

DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION: PRESERVING COMPETITION IN THE DEFENSE INDUSTRY

Tuesday, April 12

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) (“the Agencies”) are issuing this joint statement to explain our standard of review under the antitrust statutes of proposed transactions within the defense industry. The Agencies are responsible for reviewing mergers in the defense industry under Section 7 of the Clayton Act, which prohibits mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” The Department of Defense (DoD) is responsible for ensuring our nation’s security and is in a unique position to assess the impact of potential defense industry consolidation on its ability to fulfill its mission. The Agencies rely on DoD’s expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint business arrangements between firms in the defense industry. When assessing proposed consolidation in this sector, the overriding goal of the Agencies in enforcing the antitrust laws is to maintain competition going forward for the products and services purchased by DoD. Competition ensures that DoD has a variety of sourcing alternatives and the most innovative technology to protect American soldiers, sailors, marines, and air crews, all at the lowest cost for the American taxpayer.

The Agencies analyze mergers pursuant to the analytical framework set forth in the DOJ/FTC 2010 Horizontal Merger Guidelines. The unifying theme of the Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. A merger can produce these harmful outcomes if it is likely to enhance the ability of one or more firms to raise price, lower output, reduce innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. The Guidelines “reflect the congressional intent [in Section 7 of the Clayton Act] that merger enforcement should interdict competitive problems in their incipiency and that certainty about the anticompetitive effect is seldom possible and not required for a merger to be illegal.”

The Guidelines are necessarily general, as they apply to all industries. They are also sufficiently flexible to address DoD concerns that reductions in current or future competitors can adversely affect competition in the defense industry and thus, national security. The Agencies also consider particular aspects of the defense industry, such as high barriers to entry, the importance of investment in research and development (R&D), and the need for surge capacity, a skilled workforce, and robust subcontractor base. In light of our substantial experience applying the Guidelines to defense industry mergers and acquisitions, the Agencies are able to focus on issues that are central to, and often dispositive in, assessing the competitive effects of such mergers.

In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security and that a sufficient number of competitors, including both prime and subcontractors, remain to ensure that current, planned, and future procurement competition is robust. Many sectors of the defense industry are already highly concentrated. Others appear to be on a similar trajectory. In those markets, the Clayton Act's incipiency standard is a particularly important aspect of the Agencies' analysis.

As part of an investigation, the Agencies will consider any procompetitive aspects of a proposed transaction, including economies of scale, decreased production costs, and enhanced R&D capabilities. However, if a transaction threatens to harm innovation, reduce the number of competitive options needed by DoD, or otherwise lessen competition, and therefore has the potential to adversely affect our national security, the Agencies will not hesitate to take appropriate enforcement action, including a suit to block the transaction. As the 1994 Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation report states, "the antitrust agencies should continue to determine the ultimate question of whether a merger of defense contractors should be challenged on the ground that it violates the antitrust laws." The Agencies are committed to "giving DoD's assessment substantial weight in areas where DoD has special expertise and information, such as national security issues."

Our mission when reviewing defense industry mergers is to ensure that our military continues to receive the most effective and innovative products at competitive prices over both the short- and long-term, thereby protecting both our troops and our nation's taxpayers.