------|----------------|--|
| Izzet M. Sinan | +32.2.507.7522 | isinan@morganlewis.com |
| Jonathan N.T. Uphoff | +32.2.507.7543 | juphoff@morganlewis.com |

About Morgan, Lewis & Bockius LLP

With 23 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.

