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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by the United States --

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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

3. Consideration of Non-Competition Factors in the Review of Mergers

5. Competition through free enterprise and open markets is the organizing principle for the U.S. economy. Other than in the few cases of true natural monopolies, competition among firms is the best vehicle to achieve optimum prices, quantity, and quality of goods and services for consumers. The antitrust laws seek “to maximize consumer welfare by encouraging firms to behave competitively.”⁸ U.S. courts have expressed that there is a public interest in enforcement of the antitrust laws⁹ and that public equity outweighs private equities.¹⁰

6. Section 7’s explicit and single-minded focus on competition is critical. The Supreme Court observed that the law was designed for “the protection of *competition*, not *competitors*” and reflects “the desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”¹¹ Also critical is the insight that focusing on competition implies focusing on market power.

7. The Agencies do not consider non-competition factors in their antitrust analysis. The Agencies have learned that, while such considerations “may be appropriate policy objectives and worthy goals overall ... integrating their consideration into a competition analysis ... can lead to poor outcomes to the detriment of both businesses and consumers.”¹² Instead, the Agencies focus on ensuring competition that benefits consumers,¹³ and they leave other policies to other parts of government that may be specifically charged with or better placed to consider such objectives.

⁶ *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* 511 (2000)).

⁷ *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

⁸ Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶100a at 4 (2000). *See also FTC v. Univ. Health*, 938 F.2d 1206, 1225 (11th Cir. 1991) (antitrust laws “are intended to safeguard competition, and, hence, consumers,” so denying the injunction “would frustrate the FTC’s ability to protect the public from anticompetitive behavior”).

⁹ *See, e.g., Swedish Match*, 131 F. Supp. 2d at 173 (D.D.C. 2000) (“There is a strong public interest in effective enforcement of the antitrust laws.”); *U.S. v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) (“By enacting Section 7, Congress declN

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Similarly, economics literature published during the 1960s began to focus on balancing cost savings from merger efficiencies with consumer harm from possible merger-related price increases.²³

11. By the 1970s, those principles gained judicial approval in the U.S. Supreme Court, as reflected in cases such as *Continental T.V., Inc. v. GTE Sylvania Inc.*,²⁴ *Nat'l Soc'y of Prof. Engineers v. United States*,²⁵ and *Nat'l Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla.*²⁶ The Agencies have incorporated this learning and these judicial interpretations into their analysis of mergers and conduct, precluding the consideration of non-competition factors in their analysis and decisions.

5. Public Interest Standard in the Review of Mergers by Other Regulatory Agencies

12. Certain mergers may also be subject to a separate review by a specialized regulatory agency; that agency may be charged with applying different standards, which may include a broader public interest in addition to competition goals. For example, the Federal Communications Commission (FCC) employs a “public interest, convenience, and necessity” standard in the review of transactions involving licenses and authorizations in the telecommunications sector.²⁷ In cases of concurrent review of telecommunications mergers, the DOJ and FCC work in close cooperation, consulting extensively to coordinate their reviews and to create remedies that are both consistent and comprehensive.

13. As part of a process separate and apart from the Agencies' review of mergers, acquisitions of U.S. businesses by foreign persons that may affect national security may be reviewed by the Committee on Foreign Investment in the United States (CFIUS), an inter

CFIUS has the power to review transactions regardless of whether they are notified. If a transaction raises national security concerns, CFIUS can apply mitigation measures or recommend that the President block or suspend the transaction.

14. As discussed, however, public interest considerations other than the public interest in enforcement of the antitrust laws play no role in the Agencies' review of mergers, and no other agency or government body is responsible for reviewing the Agencies' actions from a public interest perspective.