

AN FTC GUIDE TO Mergers

INTRODUCTION

MANY MERGERS BENEFIT COMPETITION AND CONSUMERS by allowing firms to operate more efficiently. But some mergers change market dynamics in ways that can lead to higher prices, fewer or lower-quality goods or services, or less innovation.

Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect “may be substantially to lessen competition, or to tend to create a monopoly.” The key question the agency asks is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. The greatest antitrust concern arises with proposed mergers between direct competitors (horizontal mergers). The FTC and the DOJ have developed Horizontal Merger Guidelines that set out the agencies’ analytical framework for answering that key question, and have provided a Commentary on the Horizontal Merger Guidelines that provides many specific examples of how those principles have been applied in actual mergers reviewed by the agencies.

Merger law is generally forward-looking: it bars mergers that may lead to harmful effects. The premerger notification requirements of the Hart-Scott-Rodino Act allow the antitrust agencies to examine the likely effects of proposed mergers before they take place. This advance notice avoids the difficult and potentially ineffective “unscrambling of the eggs” once an anticompetitive merger has been completed. The agencies also investigate some completed mergers that subsequently appear to have harmed customers.

Each year, the FTC and Department of Justice review over a thousand merger filings. Fully 95 percent of merger filings present no competitive issues. For those deals requiring more in-depth investigation, the FTC has developed Merger Best Practices to help streamline the merger review process and

more quickly identify deals that present competitive problems. For those, it is often possible to resolve competitive concerns by consent agreement with the parties, which allows the beneficial aspects of the deal to go forward while eliminating the competitive threat. In a few cases, the agency and the parties cannot agree on a way to fix the competitive problems, and the agency may go to federal court to prevent the merger pending an administrative trial on the merits of the deal.

By law, all information provided to, or obtained by, the agencies in a merger investigation is confidential, and the agencies have very strict rules against disclosing it. These rules prevent the agencies from even disclosing the existence of an investigation. In some situations, however, the parties themselves may announce their merger plans, and the FTC may then confirm the existence of an investigation.

FACT SHEETS FOR MERGERS

- » **Premerger Notification and the Merger Review Process:** Steps in the Merger Review Process
- » **Markets:** Similar products or services sold in the same locale
- » **Competitive Effects:** Horizontal Mergers, Vertical Mergers, or Potential Competition Mergers
- » **Entry and Efficiencies**

THE KEY QUESTION THE AGENCY ASKS IS WHETHER THE PROPOSED MERGER IS LIKELY TO CREATE OR ENHANCE MARKET POWER OR FACILITATE ITS EXERCISE.

