

MERGER INVESTIGATIONS

At the
U.S. Federal Trade Commission

OVERVIEW OF PRESENTATION

- Key Principles
- What We Do With Initial Filing
- Preliminary Investigation: First 30-day Waiting Period
- Decision to Issue Second Request
- Full Investigation and Second Requests
- The Commission's Compulsory Process
- How Post-Merger Investigations Differ

SOME KEY PRINCIPLES

- Very few mergers are anticompetitive
 - Mergers almost always create efficiencies
 - We don't want to "chill" pro-competitive mergers
 - We investigate fewer than 2% of all mergers
- There is no substitute for rigorous analysis
 - All markets are different and markets change with time
 - All presumptions are rebuttable
 - "Hot" documents or "admissions" not enough
 - Need "business records" and "business documents" to understand how market works
- Maintain confidentiality of sources and information
- Transparency with parties almost always helpful
- Standard is Injury to competition, not injury to competitors
 - Be skeptical of competitor complaints
 - Customers won't complain if they can pass on price increases

The Initial Filing

- Check notification form for completeness
 - Required documents, Information, fees
- PMN office prepares summary sheet
- The importance of “4 (c)” documents
 - Management documents that analyze the merger
 - We read them with suspicion
- Information in filing never sole basis for not conducting preliminary investigation
- We often grant early termination

Preliminary Investigation: Initial 30-Day Waiting Period

- Any doubt requires a preliminary investigation
- Clearance procedures between FTC and DOJ decides which agency conducts Investigation
- Initial staffing usually minimal
 - Attorneys, economists
- Some initial information sources
 - Publicly available information
 - Expertise developed from prior investigations
- Contact parties early on:
 - Names of principal competitors
 - Names of principal customers
 - Ask for certain documents
 - Suggest White paper or other presentation
- Interview competitors (by telephone)
- Interview customers (by telephone)
- We sample the products

The initial telephone interviews

- Of Competitors

- Large and small
 - Complaints from small competitors suggest merger efficiencies and lower prices
- Talk to right person
- How market works
 - Principal competitors
 - Who monitor
 - How determine prices
 - Where sell
 - Recent entry
- Market share estimates

- Of Customers

- Large and small
- Talk to right person
- Any concerns
 - Who buy from
 - What alternatives
 - Options if price increase
 - unilaterally
 - marketwide

What we disclose to people

- Reason for contact and fact of investigation
- Explain why we need information from them
 - Their experiences are important to us
 - Do not disclose confidential information
 - Assure them their information will be kept confidential
 - Don't disclose who else you're talking to
- Consider possible biases
- Facts, not opinions, are key
 - Cross examine every opinion
 - Question every important fact

“White papers” from parties

- Parties normally eager to come in and talk
 - Often they bring in economic experts
- We let parties control agenda
- Written presentation helpful (“white paper”)
- Management should talk, not attorneys
- Ask for key documents
 - Brand plans
 - Planning documents
 - Pricing documents, financial statements

Full phase investigation begins with “second request”

- Second Request for documents and information
- Implications of Issuance of Second request
 - Extends the waiting period to 30 days after “substantial compliance”
 - No authority to compel compliance
- Second requests are very broad
- No third request except voluntary submissions
 - No judicial oversight
 - We assume negotiations and modifications as part of process

Second request decision process

- Second request is issued by Commission, not staff
- Impossible to fully investigate in 30 days
 - We're looking for dispositive issues against bringing a case
 - Easy entry (recent entry?)
 - Low concentration
- Key is possibility of competitive harm
 - Assume worst case product market
 - Assume worst case geographic market
 - Need estimate of concentration
 - Assume entry difficult unless recent entry
- Things we ignore at this stage:
 - Competitive effects evidence
 - Efficiencies

Sample second requests

- We use (and publish) several models on our web site
 - Manufacturing, Retail, Supermarkets
- We normally ask for more detailed information for familiar industries and complex matters
- Narrative Interrogatories have limited utility
- Econometric data requests
 - Pricing and sales info
- Document requests
 - All documents “relating to” competition, pricing, planning
 - Identify types of documents in separate specs
 - Financial reports, strategic plans, contracts, sales call reports

Second requests can be burdensome

- Massive submissions are commonplace
 - Thousands of boxes in big cases
 - But parties often cry “crocodile tears”
- Some ways to limit burden:
 - Provide for electronic submissions
 - Search key people or headquarters office only
 - Ask for documents that “discuss” or “analyze” instead of “relating to”
 - Shorten the time periods

But not always burdensome

- 70% of second requests responses give us document production of under 20 boxes
- Vast majority of investigations completed in less than 4 months
 - includes consent orders

How we deal with large document productions

- Not uncommon to get thousands of boxes in complex matters
 - Parties sometimes prefer large submissions
 - Takes time to locate responsive documents
 - Theoretically possible to hide key documents in a large submission
- We ask for (and usually get) a rolling submission
- We normally negotiate a timing agreement
 - 30-day waiting period can be extended by parties
 - Impossible properly to consider complex matter in 30 days
 - We almost always get more time
 - In parties interest to give us more time
 - Often the extra time goes to the commissioners, not staff
- Need to find key documents
 - Identify key people
 - Ask for them in separate spec
 - Ask parties to identify documents most helpful to them

Modification negotiations may prevent undue burden

- Scope of search issues:
 - Start with organization chart
 - Broad (people) v. deep (documents)
 - E-mail backup systems
- Production issues:
 - Boxes
 - Index
 - Documents as kept in files
 - Identify specifications
 - Duplicates
 - From key people

There is no good way to determine “substantial compliance”

- Substantial compliance is less than full compliance
 - One test -- Might what is missing make a difference in outcome?
- Things we look for:
 - Was language of certification changed?
 - Were all interrogatories answered?
 - Was all data provided (or reason given why it was not)
 - Obviously missing documents
- We can conduct compliance investigation
 - Interview person who certified substantial compliance
- Parties incentive are not to hold back material

Timing uncertainty means we must prepare to litigate as we investigate

- Must give Agency option to sue – vote not always predictable
- Antitrust investigations unique because we have no control over timing in our own investigations
 - Can be difficult
 - But may be better than imposing arbitrary limits
 - If parties think we have a case they may not push for quick decision
 - Its usually helpful for parties to give us what we ask for
 - Hire economic expert to explain case to judge
 - Prepare court papers
 - Third party affidavits
 - Memoranda

FTC has broad compulsory process tools

- Process can be directed to anyone that may have information
 - Subpoenas for documents
 - Subpoenas for testimony
 - Civil Investigative demands for information
- Second requests limited to merging parties

Transcribed Depositions of Key People is of Great Value

- Of parties:
 - Some benefits of early depositions
 - Learn parties' best arguments
 - Parties are “locked-in” to a position on merits
 - Some benefits of late depositions
 - More focused examination on issues
- Of key third parties

The kinds of information we need from third parties

- From competitors - estimates of revenues, production, capacity for market share
 - Depends upon type of market and best way to measure market power
 - » Commodities – use capacity
 - » Consumer goods – use revenues and production
- Business documents from key players
- From customers – what options in response to price increases

We should be prepared to close the investigation at any time

- Whenever we determine that the merger poses no basis for concern
 - Preserves scarce agency resources
 - Not delay or deter a pro-competitive transaction
- Our “quick look” procedure for a dispositive issue
 - Early in the investigation
 - Usually focus upon entry conditions
 - Parties have to cooperate
 - otherwise we lose valuable time not developing other aspects of the investigation
 - Not often used because it is risky for parties
 - One way is temporarily withdraw filing (delay issuance of second request)

Staffing of cases

- Complexity of investigation and workload will determine staffing
 - Attorneys
 - Economists
 - Accountants
 - Paralegals
 - Clerical
 - Experts

Use of outside experts varies with the nature of the case

- In anticipation of litigation
 - Mostly industrial organization economists
 - We generally don't use them to advise us whether to recommend a case
 - We need them to explain the case to a judge
- Occasionally other experts to help us understand an industry
 - Our early telecommunications cases
 - Health care issues

How we handle post-merger investigations

- Filing requirement not a tolerance level for anticompetitive mergers
- All process available (except second request)
- No time constraints upon us in investigation
- Parties have less incentive to cooperate
- Administrative litigation on the merits instead of preliminary injunction standard of “likelihood of success”
- We may have to prove actual effects
 - Technically not required by language of Clayton 7
 - But if much time has passed it may be necessary

Cooperation with other countries

- Many big mergers are under concurrent review in other jurisdictions
 - Very helpful to coordinate timing
 - Cooperation of merging parties important
 - » Waivers of confidentiality allow for file sharing
 - » Cooperation on remedies to ensure they are not incompatible
- Increasing “convergence” in standards for review regardless of language of statute

Some Final Thoughts

- Premerger review process as originally intended:
 - Modest informational demands
 - Seek PI if issues needed to be litigated administratively
 - Minimal showing – likelihood of success
- Premerger review process in practice
 - Costly
 - Very time consuming
 - PI litigation usually dispositive
- We don't bluff
 - We won't ask for relief unless we are prepared to litigate
 - We won't litigate unless we think we will win