



Antitrust/Mergers and Acquisitions Information Memo

Electronic Dispatch

September 2010

[Go to BS&K Mergers and Acquisitions Law Home Page](#)

ANTITRUST ENFORCEMENT AGENCIES ISSUE REVISED HORIZONTAL MERGER GUIDELINES

With the intended effect of “increasing the transparency of the analytical process underlying the Agencies’ enforcement decisions” and reflecting their “ongoing accumulation of experience”, the U.S. Department of Justice and Federal Trade Commission (“the Agencies”) issued, on August 19, 2010, the first major revision to their guidelines pertaining to mergers and acquisitions involving actual or potential competitors (“the Guidelines”) since 1992. While the Agencies are clear that the Guidelines are not to be read as an outline of, or limitation on, their litigation strategy on cases they pursue, the Guidelines are intended to reflect the Agencies’ actual practices. Under antitrust law, the word “merger” includes a merger under state law as well as an acquisition of assets or stock and may include a joint venture.

Mergers whose effect “may be substantially to lessen competition, or tend to create a monopoly” are specifically banned by federal law. 15 USC § 18 (Clayton Act § 7). The Guidelines acknowledge the essentially predictive nature of merger analysis, but express confidence in the Agencies’ capacity to blend experience, “reasonably available and reliable evidence” and various analytical tools into an evaluation process that meets their charter.

Evidence to be considered in such an evaluation includes:

- observed post-merger price increases and other changes adverse to customers;
- the effects of analogous (historical) events in similar markets;
- pre- and post-merger market share (based on actual or projected revenues in the relevant market) and market concentration (often based on the Herfindahl-Hirschman Index, or HHI calculation); and
- the anticipated state of the post-merger market, including remaining competitors and customer vulnerability to price discrimination.

Such evidence is to be gleaned from a wide variety of sources, including the merging parties, their actual and potential customers, and other industry participants such as suppliers, distributors, analysts, and even rivals.

Key to every analysis is the definition of the relevant market. The Guidelines identify the “hypothetical monopolist test” as useful to that exercise. The test is whether the hypothetical monopolist “likely would impose at least a small but significant and non-transitory increase in price (‘SSNIP’) on at least one product in the market, including at least one product sold by one of the merging firms.” A SSNIP of five percent is most often used as the relevant benchmark, but characteristics of the industry and those who participate in it may move that number up or down.

The Agencies’ analysis is not limited to current market participants. Firms that could enter the market in response to a SSNIP may be considered for purposes of determining market share.

Bond, Schoeneck & King, PLLC

New York ▪ Albany Buffalo Garden City Ithaca New York Oswego Rochester Syracuse Utica Florida ▪ Naples Kansas ▪ Overland Park

The Guidelines also examine the “unilateral effects” that arise as a result of the merger of competitors. The analysis includes an evaluation of the extent of direct competition between products sold by the merging parties. “Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider the products sold by the other merging firm to be their next choice.”

On the affirmative side, merger-specific efficiencies are considered by the Agencies where they can be substantiated “by reasonable means” (i.e., “cognizable efficiencies”).

When the value of a proposed merger satisfies certain size criteria (the current transaction threshold – aggregated voting securities, non-corporate interests and/or assets – is \$63.4 million), both acquiring and acquired parties are required to make premerger notification filings with the Agencies under the Hart-Scott-Rodino Antitrust Improvements Act (HSR), 15 USC § 18A (Clayton Act § 7A). Recent enforcement actions emphasize that even when a merger does not require HSR premerger notification filings, the Agencies can challenge a consummated merger where the effect of the merger may be substantially to lessen competition in violation of Clayton Act § 7.

The Guidelines can be accessed at www.justice.gov/atr/public/guidelines/hmg-2010.html. We would be pleased to advise you in determining the application of the Guidelines to your current and future business plans.

If you have any questions, please contact your BS&K attorney or an attorney listed below:

In Buffalo / Niagara Falls, call 716-566-2800 or e-mail:

Robert A. Doren rdoren@bsk.com

In the Capital District, call 518-533-3000 or e-mail:

Gregory J. Champion gchampion@bsk.com

In Central New York, call 315-218-8000 or e-mail:

Ronald C. Berger rberger@bsk.com

In the New York Metro area, call 646-253-2300 or e-mail:

Louis P. DiLorenzo ldilorenzo@bsk.com

In the Rochester Region, call 585-362-4700 or e-mail:

Jeffrey R. Clark jrclark@bsk.com

Robert H. Kirchner rkirchner@bsk.com

In Florida, call 239-659-3800 or e-mail:

F. Joseph McMackin, III jmcmackin@bsk.com