



DEPARTMENT OF JUSTICE

REVIEWING MERGER ENFORCEMENT AT THE FEDERAL ANTITRUST AGENCIES

Address by

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Presented at
2003 Annual Fall Forum
ABA Section of Antitrust Law
Washington, DC

November 18, 2003

Good morning, and thank you Kevin for making it clear to everyone that I am not Tim Muris. Tim was kind enough to switch dates with me so I could testify on Wednesday before the House Judiciary Committee's telecom hearing. I also want to thank Doug Melamed and Stephen Stack for their work in putting this important conference together. I hope to make up for depriving you of the chance to hear Tim speak this morning by announcing an important joint initiative between our two agencies concerning a review of data from past merger enforcement.

Between the headquarters buildings of the Department of Justice and the Federal Trade Commission on Constitution Avenue stands the National Archives. Written in stone on that building is the phrase "What is Past is Prologue." While Tim and I are undertaking a number of new policy initiatives focusing on the future, the words that come between us also serve to remind us that studying what has occurred in the past can assist us in the future.

The Department and the Commission are forward-looking agencies. We apply the antitrust laws to an evolving economy, with a rapid pace of technological change, and a variety of forces expanding the scope of competition. But even with all the hard work both Agencies have been doing, Tim and I fear that perhaps we have not have been sufficiently *backward* looking. We realize that our past enforcement efforts should also be examined to see what, if anything, they can tell us—not only about what we have done, but also about what we should be doing.

Today I am announcing that the federal antitrust agencies jointly are conducting a review of their recent past horizontal merger enforcement efforts. The Agencies will soon release data generated through a review of those efforts taken during the past five years. The data to be released will focus on the level of the post-merger Herfindahl-Hirschman Index (HHI) of market concentration and the change in the HHI level for mergers to which the Department or the

Commission indicated opposition in a public way. For the Department, this means either that a complaint was filed or that a press release was issued indicating that the deal was abandoned or restructured as a result of our opposition.

We are aware of no past efforts by either Agency to examine how its actual enforcement compares to the HHI standards in the Horizontal Merger Guidelines. U.S. antitrust practitioners who specialize in merger work know that the Agencies' actual enforcement is accurately described by the Guidelines' statement that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." These specialists know that the Agencies base their enforcement decisions on case-by-case analysis of competitive effects and do not necessarily challenge mergers just because the merging firms have large shares of a concentrated market. But the audience for the Horizontal Merger Guidelines includes the business community and regulatory agencies both in the United States and abroad. And our merger enforcement policies should to the extent possible be transparent to this broader audience as well. Tim and I are confident that the data we release will prove highly informative to both Agencies, as well as to foreign antitrust enforcement officials, industry regulators, and antitrust practitioners—who can better counsel their clients using these data.

Both Agencies will also be examining whether, and if so what, other data might usefully be disseminated. We will be looking at what other information concerning these horizontal mergers might be released (possibly, for example, the theory of competitive harm and the number of significant and fringe competitors) as well as at what might be released on matters not pursued to enforcement by the Agencies.

The review and potential dissemination of these additional data raise many questions the

Agencies have only begun to address. First, there is no specific set of information either Agency necessarily collects in all of its investigations. The Agencies become satisfied that many of the mergers they investigate would not create or maintain market power without resolving most of the issues that have to be considered before a merger is challenged. Thus, for some matters, we will have information for such things as customer reactions, existence of so-called “hot” documents, or empirical studies. For a number of matters we may not have such information, or even perhaps reliable market shares. Whether matters where this data is missing can be helpful is something that we are examining.

A second issue is what set of mergers should be examined. Is it something like all HSR filings, in which case there would be little data on the vast majority of mergers? Is it the far smaller universe of all merger investigations opened, in which case large amounts of data still would be missing? Is it all second requests issued, which makes for a more manageable and more reliable data set than either of the previous options, but for which the data still would be incomplete? This suggests some smaller universe, but we have been unable to identify any bright line that demarcates such mergers consistently across both Agencies.

These issues are difficult, and I am not sure that additional data will be as easily developed by the Agencies or be suitable for public release. In addition, the scope and format of additional data from each agency may not be the same.

In considering these issues, however, we at the Antitrust Division have concluded that it would be helpful in a variety of ways to maintain a more comprehensive data base on our investigations. Thus, I have asked Antitrust Division staff to begin the process of determining the types of information we would ideally like to have on all horizontal merger matters we

evaluate. Then we will work to collect such information and preserve it so future retrospectives of merger enforcement can be more robust.

The Agencies anticipate an initial data release in early December. We plan to follow that up about two months later with one or more joint DOJ/FTC workshops. At these workshops, panels of practicing attorneys and economists, along with academics, will provide the Agencies with feedback on continuing issues relating to real-world implementation of the Horizontal Merger Guidelines. Among the issues that we hope to discuss are: our experience with the hypothetical monopolist test under the Guidelines, the state of the art in assessing coordinated and unilateral effects, the treatment of efficiencies, and others. These workshops will be open to the public, and their goal will be to provide the enforcement agencies with useful information and usable suggestions for how to employ the basic framework of the Guidelines to better achieve its goal of guiding intelligent enforcement of the nation's merger laws.

In short, our goal is to learn from the past to inform the future. By doing so we hope to make our merger enforcement decisions more transparent, and to give the business community, the bar, regulatory agencies, and others better information about our merger enforcement efforts. We look forward to working with many of you here today on this effort.