



DEPARTMENT OF JUSTICE

Merger Enforcement in the Americas: Update from the U.S. Department of Justice

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**Remarks as Prepared for the
New York State Bar Association Summer Merger Forum**

New York, New York

July 17, 2012

Good afternoon. It is a pleasure to be here in New York to discuss merger enforcement in the Americas from the perspective of the U.S. Department of Justice.

In addition to being a pleasure, speaking engagements are part of the Antitrust Division's competition advocacy efforts. We understand that the business community and the antitrust bar watch our merger investigations and enforcement actions carefully. Businesses want predictability of process and result, and therefore want to be able to understand the Antitrust Division's approach to merger analysis. Accordingly, we place a high value on providing transparency into our merger review policies and procedures. We do this in a variety of ways, including through guidelines, policy statements, competitive impact statements, closing statements and speeches.

One of the Antitrust Division's most significant recent efforts to increase transparency was the release of revised Horizontal Merger Guidelines in August 2010.¹ We are approaching the two-year anniversary of the issuance of those latest revisions to the guidelines, and that pending anniversary makes this an appropriate moment to stop and reflect on their issuance and subsequent effect and application by U.S. courts.

¹ U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>. See generally Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651 (2011); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010); Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 ANTITRUST 48 (Summer 2011).

I will also talk about other transparency initiatives we have taken in the mergers field, and about cooperation with our international counterparts, notably in the Americas.

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The Horizontal Merger Guidelines describe the enforcement policy of the Department of Justice and the Federal Trade Commission (FTC) with respect to mergers and acquisitions involving horizontal competitors under the federal antitrust laws. The 2010 Horizontal Merger Guidelines are the sixth iteration of merger guidelines for the Department of Justice. Originally introduced in 1968, they were subsequently revised in 1982, 1984, and then 1992 and 1997, when they were issued jointly by the department and the FTC.

Although some prior changes to the guidelines reflected changes in policy, the 2010 guidelines are appropriately viewed not as a major substantive shift but rather as an update reflecting changes in actual practice that had occurred since the last major guidelines revision in 1992. The 2010 guidelines do this by increasing transparency into the merger review tools and methods used at the Antitrust Division, detailing the kinds of competitive concerns that are typically at issue in our investigations and explaining the range of economic tools that the Antitrust Division uses to analyze those potential effects, including merger simulation and analysis of diversion ratios. The revised guidelines also address the types of evidence the Antitrust Division often relies on in its merger analysis, including information from the merging parties, customers, and other industry participants and observers.

The core of the prior guidelines structure remains: defining markets under the hypothetical monopolist test, assessing potential unilateral and coordinated effects, and considering the potential for entry, repositioning, or efficiencies to offset potential increases in market power.

Over the years, courts have found the guidelines to be helpful in assessing merger challenges. For instance, in 2008, the Fifth Circuit Court of Appeals described the guidelines as “persuasive authority when deciding if a particular acquisition violates antitrust laws.”² The 2010 guidelines are no different; indeed, they have already been cited by the courts.

Notably, the U.S. District Court for the District of Columbia cited the 2010 Guidelines extensively in its decision upholding the Antitrust Division’s lawsuit challenging H&R Block’s proposed acquisition of 2SS Holdings, the entity that sells TaxACT.³ That case involved digital do-it-yourself (DDIY) tax-preparation products, where there was only one substantial competitor other than the merging parties: Intuit, which sells TurboTax.⁴ In the years leading up to the merger, TaxACT had competed aggressively through low pricing and innovative product offerings.⁵ The Antitrust

² *Chi. Bridge & Iron Co. v. Fed. Trade Comm’n*, 534 F.3d 410, 431 n.11 (5th Cir. 2008).

³ *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).

⁴ *Id.* at 44.

⁵ *Id.* at 45-46.

Division claimed that the transaction would have left taxpayers with only two major DDIY tax-preparation providers, likely leading to higher prices, lower quality products, and less innovation.⁶

In her opinion preventing the merger, Judge Howell cited the 2010 guidelines extensively. The court applied the hypothetical monopolist test and reaffirmed the principle that the smallest market satisfying the hypothetical monopolist test constitutes a relevant market.⁷ Applying that framework to the evidence, including the defendants' internal analyses and the testimony of the defendants' own executives at trial, the court accepted the Antitrust Division's proposed market definition: digital do-it-yourself tax preparation products.⁸

The court then analyzed the merger's potential effect on market concentration using the Herfindahl-Hirschman Index. Citing the guidelines and case law, Judge Howell found that the increase in concentration created a presumption of anticompetitive effect.⁹ The court also relied on the guidelines in considering the possibility that entry could overcome that presumption, applying the guidelines test that, to overcome anticompetitive effects,

⁶ *Id.* at 44.

⁷ *Id.* at 50-52.

⁸ *Id.* at 50-60.

⁹ *Id.* at 72. Specifically, the court concluded that the proposed transaction “will increase the HHI by approximately 400, resulting in a post-acquisition HHI of 4,691.” *Id.*

entry or expansion must be timely, likely, and sufficient, and concluding that entry was unlikely under that standard.¹⁰

The court found that the proposed transaction would have resulted in a likelihood of both coordinated and unilateral effects. In its coordinated effects analysis, the court noted that the merger would result in the elimination of an aggressive competitor, relying on the guidelines discussion of the importance of maverick competitors. Specifically, the court found that TaxACT plays “a special role in this market that constrains prices” and that its elimination as a separate competitor accordingly would make coordinated effects more likely.¹¹ Similarly, the court concluded that unilateral effects were likely even though “Intuit may be the closest competitor for both [H&R Block] and TaxACT.”¹² That holding echoed the observation in the 2010 guidelines that only a significant fraction, not a majority, of customers need view the merging parties’ products as next-best substitutes for unilateral effects to be possible.¹³

In short, the court essentially applied the 2010 guidelines framework to our challenge under Section 7 of the Clayton Act.

¹⁰ *Id.* at 73-76.

¹¹ *Id.* at 80.

¹² *Id.* at 83.

¹³ U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

Similarly, the courts in two FTC merger challenges in the healthcare arena both relied on the 2010 guidelines in upholding FTC challenges. The U.S. District Court for the Northern District of Ohio relied on the portions of the guidelines addressing product market, geographic market, presumptions of harm flowing from concentration levels, efficiencies, and the failing firm defense in granting an FTC request for a preliminary injunction preventing ProMedica from future consolidation efforts with St. Luke's Hospital in Ohio.¹⁴ The U.S. District Court for the Northern District of Illinois likewise relied on the 2010 guidelines in defining markets, assigning a presumption of competitive harm based on an increase in market concentration, and analyzing coordinated effects and efficiencies when it prevented OSF Healthcare System and Rockford Health System from consummating an affiliation agreement that would have effectively merged two competing healthcare systems in Illinois.¹⁵

In addition to the 2010 Horizontal Merger Guidelines, other recent Antitrust Division efforts to increase transparency include the updated Policy Guide to Merger Remedies,¹⁶ our detailed competitive impact statements (CIS) that accompany our settlements, and our closing statements, including closing statements addressing

¹⁴ *Fed. Trade Comm'n v. ProMedica Health Sys.*, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011).

¹⁵ *Fed. Trade Comm'n v. OSF Healthcare Sys.*, 2012 WL 1134731 (N.D. Ill. Apr. 5, 2012).

¹⁶ U.S. DEP'T OF JUSTICE, ANTITRUST POLICY GUIDE TO MERGER REMEDIES (2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

Highmark's affiliation agreement with West Penn Allegheny Health System,¹⁷ Google's acquisition of Motorola Mobility Holdings,¹⁸ Google's acquisition of Admeld,¹⁹ Purdue's acquisition of Coleman Natural Foods,²⁰ Southwest's acquisition of AirTran,²¹ Cisco's acquisition of Tandberg,²² and the joint venture between Microsoft and Yahoo!.²³ Closing

¹⁷ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigation of Highmark's Affiliation Agreement with West Penn Allegheny Health System* (Apr. 10, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/282076.htm.

¹⁸ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

¹⁹ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc.* (Dec. 2, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/277935.htm.

²⁰ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigation of Purdue's Acquisition of Coleman Natural Foods* (May 2, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270591.htm.

²¹ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close Its Investigation of Southwest's Acquisition of AirTran* (Apr. 26, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270293.htm.

²² Press Release, U.S. Dep't of Justice, *Justice Department Will Not Challenge Cisco's Acquisition of Tandberg* (Mar. 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

statements typically describe the reasons that the Antitrust Division has not taken an enforcement action with respect to a particular matter. Without disclosing confidential, non-public information, the division's closing statements provide enough detail for the public to understand what the most important relevant issues were from the Antitrust Division's perspective and the most important considerations that drove the exercise of our prosecutorial discretion. The Antitrust Division has issued eight closing statements since 2009, and I commend them to your attention.

That same spirit of transparency driving our competition advocacy efforts with respect to guidelines, competitive impact and closing statements, and speeches also informs our relations with our counterpart merger enforcers around the world. As the world's economies become increasingly interconnected, the Antitrust Division reviews a growing number of transactions with international dimensions. This trend has important ramifications for the way the Antitrust Division does its work. First and foremost, the number of cross-border transactions has highlighted the need for the Antitrust Division to work cooperatively with our counterparts around the world. Indeed, in recent months, the Antitrust Division has cooperated on merger reviews—often under waivers from parties

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²³ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.* (Feb. 13, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

and third parties—with many non-U.S. competition agencies, including those in the Americas (notably Brazil, Canada, Colombia and Mexico), as well as in Australia, the European Union, Germany, Japan, Mexico, South Africa, and the United Kingdom.

I will mention a few practical results of our efforts to cooperate with our non-U.S. counterparts. First, cooperation allows us to anticipate and be mindful of any potential complications that might arise from another jurisdiction’s review of the same transaction. Surprises are avoided both for us and for the other reviewing agency or agencies. Second, the real-time, in-depth discussion that occurs between us and our counterparts around the world helps us (and I would suggest also our counterparts) to conduct our investigations more efficiently to the benefit of all the competition agencies involved, the parties, and, ultimately, consumers. Sharing insights and analyses with our colleagues around the world helps us all to understand the competitive conditions of a particular transaction, and the similarities and differences among the jurisdictions affected by the transaction. Third, cooperation among agencies helps ensure the compatibility of remedies—and avoid the potential for inconsistent or conflicting remedies that do not take into account outcomes in other jurisdictions. Finally, it is worth noting that cooperation may not always lead to the same result in the various jurisdictions reviewing a transaction. For instance, there may be different competitive conditions in different countries leading to, and justifying, different

outcomes. Effective communication among agencies allows appreciation of the differences, as well as the similarities, in the analyses we are undertaking in a given case.²⁴

Our conversations with our international counterparts increasingly occur in real time. At the Antitrust Division, we consider the international dimensions of merger transactions on a daily basis and discuss them with the relevant non-U.S. agency or agencies. Our interactions with our non-U.S. counterparts are deep and multi-faceted, encompassing not only the topic of this panel—mergers—but also criminal and civil non-merger enforcement matters as well. Increasingly, these are real-time, pick-up-the-phone type relationships.²⁵

Seven principles guide the international cooperation efforts at the Antitrust Division: we strive for increased transparency of our actions; we seek expanded and deeper cooperation between the U.S. and non-U.S. competition enforcement authorities; we work toward greater convergence of competition regimes; we are mindful of other jurisdictions' interests; we respect other jurisdictions' legal, political, and economic cultures; we trust

²⁴ See generally Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm>; Sharis A. Pozen, *Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers* (Apr. 23, 2012), available at <http://www.justice.gov/atr/public/speeches/282515.pdf>; Rachel Brandenburger, *Intensification of International Cooperation: The Antitrust Division's Recent Efforts* (Feb. 17, 2012), available at <http://www.justice.gov/atr/public/speeches/281609.pdf>.

²⁵ See generally Rachel Brandenburger, *The Many Facets of International Cooperation at the Antitrust Division* (June 15, 2012), available at <http://www.justice.gov/atr/public/speeches/284239.pdf>.

each other's actions; and we engage in ongoing dialogue on all aspects of international competition policy and enforcement.²⁶

There are many examples of merger matters recently where the Antitrust Division has worked closely with an increasingly broad set of international counterparts. I will highlight two in some depth today. First, the Antitrust Division and the European Commission both investigated Google's acquisition of Motorola Mobility. The two agencies worked closely together and announced our decisions within a few hours of each other.²⁷ The focus of our respective investigations was the transfer of ownership to Google of Motorola's portfolio of patents that Motorola committed to license through its participation in standard setting organizations.²⁸ The Antitrust Division cooperated closely with the European Commission, and we also had discussions about the merger with the

²⁶ Christine A. Varney, *International Cooperation: Preparing for the Future* (Sept. 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>; Rachel Brandenburger, *International Competition Policy and Practice: New Perspectives?* (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

²⁷ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280190.htm; Press Release, European Commission, *Mergers: Commission Approves Acquisition of Motorola Mobility by Google* (Feb. 13, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129>.

²⁸ DOJ Google Press Release, *supra* n. 27.

Australian Competition and Consumer Commission, the Canadian Competition Bureau, the Israeli Antitrust Authority, and the Korean Fair Trade Commission.²⁹

The Antitrust Division also worked closely with the European Commission on our respective investigations of the proposed combination of Deutsche Börse and NYSE, with frequent contact between the agencies, aided by waivers from the merging parties. Our conversations on this matter lasted for almost a year. In December 2011, the Antitrust Division announced that we had reached a settlement with the parties resolving our concerns about the effect of the merger on equities trading in the United States, noting that the “open dialogue between the Antitrust Division and the European Commission was very effective and allowed each agency to conduct its respective investigation while mindful of ongoing work and developments in the other jurisdiction.”³⁰ On the same day, the European Commission announced that “we have had regular and constructive dialogue with the DOJ throughout our respective procedures” and noted that “the markets that the DOJ is examining in its own jurisdiction, namely in the area of U.S. equities, are different

²⁹ *Id.*

³⁰ Press Release, U.S. Dep’t of Justice, *Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merger with NYSE Euronext* (Dec. 22, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/278537.htm; Press Release, U.S. Dep’t of Justice, *Justice Department Dismisses Antitrust Lawsuit against Deutsche Börse and NYSE Euronext* (Feb. 9, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280066.htm.

to those where the Commission has raised concerns, namely European financial derivatives.”³¹ In February 2012, the European Commission prohibited the merger.³²

Although the outcomes in the United States and the European Union were different, there was no conflict: the differing conclusions of the two agencies resulted from differences in the markets in the respective jurisdictions. Indeed, this is an example of how it is useful for agencies to work closely together even when market conditions differ among jurisdictions. Cooperation allows each agency to understand and anticipate the outcome of other agencies’ investigations.

I will also briefly mention a few other merger matters at the Antitrust Division with an international dimension to give you a sense of the breadth of the cooperative efforts that the Antitrust Division engages in with our international counterparts. As I indicated during my earlier discussion of the transaction between Google and Motorola, our international cooperation efforts are not limited to the European Commission. During our review of the transaction between CPTN and Novell, the Antitrust Division worked closely with the

³¹ *U.S. Clearing Deutsche Börse-NYSE Takeover Moves Final Approval to Europe*, Bloomberg, Dec. 22, 2011.

³² Press Release, European Commission, *Commission blocks proposed merger between Deutsche Börse and NYSE Euronext* (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/94>; Press Release, European Commission, *Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions* (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>.

German Federal Cartel Office.³³ During our review of the transaction between Unilever and Alberto Culver, the Antitrust Division had useful discussions with our counterparts in Mexico, South Africa and the United Kingdom.³⁴ The Antitrust Division also worked closely with the Canadian Competition Bureau in connection with our investigation related to the Nortel patent assets³⁵ and the transaction between Ticketmaster and Live Nation³⁶. I should also note that, in light of the recent changes to Brazil's merger law, we also look forward to increasing cooperation with our fellow merger enforcers from Brazil.

³³ Press Release, U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal In Order To Address Department of Justice's Open Source Concerns* (Apr. 20, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270086.htm; Press Release, German Bundeskartellamt, *Bundeskartellamt clears CPTN joint venture for acquisition of Novell patents* (Apr. 20, 2011), available at <http://www.bundeskartellamt.de/wEnglisch/News/press/20110420.php>.

³⁴ Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures In Unilever's Acquisition of Alberto-Culver Company* (May 6, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270854.htm.

³⁵ Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

³⁶ Press Release, U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger With Live Nation Inc.* (Jan. 25, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254540.htm; Press Release, Competition Bureau Canada, *Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition* (Jan. 25, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html>.

Our cooperation efforts with our international counterparts occur outside the realm of specific investigations as well. For instance, the revised Best Practices on Cooperation in Merger Investigations issued by the Antitrust Division, the FTC, and the European Commission's Competition Directorate (DG Comp) in October 2011³⁷ illustrate the importance of international merger review cooperation. The best practices provide an updated advisory framework for interagency cooperation when one of the U.S. Agencies and DG Comp are reviewing the same merger. The best practices were the fruit of a series of discussions among the three agencies regarding their experiences since the original adoption of the best practices in 2002. The revised best practices seek to promote fully informed decision-making by facilitating the exchange of information between the agencies; minimizing the risk of divergent outcomes; enhancing the efficiency of investigations; reducing burdens on merging parties and third parties; and increasing the overall transparency of the merger review process.

We are also engaged in other endeavors with our counterparts right around the world relating to merger practices and techniques outside the context of a particular merger investigation. By way of illustration, I will mention a few examples with our colleagues in the Americas. The Antitrust Division and the Canadian Competition Bureau routinely discuss merger policy, including commenting on experiences applying merger

³⁷ ANTITRUST DIVISION OF THE U.S. DEP'T OF JUSTICE, FED. TRADE COMM'N, AND EUROPEAN UNION COMPETITION DIRECTORATE-GENERAL, BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (October 2011), *available at* <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

guidelines.³⁸ Similarly, competition officials from Mexico, Canada and the United States are initiating a merger discussion group to address issues of common interest among the three jurisdictions. And, finally, the Antitrust Division and Brazil's Competition Commission have consulted on several issues of common interest.

To summarize, international cooperation efforts at the Antitrust Division with other jurisdictions in the Americas and further afield are increasingly integral to our merger enforcement activities at the Division—a trend that we anticipate only accelerating in the years ahead.

³⁸ See Transcript, U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES REVIEW PROJECT (Dec. 8, 2009) (comments of Melanie L. Aitken, Commissioner of Competition, Competition Bureau, Canada), available at <http://www.ftc.gov/bc/workshops/hmg/transcripts/091208transcript.pdf>.