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# Horizontal Merger Guidelines

CARL SHAPIRO

Deputy Assistant Attorney General for Economics  
Antitrust Division, U.S. Department of Justice

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# DOJ Merger Enforcement

	<b>FY2006</b>	<b>FY2007</b>	<b>FY2008</b>	<b>FY2009</b>	<b>FY2010</b>
HSR Filings	1768	2201	1726	716	1166
HSR Investigations Initiated by DOJ	77	81	70	49	55
DOJ Second Requests	17	32	20	16	22
% of HSRs Resulting in DOJ Second Request	1.0%	1.5%	1.2%	2.2%	1.9%
Total DOJ Merger Investigations Initiated (HSR + Non HSR)	96	101	84	66	64
Total DOJ Merger Challenges	16	12	16	12	19

# **Horizontal Merger Guidelines: Process and Goals**

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- Revision Process Initiated September 2009
- Draft Guidelines Made Public April 2010
- Revised Guidelines Issued August 2010
- Primary Goal in Updating the Guidelines Was to Enhance Transparency
  - Reflect Changes in Practice Since 1992
  - Describe More Accurately What We Do and Why We Do It

# **Horizontal Merger Guidelines: Four Audiences**

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- Provide Guidance to the Business Community and Antitrust Practitioners
- Draw on Extensive Agency Experience to Assist the Courts
- Promote Agency Consistency and Best Practices in Merger Investigations
- Communicate U.S. Enforcement Policy Internationally

# Economic Principles in the 2010 HMG

- Carl Shapiro, “The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,” *Antitrust Law Journal*, 2010, at <http://www.justice.gov/atr/public/speeches/264295.pdf>
- Carl Shapiro, “Update from the Antitrust Division,” 18 November 2010, at <http://www.justice.gov/atr/public/articles/263528.pdf>

# **Horizontal Merger Guidelines: Four Topics**

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- Market Definition and Concentration [JF]
- Unilateral Price Effects and UPP [JF]
- Coordinated Effects [CS]
- Dynamic Competition and Innovation [CS]

# Coordinated Interaction: Definition

- Basic Definition Unchanged from 1992:
  - “Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.”
- Will Merger Change the *Manner* in Which Firms Interact Repeatedly Over Time?
  - Facilitate Tacit Collusion, Conscious Parallelism
  - Enable Price Leadership, Remove Maverick

# **Coordinated Interaction: Three Types**

- Express Agreement to Limit Competition
- Tacit Agreement to Limit Competition
- Parallel Accommodating Conduct
  
- All Involve Repeated Interaction Over Time by Firms Engaged in the Coordination
- Coordinated Interaction Includes Conduct Not Otherwise Condemned by the Antitrust Laws

# Coordinated Effects: Three Conditions

- Post-Merger HHI  $> 1500$  and  $\Delta\text{HHI} > 100$
- Market Vulnerable to Coordinated Conduct
  - Section 7.2 Lists Conditions
- Merger Enhances Danger of Coordination
  - Focus on *Change* Resulting from the Merger
  - Example: Elimination of Maverick

# Hypothetical Example

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- Four-to-Three Merger, Homogeneous Good
- Shares 30%+10%, 30%, 30%
  - Post-Merger HHI 3400,  $\Delta\text{HHI}=600$
- No Unilateral Effect (Residual Demand)
- Merged Firm Will Likely Become Price Leader, Raise Prices Post-Merger
  - Merger Causes Change in Mode of Behavior
  - Specific Evidence of Coordination Details?

## Example: Alcan/Pechiney (2003)

- Market for Brazing Sheet
  - Aluminum Alloy Used in Making Heat Exchangers for Motor Vehicles
- Merged Firm Plus Leading Rival  $> 80\%$
- Post-Merger HHI  $> 3600$ ;  $\Delta\text{HHI} > 600$ 

“After the acquisition, the combined firm and its largest North American rival would share market leadership and a common incentive to pursue strategies that emphasize accommodation and do not risk provocation.”

# Unilateral Effects on Innovation

- 2010 HMG Emphasize Innovation
  - How to Assess Merger Impact on Innovation?
- Existing and Planned Products
  - Focus on Diversion, Changed Incentives
- Future Products/R&D Efforts
  - Focus on Capabilities, Future Diversion
- Innovation Synergies Also Considered
- Example: Cisco/Tandberg Merger