



MEMORANDUM

From: Enforcement Institutions Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: May 5, 2005
Re: Enforcement Institutions Study Plan

Issues Adopted by the Commission for Study

- A. Should merger enforcement at the federal level continue to be administered by two separate agencies, the U.S. Department of Justice and the Federal Trade Commission? If so, should merger review responsibility be divided by industry between DOJ and FTC?
- B. To the extent that dual enforcement continues, should steps be taken to eliminate differences in treatment arising out of which agency [DOJ or FTC] reviews a merger?
- C. What role, if any, should private parties and state attorneys general play in merger enforcement? Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers?
- D. What changes, if any, should be made to the enforcement role that the states play with respect to federal antitrust laws?

Questions for Public Comment

Dual Federal Merger Enforcement

- 1. Should merger enforcement continue to be administered by two different federal agencies? What are the advantages and disadvantages resulting from having two different federal antitrust enforcement agencies reviewing mergers? For example, does it result in bureaucratic duplication, inconsistency in treatment, more thorough enforcement, beneficial diversity in enforcement perspectives, or competition between antitrust enforcement agencies?
- 2. Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated? Please provide specific reasons for proposed reallocations.
- 3. Commenters have advised that disagreements between the FTC and DOJ concerning the clearance of mergers for review by one or the other agency have unreasonably delayed regulatory review in some cases. Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?

Differential Merger Enforcement Standards

1. Does the standard the DOJ must meet to obtain a preliminary injunction to block a merger differ, as a practical matter, from that the FTC must meet? Has any such difference affected the outcome of a decision, or might it reasonably be expected to affect the outcome?
2. To the extent there is a difference in legal standards, should the different standards be harmonized? If so, how?
3. Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?
4. What practical burdens are imposed on private parties by the FTC's policy of pursuing permanent relief through an administrative proceeding (in some instances) after failing to obtain a preliminary injunction?

Allocation of Merger Enforcement Among States, Private Plaintiffs, and Federal Agencies

1. What role should state attorneys general play in merger enforcement? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved in multiple state and federal merger reviews.
2. Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?
3. What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved.
4. What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?

Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area

1. Some commenters have suggested that dual federal and state non-merger civil antitrust enforcement should be limited or eliminated. What evidence, if any, exists regarding burden, benefits, delay, and/or uncertainty involved in dual state and federal non-merger civil antitrust enforcement?
2. To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence, and analysis.

3. Should state and federal enforcers divide responsibility for non-merger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global? If so, how should allocation be implemented?

Hearings

- Four panels of approximately two to four hours each.
1. Dual federal merger enforcement: Should merger enforcement authority be reallocated between the FTC and DOJ? Should the clearance process be revised?
 - Former DOJ and FTC officials
 - Practitioner(s)
 - Inside corporate counsel
 2. Harmonizing FTC and DOJ merger injunction procedures
 - Current FTC and DOJ officials
 - Practitioner(s)
 - Inside corporate counsel
 3. Allocation and coordination of antitrust enforcement between federal agencies and states (possibly 2 panels)
 - Current and former FTC and DOJ officials
 - Representative(s) from NAAG
 - Representatives from plaintiffs' and defense bar
 - Representative(s) of business community
 - Scholar(s)
 - Representative from European Commission or international practitioner
 4. Non-federal Agency Merger Challenges and Suits for Injunctive Relief
 - Representatives from plaintiffs' and defense bar
 - Representative(s) from NAAG
 - Representative(s) of business community
 - Representative(s) of consumer interests
 - Scholar(s)