

ANTITRUST ISSUES IMPACT MERGERS, ACQUISITIONS, AND JOINT VENTURES

Is bigger better? Before ruling on mergers, acquisitions, and joint ventures, authorities apply the antitrust *rule of reason*. Under this rule, a transaction is deemed unlawful only if it may have an unreasonable impact on competition within a defined *relevant market*. What is this rule of reason? And what constitutes a relevant market? Who can bring suit under antitrust laws, and who has jurisdiction? Here's what you need to know.

Jurisdiction

Federal antitrust statutes can be enforced by either the Department of Justice (DOJ) or the Federal Trade Commission (FTC), while attorneys general enforce state statutes. In some cases, a private plaintiff can bring suit for an injunction, damages, and attorney fees.

Affected Market

A relevant market is defined as the competitive products that are reasonably interchangeable with the product in question, within the geographic area where customers will purchase those products. Agencies look at whether a merged company would have the ability to raise prices.

Objective Guidelines

To provide some guidance, the Justice Department and FTC have issued Merger Guidelines that use the Herfindahl-Hirshman Index, or HHI. This index applies a mathematical formula to calculate the concentration in a market before and after a merger. The HHI is computed by adding the squares of all market shares of companies within the market. For example, a market with 10 equal-sized competitors would have an HHI of 1000 ($100 \times 10 = 1000$).

Normally, agencies challenge a merger only if the post-merger HHI will exceed 1,800. However, even with a high HHI, any efficiencies that may result from the proposed merger will also be taken under consideration, and authorities may also allow a merger if one of the parties has a negative cash flow and would otherwise exit the market.

Joint Ventures

Joint ventures are viewed as partial mergers and judged under similar antitrust criteria. A joint venture that does not legitimately pool assets or risks, or one that involves agreements or information exchanges that are outside the scope of the joint venture, may be viewed as a *per se* unlawful conspiracy to fix prices or allocate markets.

Notification and Filing

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires parties that propose to acquire or sell assets of voting securities to make comprehensive filings with both the FTC and DOJ, and to observe a waiting period before closing the transaction. If the transaction involves less than \$50 million in consideration, no filing is required. But, for amounts greater than that, the HSR Act requires pre-notification, filing, and a specific waiting period before the transaction is closed. Depending on the value of the transaction, 2004 filing fees range from \$45,000 to \$280,000. Beginning with fiscal year 2005, filing fees will be adjusted annually, based on the previous year's Gross National Product.

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