



**International  
Competition  
Network**

# **Planning & Conducting Merger Investigations**

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**A merger filing arrives on your desk.**



**What do you do now?**

# Steps in Conducting an Investigation

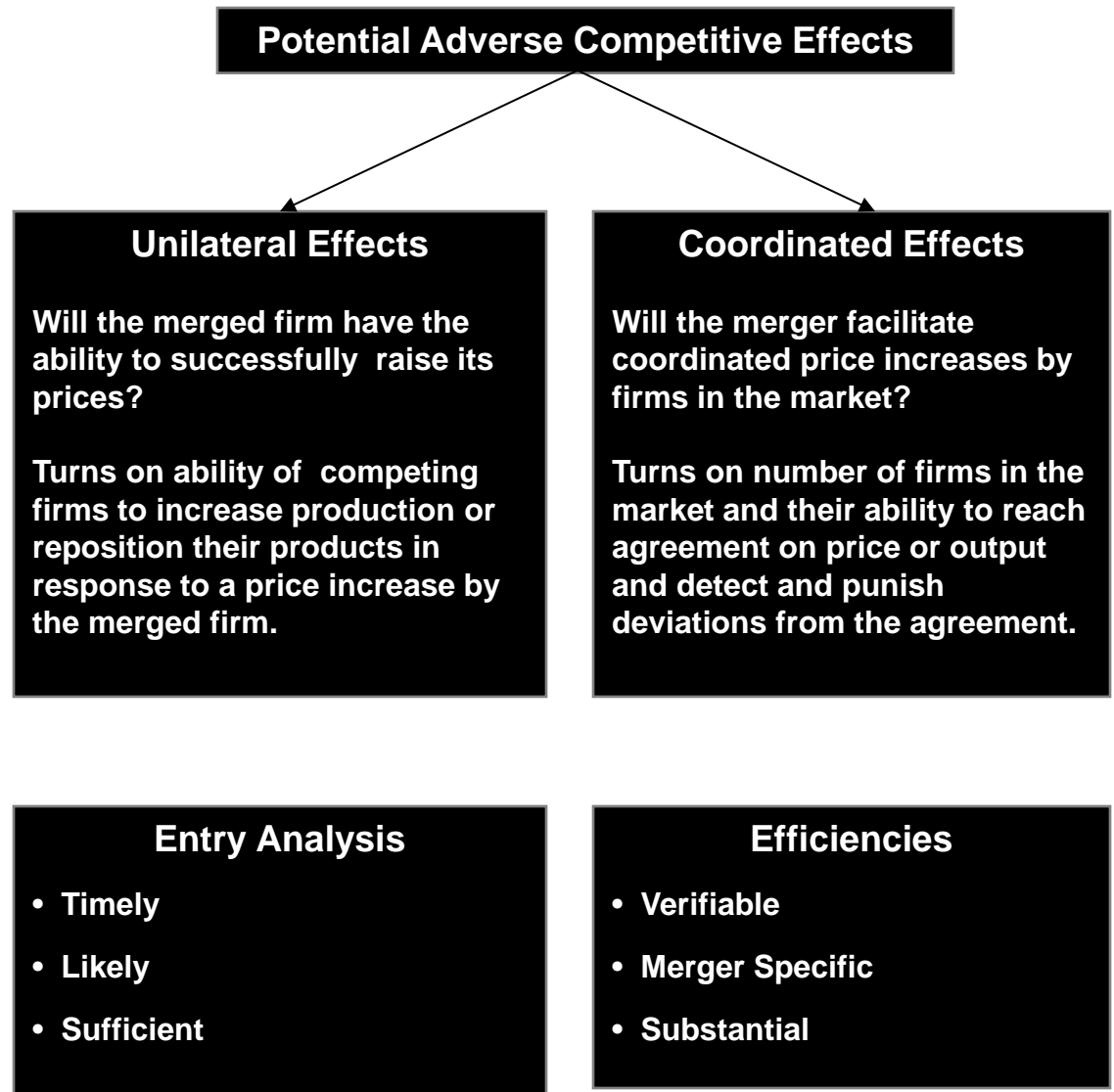
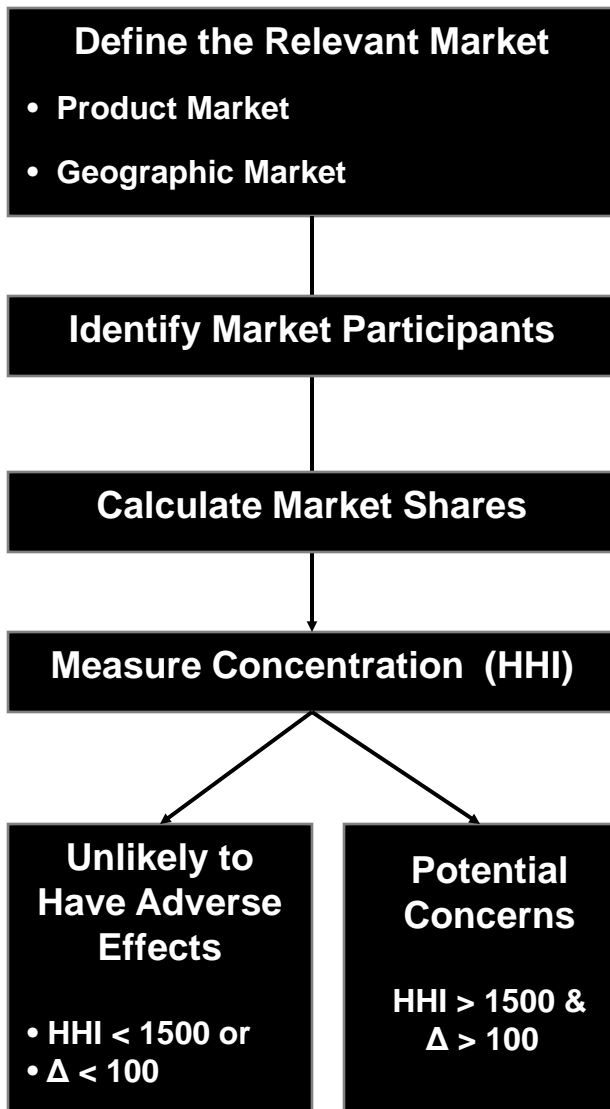
1. Develop a theory (or theories) of the case.
2. Identify sources of information.
3. Interview witnesses.
4. Request documents and data.
5. Organize and assess the evidence.
6. Determine if the merger violates the law.

# Step 1

## Develop a Theory of the Case

- Review the merger filing & public information.
- Identify possible theories of violation.
- List elements of proof for each theory of violation.
- Identify possible economic harm to competition.
- Consider possible justifications & defenses.
- Think about possible remedies.
- Prepare a written investigative plan.

# FTC-DOJ 2010 Merger Guidelines



# Merger Analysis

## Elements of Proof

## Facts

- |                                      |     |
|--------------------------------------|-----|
| 1. Market Definition & Concentration | ??? |
| 2. Competitive Effects               | ??? |
| 3. Entry Analysis                    | ??? |
| 4. Potential Efficiencies & Defenses | ??? |

## Step 2

# Identify Sources of Information

- Witnesses
- Documents & Data
- Government Sources
- Public Sources
- Related Investigations
- International Cooperation Agreements
- Others?

# Step 3

## Interview Witnesses

- To learn facts needed to prove or disprove the elements of the legal theory under investigation.
- To get information needed to understand the industry under investigation and the likely competitive effects of the merger.



# Types of Witnesses to Interview

- Complainants
- Competitors
- Customers
- Suppliers, Distributors, Retailers
- Government Agencies
- Business/Trade Organizations
- Industry Experts, Analysts, Academics
- The Merging Parties

# Step 4

## Request Documents & Data

- To learn facts needed to prove or disprove the elements of the legal theory under investigation.
- **Methods for Getting Documents & Data**
  - Voluntary requests
    - Letters, telephone interviews
  - Compulsory requests
    - Second Requests, Subpoenas, CIDs

# Sources of Documents

- Complainant
- Competitors
- Customers
- Suppliers, Distributors, Retailers
- Government Agencies
- Business/Trade Organizations
- Industry Experts, Analysts, Academics
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# Types of Document to Request

- The merger contract or agreement.
- Company formation documents.
- Company organizational charts.
- Company financial reports.
- Business, marketing, and strategic plans.
- Customer, supplier, and competitor lists.
- Sales, pricing, and production data.
- Meeting records and merger presentations.

# Reviewing Documents

- Check for completeness and compliance.
- Review for:
  - Facts that prove or disprove the theory of the case.
  - Background information about the industry, companies, competitors, and customers.
  - Things that are not clear and require follow-up questioning of a witness.
  - Other potential sources of relevant information.
- Organize documents by element of proof, date, witness.

## Step 5

# Organize and Assess the Evidence

- Organize the investigative files:
  - Correspondence
  - Documents & data
  - Interview reports
  - Witness files
  - Memoranda and legal research
- Prepare a proof checklist.

# Assessing the Evidence

- Is there evidence for each element of proof?
- Is the evidence legally sufficient?
  - Meets the rules of evidence or standards of the decision-making authority
- How strong is the evidence?
  - Credibility of the witnesses
  - Consistency & completeness
- The investigation should continue until there is sufficient evidence to confidently support or reject the theory of the case – while also meeting legally required time frames.

# Proof Checklist For Mergers

ELEMENT	EVIDENCE	SOURCE
<b>1. Relevant Market &amp; Concentration</b>		
<b>2. Competitive Effects</b>		
<b>3. Entry Analysis</b>		
<b>4. Potential Justifications</b>		



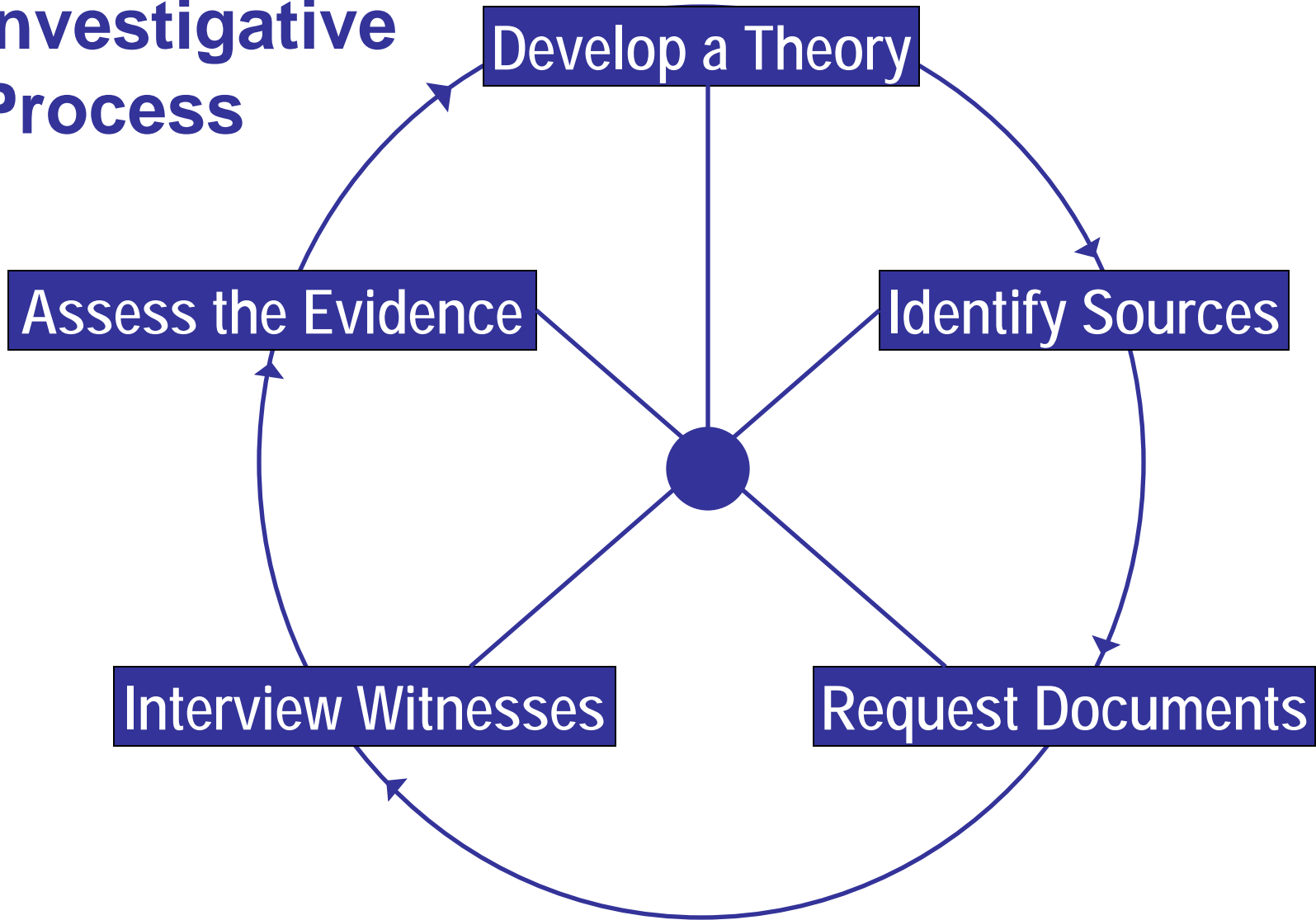
# Step 6

## Determine Whether there Is a Violation of Law

Does the “story” of the case satisfy the following:

- It’s about people who have reasons for how they act.
- It consists of evidence that is legally sufficient, told by credible witnesses, and supported by the documents & data.
- It includes all the elements of proof of a law violation.
- It makes economic sense and common sense.

# The Investigative Process



# Additional Resources

## **ICN Investigative Techniques Handbook for Merger Review:**

[www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf)

## **ICN Training-on-Demand Videos:**

### **Module IV-1: Merger Investigations**

<http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/mergerinvestigation.aspx>

### **Module VI-1: Planning and Conducting Investigations**

<http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/plan.aspx>

### **Module VI-2: Interviewing Witnesses**

<http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/interviews.aspx>