SHEARMAN & STERLING LLP

Bay Area Antitrust Seminar Series

DOJ/FTC Horizontal Merger Guidelines:

Antitrust Merger Analysis in High-Tech Industries after the 2010 Revisions

October 19, 2010

The Four Seasons Hotel
East Palo Alto, California

8:00AM - 10:00AM

2 California CLE Credits

Shearman & Sterling LLP Speakers:
Dale Collins
Beau Buffier
Jessica Delbaum

Agenda

- A little context
- Merger analysis under the 2010 Guidelines
- Applications in high tech industries
- Some special cases
  - Buyer power defenses
  - Monopsony acquisitions
  - Partial acquisitions
  - An afterthought on facilitating implicit collusion
- Summing up: What you really need to know

Clayton Act § 7

Context
2010 HMG
Applications
Special cases
Summing up

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C. § 18.

- No person shall acquire the stock or assets of another person
- where in any line of commerce in any section of the country
- the effect of such acquisition may be
  - substantially to lessen competition, or
  - to tend to create a monopoly.

Original Congressional Concerns

Context
2010 HMG
Applications
Special cases
Summing up

- Fear of “the rising tide of economic concentration in the American economy”
- Loss of opportunity for small business when competing with large enterprises
- The spread of multistate enterprises and the loss of local control over industry

- *Broadly shared macroeconomic concerns at the time*
  - *Suggested a very restrictive merger antitrust regime*
  - *Did not require deep microeconomic analysis to implement*

Implementation by the Supreme Court

- *Philadelphia National Bank* presumption

> [A] merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it is must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

United States v. Philadelphia National Bank, 374 U.S. 321 (1963)

Remains the paradigm for the judicial horizontal merger analysis

Some Early Supreme Court Precedents

Context
2010 HMG
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Summing up

- Brown Shoe/Kinney (1962)
  - Combined share of as little as 5% in an unconcentrated market
- Pabst Brewing/Blatz Brewing Company (1966)
  - 3.02% (#10) + 1.47% (#18) → 4.49% (#5) in an unconcentrated market
- Von's Grocery/Shopping Bag Food Stores (1966)
  - 4.7% (#3) + 4.2% (#6) → 8.9% (#2) in an unconcentrated market

History of Merger Guidelines

- 1968 DOJ Merger Guidelines
  - Sought to move the purpose of merger antitrust law
    - Away from thwarting increasing industrial concentration
    - Toward the preservation of price competition
  - Sought to increase the market share thresholds for the *PNB* presumption

History of Merger Guidelines

Context
2010 HMG
Applications
Special cases
Summing up

- 1982 DOJ Merger Guidelines (w/1984 amendments)
  - New explicit focus on market power as the competitive harm
    - Primarily through theories of oligopolistic interdependence
  - Introduced new "hypothetical monopolist" market definition paradigm
  - Increased market share thresholds for the *PNB* presumption
  - Recognized ease of entry as a market power-constraining force
    - Entry to be assessed over a 2-year time period
  - Recognized the efficiency-enhancing aspect of many mergers
  - Created an algorithmic approach to merger analysis
- FTC Statement Concerning Horizontal Mergers (1982)
  - Rejected DOJ's algorithmic approach—wanted more flexibility

History of Merger Guidelines

Context
2010 HMG
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Summing up

- 1992 DOJ/FTC Merger Guidelines (w/1997 amendment)
  - Retained market definition as the starting point of analysis
  - Changed market share thresholds to “safe harbors”
    - No longer a predictor of prosecutorial decision-making
  - Required explicit explanation of how the merger is anticompetitive
    - Oligopolistic interdepedence (“coordinated interaction”)
    - Introduced new “unilateral effects” theory of anticompetitive harm (35% requirement)
  - Retained entry defense (with original 2-year time frame)
  - Narrowed efficiency defense (1997 amendment)
    - Focused on marginal cost reductions
    - Pass-on to customers
  - Retained a rigid algorithmic approach

Impetus for Change

Context
2010 HMG
Applications
Special cases
Summing up

- Agencies believed that the 1992 Guidelines were—
  - No longer reflected how the agencies analyzed mergers
  - Too rigid and missed too many anticompetitive transactions
  - Being used effectively against agencies in court

Solution: Completely Rewrite Guidelines

Context
2010 HMG
Applications
Special cases
Summing up

- Adopt new flexible approach to analyzing mergers
- New emphasis on non-price dimensions of anticompetitive harm
- Deemphasize market definition
- Increase emphasis on unilateral effects and on targeted customers
- Increase emphasis on direct evidence
- Raise the bar on entry and repositioning defenses
- Maintain a high bar on efficiency defenses

New Flexible Approach to Analyzing Mergers

Context
2010 HMG
Applications
Special cases
Summing up

- No one right way to do merger analysis
  - Eliminate the programmatic approach of the 1992 guidelines
  - Any way the agencies deem reliable will work
  - But prevention of market power remains the objective
- Eliminate the numerical “safe harbor” thresholds
- Overall, intentionally very fuzzy
  - Provides agency with wide discretion
  - Does not predict enforcement outcomes
  - Precludes courts and defendants from saying that the agency misapplied the Guidelines

New Emphasis on Non-Price Dimensions of Anticompetitive Harm

Context
2010 HMG
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Special cases
Summing up

- Reduced product quality
- Reduced product variety
- Reduced service
- Diminished innovation
- Other effects that “harm customers as a result of diminished competitive constraints or incentives”

Deemphasis of Market Definition

Context
2010 HMG
Applications
Special cases
Summing up

- Eliminated market definition as an essential element
  - Unnecessary where there is other sufficient evidence of a likely anticompetitive effect
- Eliminated “safe harbors” based on market definition
  - Now only a sword, not a shield
- Modified “hypothetical monopolist” test
  - Any set of products that can support a profitable price increase can be a relevant market
  - Relevant markets are no longer unique
  - Can produce very small markets and exclude large but close substitutes
  - Example 7—Motorcycles, cars and the similarity test

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
2010 HMG
Applications
Special cases
Summing up

- Unilateral effects theory
  - Looks to the elimination of "localized" competition between the merging firms
  - *Problem*: In the absence of repositioning, entry, or efficiencies, wide variety of economic models predict a price increase at least to some subset of customers whenever two firms with a positive cross-elasticity of demand combine.

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
2010 HMG
Applications
Special cases
Summing up

- 1992 Guidelines—Tried to cabin the theory to avoid overreaching
  - The overlapping products of the merging firms must be each other's closest demand-side substitutes
    - Other products in the relevant market must be distant substitutes
  - Combined share > 35% in the relevant market

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
2010 HMG
Applications
Special cases
Summing up

- 2010 Guidelines—Unilateral effects unleashed
  - Eliminated 1992 Guidelines restrictions
    - No 35% combined share → No need for market definition
  - Likely price-increasing influence of merger on merging Firm A can be determined by looking only at:
    - “Diversion ratio” (“D_{AB}”)
      - The percentage of sales lost by Firm A to the other merging company (Firm B) whenever sales are lost (presumably for competitive reasons)
    - times the gross margin of the company to which the sales are lost ($P_B – C_B$)
  - The resulting statistic is known as *Upward Pricing Pressure* on Firm A (UPP_A)

$$UPP_A = D_{AB} \times (P_B - C_B)$$

which is the additional profit Firm A earns when it loses a sale but owns Firm B

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
2010 HMG
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Summing up

- 2010 Guidelines—Example 5

> Products A and B are being tested as a candidate market. Each sells for \$100, has an incremental cost of \$60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to \$110.

How in the world does "economic analysis" predict that there will be a \$10 price increase?

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
2010 HMG
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Summing up

- 2010 Guidelines—Example 5

$$P = \$100 \qquad C = \$40$$

$$D = 1/3 \qquad M = \frac{P - C}{P} = 0.6$$

In a symmetrical Bertrand model with linear demand and no entry, repositioning, or efficiencies:

$$\frac{P^* - P}{P} = \frac{D \times M}{2(1 - D)}$$

Plugging in the numbers and solving the equation for the postmerger price P^* yields:

$$P^* = \$110$$

Increased Emphasis on Unilateral Effects and Targeted Customers

Context
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- Example 5: A scary perturbation

$$P = \$100 \qquad C = \$40$$

$$D = .15 \qquad M = \frac{P - C}{P} = 0.6$$

So 85% of diverted sales go to other firms. Say there are 4 other firms in the marketplace with:

$$D_{AC} = D_{BC} = 0.20 \qquad D_{AE} = D_{BE} = 0.20$$

$$D_{AD} = D_{BD} = 0.20 \qquad D_{AF} = D_{BF} = 0.25$$

In what appears to be a six-to-five merger, P* = $5.30 or over 5% of the preclosing price. This implies that Firms A and B constitute a relevant market and indicates that the merger is anticompetitive, notwithstanding the existence of four other firms, each of which produce closer substitutes to the products of both A and B than A's and B's products are to each other.

Increased Emphasis on Direct Evidence

Context
2010 HMG
Applications
Special cases
Summing up

- Direct evidence
  - Definition: Evidence that is probative without the need to draw inferences
- Agencies looking for evidence of likely anticompetitive effects resulting from transaction:
  - Increases in price
  - Decreases in aggregate output
  - Decreases in product or service quality
  - Decreases in product variety
  - Decreases in the rate of technological innovation or product improvement

Increased Emphasis on Direct Evidence

Context
2010 HMG
Applications
Special cases
Summing up

- Sources of direct evidence
  - Documents of the parties
  - Financial terms of transaction
  - Customer interviews
  - Competitor interviews
  - "Natural" experiments
    - Impact of recent mergers, entry, expansion, or exit
    - Comparisons across similar markets
  - Implications of economic theory
    - Unilateral effects

Increased Emphasis on Direct Evidence

Context
2010 HMG
Applications
Special cases
Summing up

- Also look at less direct evidence
  - Market shares and concentration in a relevant market
  - Indications that merger will eliminate
    - Substantial head-to-head competition
    - A "disruptive" market influence

Rebutting the Predictions of the UPP models

Context
2010 HMG
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Summing up

- Anticompetitive predictions of UPP models can be rebutted by evidence of sufficient—
  - New entry
  - Repositioning by incumbent firms
  - Efficiencies

Raising the Bar on Entry and Repositioning Defenses

Context
2010 HMG
Applications
Special cases
Summing up

- Tone generally more skeptical than 1992 Guidelines
- Implications of high percentage gross margins

$$\frac{P-C}{P}$$

- Eliminated two-year time period for entry to occur
  - Now must be “rapid enough” to ensure no anticompetitive effect
  - Arguably will never work as a defense under the Guidelines
- Explicitly apply entry-style analysis to repositioning

Maintaining a High Bar on Efficiency Defenses

Context
2010 HMG
Applications
Special cases
Summing up

- Continue the 1992 Guidelines' hostility
- Require efficiencies to be–
  - Merger-specific
  - Reasonable verifiable on likelihood and magnitude
    - Requires a detailed explanation as to how the efficiencies will be achieved
  - Must offset merger's anticompetitive tendency and leave customers unharmed
- Other observations
  - Projections viewed very skeptically when generated outside of the usual business planning process
  - Helpful where there are historical instances where similar efficiencies have been achieved

Applications to the High-Tech/Innovation Economy

Context
2010 HMG
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Summing up

- Features of the high-tech industry and implications for merger review
- What do the 2010 Guidelines say about innovation competition and product variety?
- Do the 2010 Guidelines offer any useful guidance on how the agencies will assess (or enforce) innovation concerns?
- Merger scenarios that present innovation competition issues
- How to defend transactions with innovation concerns
- Some thoughts on anticompetitive reductions in product variety

Features of High-Tech/Innovation Industries

- Price often not the primary form of rivalry
  - Firms compete on features, functionality, service, variety, quality
  - Often a large first-mover advantage in high tech markets
- Dynamic, fast-changing, unpredictable industries
  - Technological inflection points with innovation from unexpected sources
- Classical models of perfect competition do not (easily) account for
  - Role of standards and “stacks” of complementary technologies
  - Two-sided markets
  - Positive network externalities
- Innovation produces more consumer welfare than static competition
  - Social gains from innovation > private gains when “spillover” effects are present

Implications for Merger Review

Context
2010 HMG
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Special cases
Summing up

- Focus on price effects and static models of competition will often be insufficient in the high-tech industry
  - Market dynamics require more complex explanatory models
  - Robust data series frequently unavailable
  - Agency decision-making driven more by secondary evidence
- Should this prompt a light-touch to merger regulation in the high-tech sector?
  - Higher risks of regulatory error under greater conditions of uncertainty
  - Type I error (false positive) costs may be higher when innovation is curtailed
  - Type II error costs may be lower than in traditional industries
- 2010 Guidelines reject these criticisms in favor of a more interventionist posture

Agency Attitudes To Innovation Competition Over The Last 25 Years

Context
2010 HMG
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Summing up

- 1992 Guidelines barely reference innovation
- Innovation markets approach developed in mid-90s
  - 1995 Guidelines for the Licensing of Intellectual Property
  - 2000 Guidelines for Collaborations Among Competitors
- Innovation markets approach was heavily criticized
  - Analytically redundant: existing potential competition theories sufficient
  - Delinking from actual product markets provides agencies too much discretion
- Unimpressive and inconsistent agency record in innovation cases
  - DOJ: Allison/ZF(1993); Flow/Ingersoll Rand (1994); 3D Systems/DTM (2001)
  - FTC: AHP/Cyanmid (1995); Ciba/Sandoz (1996); Genzyme/Novazyme (2004)

2010 Guidelines § 6.4 – Innovation Competition

"Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.

That curtailment of innovation could take the form of reduced incentive to continue with an existing product development effort or reduced incentive to initiate development of new products."

* * *

" The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger specific reason."

2010 Guidelines § 6.4

Context
2010 HMG
Applications
Special cases
Summing up

Unwritten assumptions in the 2010 Guidelines

- More innovative activity (rather than less) is a good thing
- *Ceteris paribus*, more competition leads to more innovation
- The competitive effects of mergers on innovation can be modeled and predicted
- (Some) recognition that mergers have the potential to lead to increased innovation

Does More Competition = More Innovation?

Context
2010 HMG
Applications
Special cases
Summing up

Virtually no empirical evidence, but two competing schools of thought

- Joseph A. Schumpeter
  - Monopoly more likely to create innovation than perfect competition
    - Concentration increases the appropriability of (and returns) from innovation
    - Scale effects in R&D; insulation from short-termism of capital markets
    - Intense competition to obtain monopoly, but monopoly gained may be lost quickly
- Kenneth J. Arrow
  - Market power reduces incentive of firms to innovate
    - A monopolist's existing revenue may not grow much from innovation because the new innovation may cannibalize existing product sales
    - A new entrant would earn more from innovation than the monopolist because every new sale is revenue it earns at the expense of the monopolist

How is Innovation Relevant in the Merger Context?

Context
2010 HMG
Applications
Special cases
Summing up

- A merger may increase the likelihood of coordinated effects on innovation, causing a reduction in aggregate innovation
  - Theoretically possible but highly improbable
  - Not discussed in the 2010 Guidelines
- A merger may have unilateral effects on the incentives of merging parties to continue to innovate
  - Unilateral effects asks whether a merger between Firm A and Firm B will
    - Increase R&D activity, innovation and/or output
    - Result in incentives to reduce innovative activity/ pure R&D
    - Eliminate potential competition affecting existing or future product markets
    - Result in product delay or suppression of innovation

Mergers Leading to Increased Innovation

Context
2010 HMG
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Summing up

- Innovation can be a key strategic driver in a merger, leading to procompetitive benefits
  - Combination will lead to more, better products faster (i.e. positive output effects and revenue synergies)
  - Fixed-cost efficiencies (synergies) in combining overlapping R&D programs
  - Merged firm may be able to appropriate more of the rewards of innovation
  - Merger may reduce the risk of successful innovation
- Can only use these arguments as a positive defense – efficiencies will not excuse an otherwise anticompetitive merger

Procompetitive Innovation Effects as a Transaction "Defense"

Context
2010 HMG
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Special cases
Summing up

- Argument often seen in pharmaceutical and healthcare cases
  - Combination of R&D capabilities can reduce the risks of clinical failure for new innovations
  - Output effects (saved lives) from faster roll-out of new products
  - Pfizer/Vicuron (FTC) vs. Thoratec/HeartWare (FTC)
- The challenge is demonstrating that the combined firm has greater chances of success than the stand-alone efforts of the merging parties
  - Agencies tend to see cost synergies from reduction in competing R&D efforts as reducing innovation (rather than focusing capabilities on the most likely path to success)
  - Innovation defense tends to be more successful the greater the evidence of complementary R&D capabilities and projects
  - Agencies will tend to discount claimed innovation efficiencies because they are "speculative" and inherently difficult to test (e.g. Thoratec/HeartWare)
  - Parties' own transaction documents and financial models will be key evidence
  - Short-term (static) price effects will trump long run innovation gains

Mergers as a Response to Innovation by Others

Context
2010 HMG
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Special cases
Summing up

- Dominant incumbent firms with eroding technology/business models merge in order to respond to innovations by others
  - Blockbuster/Hollywood Video
  - Brocade/McData
  - Intuit (Quicken)/Mint
- Necessary in these cases to affirmatively establish
  - New technology/business model will continue to displace the old
  - New technology will constrain the incumbent firms in a way that protects all customer groups
- Key evidence
  - Evidence of changing customer behavior and customer views
  - Parties own documents/forecasts on impact of new technology
  - Evidence of competitors views on likelihood of success of new technology

Mergers as a Response to Innovation by Others

- Challenges in these cases
  - Agencies not very forward-looking
  - Agencies are skeptical of open source alternatives, free services, ad-supported services, cloud-computing
  - May be difficult for merging firms to obtain accurate information on the state of innovation by competitors
  - Usually exist some identifiable group of customers who do not consider the new technology to be an adequate substitute for the old
  - Incumbent firms' documents often focus on each other more than on the emerging players
  - Often find evidence that the incumbent firms are competing even more aggressively for the same share of a shrinking pie

Merger Designed to Increase Acceptance of Risky Innovation

Context
2010 HMG
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Special cases
Summing up

- Merger may increase acceptance of (risky) new product or business model in the face of
  - Significant barriers to introduce new technology
  - Entrenched consumer preferences for existing technology
  - Strong incumbent providers
- Scale and additional investment by merged firm may be necessary to overcome these barriers
  - XM/Sirius subscription satellite radio vs. traditional free to air radio
  - Thoratec/Heartware as a response to traditional medical management and entrenched physician preferences for pharmacological treatments

Merger Designed to Increase Acceptance of Risky Innovation

Context
2010 HMG
Applications
Special cases
Summing up

- Successful defense usually requires evidence of the following
  - Merger-specific capabilities (i.e. why each firm likely won't succeed on its own)
  - That the merged firm can't discriminate against customers that have already revealed their preference for the new technology
- Challenges in these cases
  - The two innovative merging firms will tend to focus on each other in strategic plans rather than on the incumbent technology
  - May be evidence of more intense competition for those customers that have already revealed their preferences by switching to the new technology
  - Comparison of product attributes/functionalities often leads agencies to intuit that the two innovating firms will be very close competitors in a future market
  - Agencies tend to discount ability of incumbent firms to reposition

Merging to Suppress Competition from New Innovation

Context
2010 HMG
Applications
Special cases
Summing up

- Incumbent firm with a dominant position in traditional technology facing erosion by new technology seeks to acquire innovative firm
- This is really a potential competition case
- Agencies are most likely to pursue such concerns
  - The more concentrated the current marketplace is
  - The fewer companies there are pursuing similar innovations
  - The closer the emerging technology is to commercialization
- In these cases, there are likely to be unilateral price effects in addition to any innovation effects

Necessary Conditions for Harm to Innovation Incentives (1)

Context
2010 HMG
Applications
Special cases
Summing up

- Innovative activities must be likely to result in (close) future product competition
  - Most likely where the firms are current competitors in an existing product market
  - Can also be in situations where two firms are both in late-stage development of pipeline products (e.g. in pharmaceutical cases)
  - In high-tech industries, competition can come from complementary product providers, however in those situations condition (2), below, is unlikely to be satisfied
- Compare Ciba Geigy/Sandoz (FTC), where activities were very early research projects with little relation to future product markets

Necessary Conditions for Harm to Innovation Incentives (2)

Context
2010 HMG
Applications
Special cases
Summing up

- Merging parties must have a significant share of aggregate R&D capabilities directed to the same or similar innovation
- 2010 Guidelines provide no guidance on what share would be sufficient to raise concerns or how to assess closeness of firms' R&D capabilities
- If the firms are the only two or three engaged in a specific R&D project, agency concerns are likely to be higher
  - Generally true that R&D competition requires fewer firms than effective price competition
  - Guidelines for Collaborations Among Competitors establishes a safe harbor where there are four other similar R&D efforts underway

Necessary Conditions for Harm to Innovation Incentives (3)

Context
2010 HMG
Applications
Special cases
Summing up

- R&D activities must be unique/difficult for rivals to replicate
  - No antitrust concern if R&D efforts can easily be replicated by others
  - Similar to traditional entry analysis
  - Timeline for entry into R&D has to be sufficient to counter any anticompetitive effect, however 2010 Guidelines provide no indications of what is timely entry

2010 Guidelines § 6.4 – Reductions in Product Variety

Context
2010 HMG
Applications
Special cases
Summing up

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product.

Promoting Choice: Legitimate Goal of Antitrust Merger Policy?

Context
2010 HMG
Applications
Special cases
Summing up

- The 2010 Guidelines' focus on product variety is problematic
  - Always likely to be some group of customers with an entrenched preference for a particular set of product attributes
  - Especially true where customers have made substantial investments in a "legacy" platform and have concerns about product support
  - Contribution of product variety to consumer welfare impossible to measure
  - Elimination of redundant products may generate major merger efficiencies
- The question the agencies should be asking
  - Is the aggregate output of the merging firms likely to be higher with or without the transaction, regardless of the elimination of product features/variety

Conclusion

- 2010 Guidelines assume that competition best promotes innovation (despite lack of any empirical support)
- No algorithm for how the agencies will analyze innovation competition
  - Continuation of *ad-hoc* approach to investigation of innovation concerns
  - Internal company documents and customer views will remain key
  - Critical for merging firms to develop and document credible innovation efficiencies claims at the earliest stages of transaction planning
- Mergers unlikely to be challenged in court on innovation grounds alone
  - Claims of reduced innovation competition will be backstopped with allegations of potential unilateral price effects in existing or future product markets
  - Back to the future: more consent decrees obtaining ancillary relief to remedy alleged innovation competition concerns

Powerful Buyers Defense

Context
2010 HMG
Applications
Special cases
Summing up

- Buyers with negotiating leverage may limit the merged firm’s ability to increase price post-merger:
  - Threaten to sponsor entry or vertically integrate
  - Undermine coordinated effects
- But the agencies view the defense as limited:
  - Smaller customers may be harmed
  - Even “power buyers” may still be harmed

Partial Acquisitions

Context
2010 HMG
Applications
Special cases
Summing up

- The agencies also will review acquisitions of minority interests in competitors
- Review is similar to merger review, except the efficiency defense is tougher
- Concern about the acquisition resulting in:
  - Ability to influence competitive conduct of target
  - Reduction in acquiring firm's incentive to compete
  - Increased risk of coordination

Monopsony Acquisitions

Context
2010 HMG
Applications
Special cases
Summing up

- Mergers of competing buyers
- Will the merger enhance buyer market power
  - Essentially the same analysis as merger of competing sellers
- Focused on sellers' alternatives
- Merger resulting in reduced prices to sellers is not dispositive
  - Market power
  - Cognizable efficiencies
- Merger may be anticompetitive even the merged firm's output price does not increase

An Afterthought on Facilitating Implicit Collusion

Context
2010 HMG
Applications
Special cases
Summing up

- Coordinated effects theory of anticompetitive harm
- Analysis is similar to that of 1992 Guidelines
- Merger more likely to be challenged if:
  - Merger significantly increases concentration and results in at least a moderately concentrated market;
  - Market shows signs of vulnerability to coordinated conduct; and
  - Agencies have a credible basis on which to conclude that the merger may enhance this vulnerability
- Otherwise lawful conduct may be actionable coordinated interaction

SUMMING UP – WHAT YOU REALLY NEED TO KNOW