

## Merger Enforcement-Substance Discussion Outline

*Note:* Italicized text is based on questions on which the Commission requested comment from the public.

I. *Has current U.S. merger enforcement policy been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?*

[1] Find that there is a general consensus that, while there may be disagreement over specific merger decisions, and policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.

In particular:

[a] Find that the Commission was not presented with evidence that current policy is materially hampering the ability of companies to operate efficiently and compete in global markets.

[b] Recommend that DOJ and FTC continue to seek to ensure that enforcement policy is appropriately sensitive to the needs of U.S. companies to innovate and obtain scope and scale needed to compete in global marketplaces while protecting the interests of U.S. consumers, including business consumers.

[c] Do not recommend legislative change.

[d] Recommend that DOJ and FTC give greater consideration to efficiencies, as specified below.

[e] Recommend that DOJ and FTC give greater consideration to arguments that a merger will increase innovation, as specified below.

[f] Recommend that DOJ and FTC rely less on concentration presumptions in predicting competitive effects of a merger, given the relative lack of an empirical evidence on the relationship between increased concentration and market performance.

[g] Recommend that DOJ and FTC deemphasize the importance of market definition and focus more on a direct assessment of the ability and incentives of a merged firm to increase prices unilaterally in appropriate cases.

[2] Find that U.S. merger enforcement policy has been lax in allowing anticompetitive mergers to proceed or to proceed without restructuring.

[a] Recommend that the agencies and courts enforce the antitrust merger law more aggressively.

[b] Recommend that the agencies enforce more closely the HHI thresholds in the *Merger Guidelines* and/or strengthen the presumption that mergers exceeding the existing thresholds will be challenged.

[3] Find that current U.S. merger enforcement policy has been overly restrictive in blocking or inhibiting lawful transactions or requiring unnecessary relief.

[a] Recommend that the agencies and courts enforce the antitrust laws with respect to mergers less aggressively.

[b] Recommend that the agencies should give greater consideration to efficiencies, as specified below.

[c] Recommend that the agencies should give greater consideration to arguments that a merger will increase innovation, as specified below.

[d] Recommend that the agencies rely less on concentration presumptions in predicting competitive effects of a merger given the relative lack of an empirical evidence on the relationship between increased concentration and market performance.

[4] Make no findings with respect to U.S. merger enforcement policy because the evidence as to its efficacy is inconclusive.

[5] Find that merger enforcement policy would benefit from further study of agency enforcement activity and/or economic understanding of the foundations of merger policy.

In particular:

[a] Recommend that DOJ and the FTC increase their use of retrospective studies of merger enforcement decisions (which should be released to the public) to assist in determining the efficacy of merger policy.

[b] Recommend that the agencies periodically conduct internal reviews of data relating to their merger enforcement activity and publish the results. DOJ and the FTC should attempt to coordinate their collection and maintenance of internal data for this purpose.

[c] Recommend that the agencies conduct or commission further study of the relationship between concentration and market performance to provide a better basis for assessing the efficacy of current merger policy.

II. *What features, if any, of dynamic, innovation-driven industries pose distinctive problems for antitrust analysis, and what impact, if any, should those features have on the application of antitrust analysis to these industries?*

*Should antitrust law be concerned with “innovation markets”? If so, how should antitrust enforcers analyze innovation markets?*

*In what circumstances, if any, should the two-year time horizon used in the Horizontal Merger Guidelines to assess the timeliness of entry be adjusted?*

[6] Find that no substantial changes to merger enforcement policy are necessary to account for dynamic, innovation-driven industries, because the current *Merger Guidelines* and merger policy as it has been developed by the agencies and courts are sufficiently flexible to address these features.

[7] Recommend that the agencies update the *Merger Guidelines* to explain how they evaluate impacts on innovation.

[8] Recommend that the agencies continue to use innovation-market analysis in appropriate merger cases.

[9] Recommend that the agencies abandon the use of innovation-market analysis in merger cases.

[10] Find that the two-year time horizon for entry is applied flexibly by the agencies, and should not be changed.

[11] Recommend that the agencies be more flexible in lengthening the two-year time horizon for entry where appropriate to account for innovation that may change competitive conditions beyond two years.

III. *Do the U.S. courts and federal antitrust enforcement agencies adequately consider efficiencies in merger analysis?*

*What types of efficiencies should be recognized in antitrust merger analysis and in what circumstances should they be considered or not considered in determining the legality of a merger? How should courts and agencies evaluate claims of efficiencies? What should be the burdens of production and proof for establishing efficiencies?*

*What is the appropriate welfare standard to use in assessing efficiencies — a consumer welfare standard, a total welfare standard, or some alternative standard?*

[12] Find that the U.S. enforcement agencies and courts adequately consider efficiencies in merger analysis and recommend no change to current policy.

[13] Find that the agencies may give insufficient credit to some claims of efficiencies, and recommend that the agencies place increased weight on efficiencies of the following type(s):

[a] The agencies and courts should give greater credit for efficiencies in R&D and innovation.

[b] The agencies and courts should give greater credit for fixed-cost efficiencies, particularly in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.

[14] Recommend that the agencies revise their policy with respect to efficiencies to adopt a “total welfare” standard.

IV. *Do the Horizontal Merger Guidelines provide informative guidance to merging parties regarding the likely antitrust treatment of their transactions, and do they appear accurately to reflect actual current FTC and DOJ enforcement practices (for example, with respect to market definition and concentration threshold presumptions of antitrust concern)?*

*Should the federal antitrust enforcement agencies provide more guidance regarding their enforcement policies, including when they decide not to challenge a transaction?*

[15] Find that the current *Merger Guidelines*, in conjunction with agency policy statements, commentary, and enforcement activity, provide informative guidance to merging parties and accurately reflect current enforcement policy. Encourage DOJ and the FTC to continue to work towards increasing transparency and heightening understanding of the basis for enforcement policy.

[16] Find that the current *Merger Guidelines* do not reflect current enforcement policy with respect to the concentration threshold levels and recommend that the agencies modify the *Guidelines* to increase the concentration thresholds to reflect current and recent practice.

[17] Recommend that the agencies increase transparency by:

[a] Issuing “closing statements” to explain the rationale for taking no enforcement action in a matter after a significant investigation.

[b] Periodically reporting statistics on merger enforcement efforts, including such information as was reported by the FTC in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions.

[18] Recommend that the agencies revise the *Merger Guidelines* to include an explanation of how the agencies evaluate non-horizontal mergers.