COMMENTS TO THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

HORIZONTAL MERGER GUIDELINES REVIEW PROJECT

COMMENT, PROJECT NO. P092900

Lilla Csorgo and Serge Moresi
Vice Presidents, Charles River Associates

We thank the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (the "Agencies") for inviting the public to submit comments on the proposed revisions to the Horizontal Merger Guidelines (the "Guidelines") issued on April 20, 2010.

The proposed revisions constitute a significant improvement relative to the current Guidelines. They reflect more accurately how the Agencies are currently analyzing mergers. The following comments identify a few areas of the proposed revisions where further clarification might be helpful and provide better guidance to the business community. We hope the Agencies will find our suggestions useful.

The Hypothetical Monopolist Test

The Agencies explain that, "[s]pecifically, the [hypothetical monopolist] test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("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. [Footnote reproduced below.] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant." (at section 4.1.1, page 9) This is similar to the description of the hypothetical monopolist test in the 1992 Guidelines. An important difference, however, appears in a footnote:

"If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment." (at footnote 3, page 9)

The example in the footnote indicates that the Agencies might use the "hypothetical cartel" test (as opposed to the hypothetical monopolist test) in situations where the firms involved in the candidate market also sell products outside the candidate market and those “outside products” are complements for the "inside products." This would tend to define broader markets than the hypothetical monopolist test. The general description of the hypothetical cartel test suggests that the Agencies might use that test also in situations where the outside products are substitutes for the inside products (which would tend to define narrower markets than the hypothetical monopolist test). A clarification that this approach might be appropriate for both complements and substitutes would be helpful.

This approach could lead to the following situation. At a given point in time, a given group of products – say, for example, high-end printers – is not a relevant antitrust market because a SSNIP of high-end printers would cause the hypothetical cartel of high-end printer producers to lose a substantial volume of cartridge sales (in addition to a loss of printer sales). Instead, the relevant antitrust market is broader and comprises both high-end and low-end printers. The Agencies thus decide to clear a merger of two manufacturers of high-end printers. A couple of years later, nothing has changed in terms of price, output and quality, except that the producers of high-end printers have sold their cartridge operations to independent suppliers. (The merged firms may not have sold anything if the cartridge operations were owned by other producers of high-end printers.) As a result of this change in the ownership structure of the outside products, the Agencies determine that high-end printers have become a relevant antitrust market. The Agencies should clarify whether such a situation could arise. If it could, the agencies in addition should clarify whether a merger that was found to be legal initially could become illegal later on as a result of such a change in market definition.

Mergers of Competing Buyers

The Agencies' indication that they do not "evaluate the competitive effects of mergers between competing buyers strictly, or evenly primarily, on the basis of effects in the downstream markets in which the merging firms sell" (at section 12, page 33) is a welcome clarification. Two additional clarifications would be helpful.

1) Definition of “buyer market power”

The Agencies note that "[b]uyer market power is sometimes called ’monopsony power.’" (at section 12, page 32) An exact definition of what is meant by either “buyer market power” or “monopsony power” would be helpful. A monopsony can be defined simply as a single or dominant buyer dealing with multiple sellers. Other definitions go further to note explicitly the effect an exercise of monopsony power has on output so as to distinguish it from bargaining power. Finally, "buyer power" can be used as an umbrella term that includes both monopsony and bargaining power. The OECD's letter to delegates in regard to its 2008 Roundtable on Monopsony and Buyer Power is illustrative:

“Monopsony power is typically defined as the ability of a firm to profitably reduce the price of an input below competitive levels by reducing its purchases of the input. It corresponds to market power exercised by a buyer instead of a seller. The potential for the exercise of monopsony power arises when a large buyer of an input is supplied by competitive firms with increasing marginal cost. More recent concern and study has considered the economics and policy implications more generally of “buyer power.” Buyer power appears to include monopsony, oligopsony and bargaining power. A buyer has bargaining power when it is able to offset, at least in part, the market power of *sellers*. Bargaining power is exercised only when in its absence a buyer would pay prices in excess of competitive levels. Bargaining power is a source of countervailing power against the market power of suppliers.” ("Re: Roundtable on Monopsony and Buyer Power (22-23 October 2008)", letter to all competition delegates and observers, July 24, 2008, Frederic Jenny, Chair of Competition Committee, OECD)

2) Indicators of buyer market power

The uncertainty as to whether a decrease in output (or some other dimension of competition) must occur in order for an exercise of buyer market power to be of concern is further confused by the Agencies noting that they "do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power." (at section 12, page 33) While a short-run reduction in output may not be the *only* or *best* indicator of enhanced buyer market power, it is not clear whether the Agencies nonetheless view it as a necessary (but not sufficient) indicator. If it is not a necessary indicator, it should be made clear whether this is because the Agencies are possibly concerned with incidents of bargaining power or, rather, because they wish to also capture situations of (perfect) price discrimination where the monopsonist can extract the maximum surplus from suppliers without reducing output. If the latter, the Agencies might consider noting that this is only likely to arise in exceptional cases.