Announcement of a Workshop on Merger Enforcement

The Federal Trade Commission (Commission) and the Antitrust Division of the U.S. Department of Justice (Department) jointly will hold a three day workshop focusing on state of the art application of the Horizontal Merger Guidelines (Guidelines). This workshop is open to the public and will be held on February 17–19, 2004, at the Federal Trade Commission's 601 New Jersey Avenue Conference Center. Comments from interested parties are sought in advance of the workshop, and should be e-mailed by February 10, 2004 to merger_enforcement_workshop@ftc.gov and MergerWorkshopComments@usdoj.gov. Paper copies of comments can be delivered to (i) Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, D.C. 20580 and (ii) Legal Policy Section, Antitrust Division, U.S. Department of Justice, 10th Floor, 601 D Street, N.W., Washington, D.C. 20530. Comments do not need to be limited to the topics discussed below. A later notice will provide additional information on the organization of the workshop.

Introduction

Mergers are a significant dynamic force in the American economy. Mergers can lower costs and otherwise benefit consumers, but mergers can also allow a single firm or group of firms to exercise market power and raise prices to consumers. The Commission and the Department enforce statutes that prevent anticompetitive mergers, principally section 7 of the Clayton Act, which prohibits mergers and acquisitions that may substantially lessen competition.

Merger enforcement is a complex and evolving endeavor, designed to prevent potentially anticompetitive acquisitions while allowing those mergers to proceed that do not pose a competitive risk. To promote transparency of the analytic process by which merger transactions are reviewed, the Department published Merger Guidelines in 1968 and issued substantially revised Guidelines in 1982. In 1992, the Commission and the Department jointly issued the current Guidelines, one part of which (section 4, dealing with efficiencies) was revised in 1997.

The workshop will allow the Commission and the Department to receive input on topics that arise in horizontal merger investigations. Topics on which the Agencies seek input include:

- application of the hypothetical monopolist test for market definition
- concentration, market share, and other screens
- uncommitted entry
- coordinated interaction

- unilateral effects
- dynamic competitive analysis
- creation of market power on the buying side of the market
- efficiencies issues, including non-standard efficiencies
- non-price competition, including analysis of innovation effects
- implementation of the Guidelines' many steps in an integrated manner

With respect to all these topics, the Agencies seek analysis and insight based on economic theory, empirical analysis, business perspectives, and especially experience from actual mergers or merger investigations.

Application of the Hypothetical Monopolist Test

To define relevant markets, the Guidelines ask whether a hypothetical profit-maximizing monopolist would increase price significantly for a sustained period of time. The Guidelines do not discuss how to determine whether, given the evidence on substitution patterns, a profit-maximizing monopolist would likely increase prices. The Agencies seek comment on the application of critical loss and critical elasticity analysis in evaluating whether a profit-maximizing hypothetical monopolist likely would significantly increase price, as well as on other issues that arise in market definition.

Concentration and Market Shares

To help identify possibly anticompetitive mergers, the Guidelines rely, in part, on market shares and concentration. However, as stated in § 2.0 of the Guidelines, "market share and concentration data provide only the starting point for analyzing the competitive impact of the merger." Today, the Agencies are jointly releasing data on the post-merger HHI and the change in the HHI for mergers challenged during fiscal years 1999 through 2003, and the Agencies separately may release additional data in advance of the workshop. The Agencies seek comment on the significance of concentration and market share data for future enforcement decisions, as well as how to incorporate other market structure variables, such as the number of significant competitors or the presence of an aggressive fringe, as potential screens for likely anticompetitive effects.

Firms that Participate Through a Supply Response: Uncommitted Entry

The Guidelines define "uncommitted entrants" as firms willing and able to begin making sales in the relevant market both quickly and without incurring more than trivial sunk costs. The Guidelines treat uncommitted entrants as incumbent competitors because they are relevant to the

pre- and post-merger competitive process in much the same way as firms actively making sales. Nevertheless, the Guidelines do not discuss the role of uncommitted entrants in the evaluation of competitive effects nor do they indicate how one assigns shares to uncommitted entrants. The Agencies seek comment on the proper treatment of uncommitted entrants, including the utility of the distinction between uncommitted and committed entrants in practice.

Coordinated Interaction

A merger can increase the probability that post-merger firms can successfully coordinate their conduct and raise prices or reduce output or innovation. Under the Horizontal Merger Guidelines, evaluation of a merger's likely impact on coordination of pricing and output decisions entails a highly fact-specific inquiry. The Agencies focus on the propensity of the market for coordinated conduct, as well as on how the merger makes coordination more or less likely or durable. This requires inquiry into pre-merger market conditions and firm behavior, along with analysis to determine if the market conditions, post merger, are more or less conducive to coordinated behavior. The Agencies seek comment on how best to perform this analysis, and in particular, on the implications of evidence on present or past coordination, and on factors that may affect the ability to coordinate in certain ways, but not in others.

Unilateral Effects

The merged firm may have the ability and incentive unilaterally to raise price or reduce output or innovation. While the Guidelines discuss conditions under which significant unilateral effects are likely, they do not provide tools for evaluating those potential effects. The Agencies seek comment on the utility of tools (e.g., merger simulation and surveys of consumer purchasing preferences or behavior) that have been applied to evaluate unilateral effects and the conditions under which unilateral effects are likely. The Agencies also seek comment on how best to evaluate whether actions of non-merging firms, in particular, product "repositioning," can be expected to prevent significant anticompetitive effects.

Dynamic Competitive Analysis

A merger may have quite different effects at different times: merger efficiencies may take years to materialize; anticompetitive effects may last for years or only until the market has adjusted to the merger; and competitive strategies change with different frequencies (e.g., price changes may be very fast, while product quality and design usually change more slowly). The Agencies seek comment on how to account for anticompetitive effects and efficiencies that occur

over different time horizons.

Creation of Market Power on the Buying Side of the Market

For most mergers that present significant competitive concerns, the focus is on the selling side of the market; the issue is whether the customers of the merging firms and their rivals likely will be injured by higher prices or reduced quality or innovation. The Guidelines, however, recognize that mergers also may create or enhance market power on the buying side of the market, i.e., the merging firms may lower prices to their suppliers, who also are entitled to the protection of the antitrust laws. The Agencies seek comment on how, if at all, they should assess the creation of buying market power differently than selling market power.

Efficiencies Issues

Some efficiencies may have no immediate effect on prices. Nevertheless, a merger could ultimately lead to lower prices or improved products for consumers, for example by enhancing research and development. Moreover, consumers benefit if fixed cost savings result in price reductions over the relatively near term, for example, if fixed cost plant improvements allow manufacturing processes to be introduced that would lower marginal production costs. The Agencies seek comment on the treatment of such efficiencies and related issues, including how to analyze whether these and other efficiencies are merger specific. The Agencies also seek comment on the proper determination of whether efficiencies are merger specific and on conditions under which out-of-market efficiencies should be weighed in favor of a merger.

Non-Price Competition

The Agencies seek comment regarding the assessment of whether a merger is likely to reduce or anticompetitively distort non-price competition, including innovation. The Agencies have addressed competition through innovation mainly in their 1995 Antitrust Guidelines for the Licensing of Intellectual Property, which employed the concept of an "innovation market." Merger investigations may involve other non-price competition issues, such as product diversity and promotion.

Integrated Analysis of Mergers

The dispositive issue in merger analysis is whether the merger likely will harm competition. Answering that question requires a probabilistic assessment of a complex interaction of many factors. The Agencies seek comment on, and the workshop will explore, the

interrelationships among the Guidelines' various analytical steps to ensure consistency in, and robustness of, the final determination of likely competitive effects.