FAS-Russia Comment on Draft Horizontal Merger Guidelines

Message to the drafters of the Horizontal Merger Guidelines

Dear U.S. Colleagues,

It was our pleasure to review the Draft Horizontal Merger Guidelines and prepare the comment to this document by the Federal Antimonopoly Service (FAS) of Russia per request of the U.S. Federal Trade Commission. The Draft Guidelines represented a definite interest for our Agency since this document contains very useful principles and techniques of the horizontal merger review. The significance of this document goes beyond the boundaries of the U.S. because it provides a very useful guidance on the U.S. DOJ and FTC principles of reviewing horizontal mergers for both domestic and international companies operating in the territory of the U.S., as well as because methodologies suggested in the Draft Guidelines may be used by antitrust agencies of other countries in their merger review procedures.

On our side FAS appreciates the openness and transparency of the discussion of the Draft Guidelines invoked by the U.S. antirust Agencies both domestically and internationally. We also appreciate highly literate and comprehendible language the Draft Guidelines were written in.

Our general assessment of the Draft Guidelines is very positive and we would like to congratulate the drafters with preparation of this very useful document.

The comments below are intended for consideration by the drafters of the Guidelines who may wish to use some of these comments in the course of preparation of the final version of the Guidelines. We certainly leave the decision on using comments entirely to discretion of the U.S. DOJ and FTC and would be happy if the Agencies' team of drafters finds some of these comments useful for finalizing the Guidelines.

For your convenience the comments are provided with reference to pages and paragraphs they relate to.

Sincerely yours,

FAS-Russia

Comments

Comment 1.

Page 2, Paragraph 2.

The wording of paragraph 2 of page 2 creates impression that market power is presumed to be socially harmful *per se* and obtaining the market power automatically means the intention of merging entities to abuse it. The wording of paragraph 4 of page 2 also provides impression that market power resulting from the merger automatically leads to exploitive behavior with regards to customers.

Meanwhile, it may not be so in many instances and obtaining the market power may not be associated with abusive practices by merging entities and, moreover, can create efficiencies that would not be possible in the absence of the merger. The association of the market power with the exploitive behavior leaves no possibility for efficiency defense and clearing merger basing on efficiency considerations. Thus, such understanding of the market power contradicts to Sections 2.2.1 and especially 10 of these Guidelines that clearly provide for possibility of efficiency based justification of the merger, as well as to the general spirit of the Guidelines that look rather flexible and accommodate a possibility of efficiency based defense of merger.

Our suggestion for the wording of these paragraphs is as follows:

- Clearly indicate that prevention of possible abusive conduct by the entity resulting from the merger and not obtaining market power as such should be the primary goal of the merger review.
- Mention the possibility of using efficiency based considerations in merger review.
- Make a terminological footnote explaining that the terms “market power,” “dominant position in the market,” “market dominance” are used as synonyms unless the drafters of the Guidelines believe that these terms do not identify the same phenomenon. However, in the latter case the footnote on definitions would be also desirable.

The first sentence of paragraph 4 of page 2 creates impression that the Guidelines address the mergers by sellers only, while this document also includes the analysis of mergers between buyers as it have been indicated in the next paragraph with reference to Section 12. Our suggestion is to change wording of the first sentence of paragraph 4 to indicate that the Guidelines include but are not limited to the analysis of mergers between sellers.

Comment 2.

Page 4, Paragraph 5.

The paragraph provides for a possibility of using implicit evidence of intent of the merging parties to raise prices, reduce output or capacity, reduce product quality etc. as grounds for refusal to clear the merger by the Agencies. This approach involves the issue of standard of proof and reliability of such implicit evidence especially in case the merging parties challenge the Agencies’ decision not to clear the merger in the court. The general question arising in this context is: can potential actions that may or may not take place after the merger and not reliably known before the merger serve as an evidence of anticompetitive character of the merger? If yes, how? What can be a reliable evidence of intent of post merger anticompetitive behavior?

Comment 3.

Page 6, Paragraph 3.

We have doubts about the suggestion that "…possibility of price discrimination influences market definition … the measurement of market shares … and the evaluation of competitive effects …" and can agree with it only in its part related to the competitive effects. I.e. we believe that possibility of price discrimination can influence the evaluation of the competitive effects and not the definition of the relevant market and, therefore, market shares of the entity resulting from the merger and other suppliers.

The approach according to which the definition of the relevant market may depend upon a particular type of exploitive behavior by the entity resulting from the merger may be misleading. A question arising in this context is: why only possibility of price discrimination by the entity resulting from the merger can influence the definition of the relevant market while other exploitive abuses cannot? Using this approach may lead to a conclusion that possibility of all types of exploitive abuses may influence the definition of the relevant market, including such abuses as refusal to deal, reduction of output and quality of product/service, slowing innovation etc. I.e. we are hesitant about defining product or/and geographic relevant market by a particular type of abusive conduct except a possibility of price increase for all buyers as provided for by the SSNIP test or other reasonable test involving substitution possibilities available to buyers.

However, we acknowledge the importance of price discrimination as a possible conduct to be addressed by imposing behavioral or/and structural remedies while considering merger or by refusal to authorize the merger by antitrust authorities.

Comment 4.

Page 10, Paragraph 4.

We would rather suggest that only the existing pre-merger prices could be used as a reliable benchmark for applying the SSNIP test, since the choice of the benchmark prices based on hypothetical assumptions can be successfully challenged in the court by the merging parties in case the antitrust authority refuses to authorize the merger. For example, a probabilistic decrease in price due to entry that may or may not happen may not be accepted by the court as a reliable benchmark for applying SSNIP for the purposes of the market definition. The use of lower prices for applying SSNIP would artificially lead to narrower market definition and, therefore, higher shares and this argument may be used for overruling the agency decision not to clear the merger. Conversely, the agency may overlook the anticompetitive effects of the merger if it uses higher than actual prices and, thus, unjustifiably broad definition of the relevant market.

Comment 5.

Page 10, Paragraph 6 (Example 8).

In the case used in the example the end price of oil may include not only transportation price but some speculative margin on resale of oil, as well. For clarity of the example it makes sense to add some wording explaining that transportation companies charge for oil transportation only and no resale margin is included in the price.

Comment 6.

Page 12, Paragraph 5.

Compared to SSNIP the "critical loss analysis" looks less precise for defining relevant market because the reduction of the number of units sold may be due to a decision of some customers to reduce or cancel the consumption of the units included in the "critical loss calculation." Thus, this decrease may be only partially due to the customers' substitution for another project as a result of the price increase. Meanwhile, SSNIP assumes the consumption constant and not changed as a result of the price increase assumed in the test. Thus, it provides better idea of demand elasticity and the market boundaries in product and geographic terms, therefore. The suggestion is to use the "critical loss analysis" in combination with SSNIP in cases when the "critical loss analysis" can provide additional evidence for market definition.

Comment 7.

Page 12, Paragraph 8 and Page 13, Paragraphs 1 – 3.

The idea to define "price discrimination" markets looks very interesting and practical. In fact it makes a considerable change in SSNIP based market definition by introducing the customer dimension in it additionally to product and geographic dimension. However, in this context it is important to delineate it from the concept of price discrimination in the relevant market regarded as abusive conduct and not as a characteristic of the relevant market used for its definition. It looks also necessary to explain that targeted customers and other customers are not in the same relevant market since their substitution possibilities are substantially different.

Comment 8.

Page 15, Paragraph 9.

Is the term "market participants" used for defining actual and potential suppliers? In some countries this term includes buyers, as well. For clarity reasons the definition of the term is needed here.

Comment 9.

Page 16, Paragraph 8.

The suggestion to calculate market shares of potential quick entrants can be misleading since it is based on hypothetical and not actual data on market concentration. It can lead to unjustifiably low estimate of the market share of the entity resulting from the merger in case the anticipated entry does not actually takes place. Thus, remedies needed may not be introduced. The possibility of even a quick entry is still probabilistic, since it may not occur due to preemptive policies of incumbent firms. Moreover, a wrong estimate of the market share of the potential entrant is also possible. Therefore, our suggestion is to use entry analysis at the stage of evaluation of dominance of the entity resulting from the merger with emphasis on sustainability of its dominance and avoid using it while calculating market shares.

Comment 10.

Page 17, Paragraph 5.

A possibility to base calculation of firms' market shares on projected revenues from targeted customers substantially depends on the data and evidence underlying such projection. Our

opinion is that such projection should be based on official commitment of buyers and sellers to buy and sell the commodity in question, respectively, and such statement of commitment or contract should have sufficient evidential value for it to stand in the court. Alternatively, the agency decision to clear or forbid the merger may be overruled by the court if the merging parties or other stakeholders decide to challenge it. Our suggestion to specify the character of data that can be used for calculating projected revenues and, therefore, market shares.

Comment 11.

Page 21, Paragraph 3.

Can the diversion ratio be reliably calculated *ex-ante*? Possibly it makes sense to specify the characteristics of data to be used for such calculation, e.g. available historical statistics of changes in sales of the second project as a result of raising rice for the first one.

Comment 12.

Page 31, Paragraph 3.

Can meeting foreign competition or increasing the U.S. competitiveness in international market be used as efficiency based justification for clearing merger?