THE ICN RECOMMENDED PRACTICES FOR MERGER PROCESS: WHY THEY MATTER

Before the ICN Merger Notification & Procedures Workshop: Implementing the Recommended Practices

Brno, Czech Republic
March 18, 2008

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Good morning, everyone, and thank you to the Czech Office for the Protection of Competition and the Slovak Antimonopoly Office for making arrangements to host us here in Brno.

I am honored to have the opportunity to deliver this brief Welcome Address to kick off this two-day Workshop of the International Competition Network, because this Workshop – and more generally the work of the ICN in the field of merger notification and procedures – are more than just useful. They are important. And I want to take ten minutes to explain why I say that and to make sure that we proceed with a common understanding of the significance of our mission today and tomorrow.

As you all know, capital markets have become global in nature. And they play a critical role in financing the investment that allows for growth and development and prosperity in both developed and developing countries alike. Mergers play an important role as a mechanism in the world's capital markets. From the perspective of the economic system as whole, the availability of mergers encourages investment by providing entrepreneurs and investors with a means for recovering their investment and potentially earning a return. As those of you who have operated in the private sector know, the first question an investor ordinarily asks before committing substantial funds is "what's my exit strategy?" And for many classes of investment, particularly those that involve operating businesses, the answer will often be "I'll sell the business." That is, merger and acquisition activity is a key exit strategy that induces investment.

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[*] These views are those of the speaker and do not necessarily represent the position of the Federal Trade Commission or of any individual Commissioner.

This is not a novel concept. You can find an early version of it in a decision my agency issued nearly thirty years ago:[1]

> Long-term competitive considerations require preservation of ease of entry, and opportunity for businessmen to take entrepreneurial risks. The other side of that coin is a largely unarticulated policy, a clear corollary to the first, which would preserve exit opportunities where significant anticompetitive results do not occur. It is essential that the owners of very small businesses with slight competitive potential have some reasonable flexibility to sell out. This set of considerations is particularly compelling where the small acquired asset is a family-owned business which has come upon uncertain and perhaps adverse business conditions.

A similar recognition was published even earlier, in 1974, by Professor Philip Areeda, whose writings are familiar to many of you:[2]

> The retiring entrepreneur may lack confidence in his successors or may prefer the security of portfolio diversification. Or a firm may be impelled toward merger by the fact or fear of relative decline. The actual or prospective difficulties might be in management, research, marketing, capital, labor, or anything else that affects a firm's fortune. Sale of the [a] company as a going business may cause minimum disruption to owners, managers, suppliers, customers, employees, and communities. To facilitate exit when it is desired may indeed facilitate entry. The likelihood of exit with minimum loss

efficiency-enhancing exchanges. When we think about our work as merger enforcers, we commonly think about our benefits to consumer welfare by protecting against adverse competitive effects. But we also need to think about the harm that we can inadvertently cause to consumer welfare through money costs and delay – for example, the uncertainty and consternation among customers and employees and communities as they wait to see how the businesses will be integrated and how they will be affected; the erosion in the business while the merger is pending, due in large part to that uncertainty and consternation; the deferral in the realization of merger efficiencies; and the out-of-pocket expenditures for law firms and copy vendors and other third parties who have to be hired to deal with us.

This might not be such a concern if a large fraction of transactions warranted intervention by competition authorities, but we know from empirical experience that that is *not* the case. Taken collectively, the merger review regimes of agencies represented in this room this morning directly affect literally thousands of transactions every year. The vast majority of those transactions do not raise competitive concerns. The statistics have been fairly consistent. More than 95% of transactions are cleared without need for detailed review. More than 98% are eventually cleared without need for remedy. For even the largest and most active jurisdictions, the number of transactions that require close examination each year can be measured in only the dozens. And for those transactions that do raise concern, only a handful will require detailed review or intervention by more than one or two jurisdictions.

By contrast, of the thousands of transactions that are not problematic, many will be procompetitive and efficiency-enhancing. And critically, as I observed in beginning these remarks, even for those transactions that do not ultimately prove to have generated significant deal-specific efficiencies, the mere *availability* of merger opportunities in a fluid capital market has substantial long-term systemic efficiencies.

There is a further complication we need to bear in mind as we craft merger review practices. More than ninety jurisdictions

would be when an agency conducts an unnecessarily lengthy or costly review and, in the process, adversely affects not only companies or citizens in its own jurisdiction, but also persons in other jurisdictions as well.[5]

As a practical matter, my experience is that the negative externalities outweigh the positives. This is partly because the number of innocuous transactions, which are adversely affected by negative externalities, substantially outweighs the number of problematic transactions, for which positive externalities might be relevant. I gave the numbers a minute ago. But it is also because for most transactions that present positive externalities, interventions tend quickly to become redundant. If there are positive externalities, a handful of interventions will usually be adequate to provide all the needed protection, and further interventions do not add much. By contrast, the negative externalities simply cumulate.

This brings me back to the purposes of this Workshop. In light of the concerns I have expressed this morning, what can we productively be doing to assure that the transactions costs imposed by merger authorities do not inadvertently distort the capital markets? This Workshop's organizers provide a road map with concrete steps.

First, enforcement agencies can limit our merger review activities to transactions that have a substantial nexus with our respective jurisdictions. This is the focus of the next panel, which examines questions of nexus and thresholds – and through the thresholds, questions of substantiality and materiality.

Second, where we do assert authority to review a transaction, enforcement agencies can limit the cost and delay by minimizing the information we require to conduct the review. This is the
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It has been my honor to appear before you this morning. Thank you for taking several days out of your schedules to travel from your homes and to attend this Workshop. Your work here really matters.