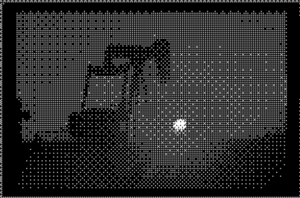
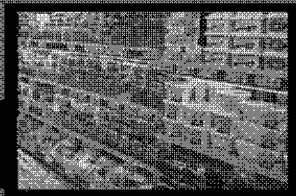
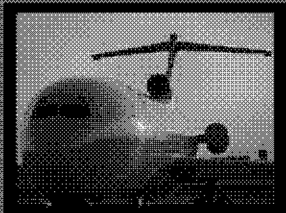
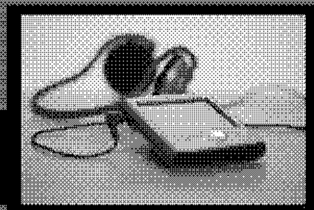
Exhibit 16 to Plaintiff’s
Memorandum of Points and Authorities
in Support of Its Motion for Temporary
Restraining Order and Preliminary
Injunction
(PX01341)
Part 1 of 5









Commentary on the Horizontal Merger Guidelines

2006

Federal Trade Commission

U.S. Department of Justice

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Foreword

Mergers between competing firms, i.e., "horizontal" mergers, are a significant dynamic force in the American economy. The vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas.

Fourteen years ago, to describe their application of the antitrust laws to horizontal mergers, the Federal Trade Commission and the U.S. Department of Justice (collectively, the "Agencies")—the two federal Agencies responsible for U.S. antitrust law enforcement—jointly issued the 1992 Horizontal Merger Guidelines (the "Guidelines"). In 1997, the Agencies jointly issued revisions to the Guidelines' section on Efficiencies. Since these publications were issued, the Agencies have consistently applied the Guidelines' analytical framework to the horizontal mergers under their review.

Today, to provide greater transparency and foster deeper understanding regarding antitrust law enforcement, the Agencies jointly issue this Commentary on the Guidelines.

The Commentary continues the Agencies' ongoing efforts to increase the transparency of their decision-making processes. These efforts include the Agencies' joint publication of Merger Challenges Data, Fiscal Years 1999–2003 (issued December 18, 2003), the Commission's subsequent publication of Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (issued February 2, 2004 and revised August 31, 2004), the Department's Merger Review Process Initiative (issued October 12, 2001 and revised August 4, 2004), the Reforms to the Merger Review Process at the Commission (issued February 16, 2006), and the Department's and Commission's increased use of explanatory closing statements following merger investigations.

The Commentary follows on the Agencies' February 2004 Merger Enforcement Workshop. Over three days, leading antitrust practitioners and economists who have examined merger policy and the Guidelines' analytical framework discussed in detail all sections of the Guidelines. The Workshop focused on whether the analytical framework set forth by the Guidelines adequately serves the dual purposes of leading to appropriate enforcement decisions on proposed horizontal mergers, and providing the antitrust bar and the business community with reasonably clear guidance from which to assess the antitrust enforcement risks of proposed transactions.

Workshop participants generally agreed that the analytical framework set out in the Guidelines is effective in yielding the right results in individual cases and in providing advice to parties considering a merger. Thus, the Agencies concluded that a revamping of the Guidelines is neither needed nor widely desired at this time. Rather, the Guidelines' analytic framework has proved both robust and sufficiently flexible to allow the Agencies properly to account for the particular facts presented in each merger investigation.

The Agencies also have observed that the antitrust bar and business community would find useful and beneficial an explication of how the Agencies apply the Guidelines in particular investigations. This Commentary is intended to respond to this important public interest by enhancing the transparency of the analytical process by which the Agencies apply the antitrust laws to horizontal mergers.

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March 2006

Introduction

Governing Legal Principles

The principal federal antitrust laws applicable to mergers are section 7 of the Clayton Act, section 1 of the Sherman Act, and section 5 of the Federal Trade Commission Act. Section 7 proscribes a merger the effects of which "may be substantially to lessen competition." Section 1 prohibits an agreement that constitutes an unreasonable "restraint of trade." Section 5, which the Federal Trade Commission enforces, proscribes "unfair methods of competition." Over many decades, the federal courts have provided an expansive body of case law interpreting these statutes within the factual and economic context of individual cases.

The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power. In the context of sellers of goods or services, "market power" may be defined as the ability profitably to maintain prices above competitive levels for a significant period of time. Market power may be exercised, however, not only by raising price, but also, for example, by reducing quality or slowing innovation. In addition, mergers also can create market power on the buying side of a market. Most mergers between rivals do not create or enhance market power. Many mergers, moreover, enable the merged firm to reduce its costs and become more efficient, which, in turn, may lead to lower prices, higher quality products, or investments in innovation. However, the Agencies challenge mergers that are likely to create or enhance the merged firm's ability—either unilaterally or through coordination with rivals—to exercise market power.

Following their mandate under the antitrust statutory and case law, the Agencies focus their horizontal merger analysis on whether the transactions under review are likely to create or enhance market power. The Guidelines set forth the analytical framework and standards, consistent with the law and with economic learning, that the Agencies use to assess whether an anticompetitive outcome is likely. The unifying theme of that assessment is "that mergers should not be permitted to create or enhance market power or to facilitate its exercise." Guidelines § 0.1. The Guidelines are flexible, allowing the Agencies' analysis to adapt as business practices and economic learning evolve.

In applying the Guidelines to the transactions that each separately reviews, the Agencies strive to allow transactions unlikely substantially to lessen competition to proceed as expeditiously as possible. The Agencies focus their attention on quickly identifying those transactions that could violate the antitrust laws, subjecting those mergers to greater scrutiny. Most mergers that pose significant risk to competition come to the Agencies' attention before they are consummated under the premerger notification and reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR"). HSR requires that the parties to a transaction above a certain size notify the Agencies before consummation and prohibits consummation of the transaction until expiration of one or more waiting periods during which one of the Agencies reviews the transaction. The waiting periods provide the Agencies time to review a transaction before consummation.

For more than 95% of the transactions reported under HSR, the Agencies promptly determine—i.e., within the initial fifteen- or thirty-day waiting period that immediately follows HSR filings—that a substantial lessening of competition is unlikely. The Agencies base such expeditious determinations on material provided as part of the HSR notification, experience from prior investigations, and other market information. For many industries, a wealth of information is available from government reports, trade directories and publications, and Internet resources. For some transactions, the parties volunteer additional information, and for some, the Agencies obtain information from non-public sources. The most important non-public sources are market participants, especially the parties' customers, who typically provide information voluntarily when the Agencies solicit their cooperation.

Evidence that the merged firm would have a relatively high share of sales (or of capacity, or of units, or of another relevant basis for measurement) or that the market is relatively highly concentrated may be particularly significant to a decision by either of the Agencies to extend a pre-merger investigation pursuant to HSR by issuing a request for additional information (commonly referred to as a "second request"). A decision to issue a second request must be made within the initial HSR thirty-day waiting period (fifteen days for cash tender offers), or the parties will no longer be prevented under HSR from consummating their merger. A second request may be necessary when it is not possible within thirty days to gather and analyze the facts necessary to address appropriately the competitive concerns that may arise at the threshold of the investigation, such as when parties to a merger appear to have relatively high shares in the market or markets in which they compete. Although the ultimate decision of whether a merger likely will be anticompetitive is based heavily on evidence of potential anticompetitive effects, the Agencies find that only in extraordinary circumstances can they conduct an extensive competitive effects analysis within thirty days. That is why market shares and concentration levels, which have some predictive value, frequently are used as at least a starting point during the initial waiting period.

Sometimes the Agencies also investigate consummated mergers, especially when evidence suggests that anticompetitive effects may have resulted from them. The Agencies apply Guidelines analysis to consummated mergers as well as to mergers under review pursuant to HSR.

Overview of Guidelines Analysis

The Guidelines' five-part organizational structure has become deeply embedded in mainstream merger analysis. These parts are: (1) market definition and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failing and exiting assets.

Each of the Guidelines' sections identifies a distinct analytical element that the Agencies apply in an integrated approach to merger review. The ordering of these elements in the Guidelines, however, is not itself analytically significant, because the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets. Analysis of efficiencies, for example, does not occur "after" competitive effects or market definition in the Agencies' analysis of proposed mergers, but rather is part of an integrated approach. If the conditions necessary for an anticompetitive effect are not present—for example, because entry would reverse that effect before significant time elapsed—the Agencies terminate their review because it would be unnecessary to address all of the analytical elements.

The chapters that follow, in the context of specific analytical elements such as market definition or entry, describe many principles of Guidelines analysis that the Agencies apply in the course of investigating mergers. Three significant principles are generally applicable throughout.

The Agencies' Focus Is on Competitive Effects

The Guidelines' integrated process is "a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." Guidelines § 0.2. At the center of the Agencies' application of the Guidelines, therefore, is competitive effects analysis. That inquiry directly addresses the key question that the Agencies must answer: Is the merger under review likely substantially to lessen competition? To this end, the Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation.

The Guidelines identify two broad analytical frameworks for assessing whether a merger between competing firms may substantially lessen competition. These frameworks require that the

Agencies ask whether the merger may increase market power by facilitating coordinated interaction among rival firms and whether the merger may enable the merged firm unilaterally to raise price or otherwise exercise market power. Together, these two frameworks are intended to embrace every competitive effect of any form of horizontal merger. The Guidelines were never intended to detail how the Agencies would assess every set of circumstances that a proposed merger may present. As the Guidelines themselves note, the specific standards set forth therein must be applied to a broad range of possible factual circumstances.

Investigations Are Intensively Fact-Driven, Iterative Processes

Merger analysis depends heavily on the specific facts of each case. At the outset of an investigation, when Agency staff may know relatively little about the merging firms, their products, their rivals, or the applicable relevant markets, staff typically contemplates several broad hypotheses of possible harm.

For example, based on initial information, staff may hypothesize that a merger would reduce the number of competitors from four to three and, in so doing, may foster or enhance coordination by enabling the remaining firms profitably to allocate customers based on prior sales. Staff also might hypothesize that the products of the merging firms are particularly close substitutes with respect to product characteristics or geographic location such that unilateral anticompetitive effects are likely.

Staff evaluates potential competitive factors of this sort by gathering additional information and conducting intensive factual analysis to assess both the applicability of individual analytical frameworks and their implications for the likely competitive effects of the merger. As it learns more about the merging firms and the market environment in which they compete, staff rejects or refines its hypotheses of probable relevant markets and competitive effects, ultimately resulting in a conclusion about likelihood of harm. If the facts do not point to such a likelihood, the merger investigation is closed.

In testing a particular postulated risk of competitive harm arising from a merger, the Agencies take into account pertinent characteristics of the market's competitive process using data, documents, and other information obtained from the parties, their competitors, their customers, databases of various sorts, and academic literature or private industry studies. The Agencies carefully consider the views of informed customers on market structure, the competitive process, and anticipated effects from the merger. The Agencies further consider any information voluntarily provided by the parties, which may include extensive analyses prepared by economists or in consultation with economists. The Agencies also carefully consider prospects for efficiencies that the proposed transaction may generate and evaluate the effects of any efficiencies on the outcome of the competitive process.

The Same Evidence Often Is Relevant to Multiple Elements of the Analysis

A single piece of evidence often is relevant to several issues in the assessment of a proposed merger. For example, mergers frequently occur in markets that have experienced prior mergers. Sometimes evidence exists concerning the effects of prior mergers on various attributes of competition. Such evidence may be probative, for example, of the scope of the relevant product and geographic markets, of the likely competitive effects of the proposed merger, and of the likelihood that entry would deter or counteract any attempted exercise of market power following the merger under review. Similarly, evidence of actual or likely anticompetitive effects from a merger could be used in addressing the scope of the market or entry conditions.

An investigation involving potential coordinated effects may uncover evidence of past collusion and sustained supra-competitive prices in the market. This information can be relevant to several elements of the analysis. The product and geographic markets that were subject to collusion in the past may be probative of the relevant product and geographic markets today. That entry failed to undermine collusion in the past may be probative of whether entry is likely today. Of course, during its investigation, the Agency may discover facts that tend to negate these possibilities. For example, since collusion occurred, new production technologies may have emerged that have altered the ability or incentives of firms to coordinate their actions. Similarly, innovation may have led to the introduction of new products that compete with the incumbent products and constrain the ability of the merging firms and their rivals to coordinate successfully in the future.

Commentary Outline

In the chapters that follow, the Commentary explains how the Agencies have applied particular Guidelines' provisions relating to market definition and concentration, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Application of the Guidelines' provisions relating to failure and exiting assets is not discussed in the Commentary because those provisions are very infrequently applied. For convenience, the order of these chapters follows the order of the issues set forth in the Guidelines.

Included throughout the Commentary are short summaries of matters that the Agencies have investigated. They have been included to further understanding of the principles under discussion at that point in the narrative. None of the summaries exhaustively addresses all the pertinent facts or issues that arose in the investigation. No other significance should be attributed to the selection of the matters used as examples. (In some instances in the Efficiencies chapter, names and other key facts of actual matters are changed to protect the confidentiality of business and proprietary information. Each is noted as a "Disguised Example.") An Index at the end of the Commentary lists all of the mergers discussed in these case examples and provides citations to additional public information.

For the reader's convenience, the case examples briefly state how each investigation ended, i.e., whether it was closed because the Agency determined not to challenge the merger or because the parties abandoned the merger in response to imminent Agency challenge, or whether the investigation proceeded to a consent agreement or to litigation. The discussion within each case example pertains solely to the relevant Agency's analysis of the merger, and does not elaborate on any subsequent judicial or administrative proceedings.

1. Market Definition and Concentration

The Agencies evaluate a merger's likely competitive effects "within the context of economically significant markets—i.e., markets that could be subject to the exercise of market power." Guidelines § 1.0. The purpose of merger analysis under the Guidelines is to identify those mergers that are likely to create or enhance market power in any market. The Agencies therefore examine all plausible markets to determine whether an adverse competitive effect is likely to occur in any of them. The market definition process is not isolated from the other analytic components in the Guidelines. The Agencies do not settle on a relevant market definition before proceeding to address other issues. Rather, market definition is part of the integrated process by which the Agencies apply Guidelines principles, iterated as new facts are learned, to reach an understanding of the merger's likely effect on competition.

The mechanics of how the Agencies define markets using the Guidelines method has been the subject of extensive discussion in legal and economic literature and appears to be well understood in the antitrust community. This Commentary, accordingly, provides only a brief overview of the mechanics. The remainder of this chapter addresses a number of discrete topics concerning market definition issues that frequently arise in merger investigations.

Mechanics of Market Definition

The Guidelines define a market as "a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant." Guidelines § 1.0.

This approach to market definition is referred to as the "hypothetical monopolist" test. To determine the effects of this "'small but significant and nontransitory' increase in price" (commonly referred to as a "SSNIP"), the Agencies generally use a price increase of five percent. This test identifies which product(s) in which geographic locations significantly constrain the price of the merging firms' products.

The Guidelines' method for implementing the hypothetical monopolist test starts by identifying each product produced or sold by each of the merging firms. Then, for each product, it iteratively broadens the candidate market by adding the next-best substitute. A relevant product market emerges as the smallest group of products that satisfies the hypothetical monopolist test. Product market definition depends critically upon demand-side substitution—i.e., consumers' willingness to switch from one product to another in reaction to price changes. The Guidelines' approach to market definition reflects the separation of demand substitutability from supply substitutability—i.e., the ability and willingness, given existing capacity, of firms to substitute from making one product to producing another in reaction to a price change. Under this approach, demand substitutability is the concern of market delineation, while supply substitutability and entry are concerned with current and future market participants.

Definition of the relevant geographic market is undertaken in much the same way as product market definition—by identifying the narrowest possible market and then broadening it by