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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM THE DOMINANCE TEST TO THE SLC/SIEC TEST

-- United States --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSI under item III of the agenda at its forthcoming meeting on 9 June 2009.

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1. In the United States, mergers have been challenged under two laws. Section 7 of the Clayton Act of 1914, described in detail below, specifically addresses anticompetitive acquisitions and has long been the primary basis for merger challenges. Section 1 of the Sherman Act of 1890 prohibits certain agreements and also can be used to challenge mergers. We address Section 1 as part of a discussion of changes to the U.S. substantive merger standard over time, later in this submission.

1. The substantive merger standard in the United States

2. Section 7 of the Clayton Act currently provides that:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[1]

3. Section 7 was intended to serve as "an effective tool for preventing" anticompetitive mergers.[2] The federal agencies that share merger enforcement responsibilities—the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively referred to as the Agencies)—believe that Section 7 can and does serve as intended. Section 7 covers "the entire range of corporate amalgamations"[3] as well as all anticompetitive effects flowing from them.

4. The substantial lessening of competition (SLC) standard in Section 7 prohibits mergers and acquisition reasonably likely to produce significant anticompetitive effects.[4] All mergers and acquisitions are "tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."[5] "Merger enforcement, like other areas of antitrust, is directed at market power."[6] "The lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power . . . ."[7]

5. "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need prove only that its effect 'may be substantially to lessen competition.'"[8] "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected

market. All that is necessary is that the merger create an appreciable danger of such consequence in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for."[9] The words "may be" indicate that Section 7 is concerned with "probabilities," not with "certainties" nor with mere "ephemeral possibilities."[10]

6. In challenging an acquisition, the Agencies (or other plaintiff) must identify "some mechanism by which the challenged acquisition causes anticompetitive effects."[11] The linchpin of that mechanism normally is the change in control over the operation of the acquired assets or company, but Section 7 also reaches anticompetitive effects that do not result from a change in control.[12] Such an effect can arise if one competitor acquires stock in another, causing the first competitor to share in the profits of the second.

2. Overview of merger assessment in the United States

7. The Agencies' general approach to assessing horizontal mergers—those that eliminate direct competition between the merging firms—is set out in the *Horizontal Merger Guidelines* (Guidelines)[13] and the *Commentary on the Horizontal Merger Guidelines* (Commentary) issued in 2006.[14] The Commentary explains that: "The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power."[15] Consequently, "the Agencies focus their horizontal merger analysis on whether the transactions under review are likely to create or enhance market power."[16] "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."[17]

8. The Commentary observes that the "Guidelines' five-part organizational structure has become deeply embedded in mainstream merger analysis. These parts are: (1) market definition and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failing and exiting assets."[18] The Commentary also explains that the Agencies "do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets."[19] Rather, they take "an integrated approach to merger review" that may not follow the "ordering of these elements in the Guidelines."[20]

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9 *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1389 (7th Cir. 1986) (citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963) (holding that Section 7 calls for "a prediction of [a merger's] impact upon competitive conditions in the future")).

10 *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

11 *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

12 *See Denver & Rio Grande Western Railroad Co. v. United States*, 387 U.S. 485, 501 (1967) ("A company need not acquire control of another company in order to violate the Clayton Act.").

13 The Guidelines are available on the Agencies' websites at http://www.usdoj.gov/atr/guidelines/hmg.pdf and http://www.ftc.gov/bc/docs/hmg080617.pdf.

14 The Commentary is available on the Agencies' websites at http://www.usdoj.gov/atr/guidelines/215247.pdf and http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

15 *Commentary on the Horizontal Merger Guidelines* at 1.

16 *Id.*

17 Horizontal Merger Guidelines § 0.1.

18 *Commentary on the Horizontal Merger Guidelines* at 2.

19 *Id.*

20 *Id.*

Using numerous illustrations from actual investigations, the Commentary illustrates how the Guidelines' integrated process is "a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." At the center of the Agencies' application of the Guidelines, therefore, is competitive effects analysis. That inquiry directly addresses the key question that the Agencies must answer: Is the merger under review likely substantially to lessen competition? To this end, the Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation.

The Guidelines identify two broad analytical frameworks for assessing whether a merger between competing firms may substantially lessen competition. These frameworks require that the Agencies ask whether the merger may increase market power by facilitating coordinated

11. For quite some time, it was understood that the substantive standards for mergers were materially different under Section 1 of the Sherman Act and Section 7 of the Clayton Act. Section 7 was originally