United States of America

Federal Trade Commission

There’s Nothing New Under the Sun: Reviewing Our History to Foresee the Future

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Keynote Address at GCR Live *Merger Control*

Virtually and Brussels, Belgium

October 7, 2021

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Thomas J. Klotz for his assistance in the preparation of these remarks.

Let me begin by thanking GCR and Ilene Gotts for inviting me to participate at this event again this year. Last year, I spoke about the preceding three years of merger policy and enforcement during the Trump administration, believing it would provide a useful perspective on merger enforcement for the next four years. (Boy, was I wrong, but Ilene was gracious enough to invite me back anyway.) I continue to think the past is prologue, so I will look in the rearview mirror again today to predict the future of antitrust. But this time, I believe it may be necessary to look back 40 years rather than three or four to evaluate the near-term future of merger policy and enforcement.

Before I launch into substance, let me give the standard disclaimer: The views I express are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Today I will look at recent procedural and substantive changes at the FTC. First, I will discuss changes at the FTC that affect merger review pursuant to the HSR Act. Second, I will describe conceivable shifts in substantive merger policy. To evaluate those potential changes, I will apply a historical lens.

I. Recent Shifts in the Process of Merger Review

Last year at this event, I discussed the Commission's response to the COVID-19 pandemic. I proudly spoke of our FTC staff, who transitioned to telework essentially overnight. To their credit, investigations continued apace. The conditions created by the pandemic did not alter the Commission's ability to investigate, and if necessary to challenge, mergers.

I also explained that telework caused us to move to an electronic filing system for HSR premerger filings. During a two-week transition period, the FTC suspended grants of early terminations of the HSR 30-day waiting period.[1] Soon after, normal grants of ET were back.

The process changes I discussed last year were prompted by a once-in-a-century pandemic. To my knowledge, they did not substantively impact merger outcomes. This year, in contrast, the new FTC majority has introduced changes to the merger review process that *will* affect merger outcomes.

In February, the Agencies announced a "temporary" and "brief" suspension of grants of early termination.[2] Eight months later, we still don't know when this unprecedented suspension will end.[3]

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[1] Press Release, Premerger Notification Office Implements Temporary e-Filing System, Mar. 13, 2020, https://www.ftc.gov/news-events/press-releases/2020/03/premerger-notification-office-implements-temporary-efiling ("While this temporary system is in place, early termination will not be granted for any filing.").

[2] Press Release, Fed. Trade Comm'n, FTC, DOJ Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[3] Noah J. Phillips & Christine S. Wilson, Comm'rs, Fed Trade Comm'n, Statement Regarding the Commission's Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

In May, the Commission ignored a negotiated timing agreement after the parties voluntarily extended it several times.[4] In that matter,[5] all Commissioners had reason to believe the deal violated the law, but no consent was accepted until several weeks after the parties closed their transaction.[6]

The Commission is now ignoring HSR timing obligations in another way. In August, the Commission began sending letters to merging parties upon expiration of their HSR statutory waiting periods. These letters state that the parties' transactions remain under investigation and warn them that consummation occurs at the parties' own risk.[7] By ignoring negotiated timing agreements and failing to fish or cut bait by the end of the statutory waiting period, the Commission is building a pattern of flouting the timing requirements dictated by the HSR Act.

In July, the Commission rescinded a 1995 policy statement on prior notice and prior approval that limited the circumstances in which these provisions would be imposed.[8]

Prior notice and prior approval provisions require parties to notify the agency of future transactions, even when those transactions fall below HSR filing thresholds. Thus, these obligations expand the boundaries of the premerger notification process. Prior approval provisions shift the burden of proof to the parties to establish that future transactions are not anticompetitive, flipping the burden of proof that the agency would otherwise bear.

The Commission has always had the authority to use these provisions, and courts have approved their use as fencing-in relief.[9] The FTC has employed these tools pursuant to the 1995 Policy Statement when there was a credible risk that the parties would attempt the same transaction or engage in an unreportable anticompetitive transaction. In contrast, the new FTC majority envisions using them frequently and punitively to increase the cost of future deals. In a September blog post, the Bureau of Competition indicated that it plans to require prior approval provisions "if there are circumstances that justify an even broader prior approval requirement that goes beyond the overlapping product and geographic markets – such as proposing a merger

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[4] *See* 7-Eleven, Inc. Response to FTC Commissioner Statement (May 14, 2021), https://corp.7-eleven.com/corp-press-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement.

[5] Seven & i Holdings Co., Ltd, FTC File No. 201-0108.

[6] *See* Statement of Comm'rs Noah Joshua Phillips and Christine S. Wilson, *In re Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation*, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf; Seven & i Holdings Co., Ltd, FTC File No. 201-0108 (June 25, 2021) (agreement containing consent orders), https://www.ftc.gov/system/files/documents/cases/2010108c4748sevenmarathonacco.pdf.

[7] *See* Holly Vedova, Adjusting merger review to deal with the surge in merger filings, Competition Matters blog (Aug. 3, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[8] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Oral Remarks at the Open Commission Meeting (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[9] *See* Abex Corp. v. FTC, 420 F.2d 928 (6th Cir. 1970), cert. denied, 400 U.S. 865 (1970)); Jacob Siegel Co. v. FTC, 327 U.S. 608, 611, 613 (1946); The Coca-Cola Co., 117 F.T.C. 795, 965-67 (1994); Warner Communications, Inc., 105 F.T.C. 342, 343 (1985); Louisiana-Pacific Corp., 112 F.T.C. 547, 566 (1989).

in geographic and product markets that are already highly concentrated."[10] This approach seems particularly inappropriate when the Commission has created such uncertainty about the standards it will use to assess the legality of both horizontal and vertical mergers.

Cumulatively, these process changes will affect substantive outcomes for many mergers. Longer waiting periods and broader second requests increase the cost of the pre-merger notification process. Pre-consummation warning letters increase uncertainty and deny parties the benefit of repose, further increasing deal cost. These costs of uncertainty are not theoretical – press reports indicate that parties are now negotiating to allocate the risk of uncertainty imposed by these *in terrorem* letters.[11] To put it bluntly, because antitrust review under the HSR Act occurs before deals are consummated, the FTC can kill deals by extending the timeframe for review, inflating the cost of review, and injecting substantial deal uncertainty even after statutory waiting periods expire. These added costs almost certainly will have the effect of chilling merger activity at the margin.

Demands for prior approval or prior notice provisions in Commission orders will similarly affect deal outcomes. In fact, when the 1995 Policy Statement was withdrawn, the press release explicitly acknowledged the chilling effect of these provisions.[12]

If parties view the cost of agreeing to these provisions as high, because future transactions will be made significantly more difficult, they may refuse to negotiate consent agreements. Some companies may choose to litigate rather than agree to these provisions.[13] Other merging parties may adopt fix-it-first solutions, structuring proposed transactions to exclude markets that may raise questions for antitrust authorities.[14] And still other companies will decline to proceed with possible deals, precisely as planned by the majority.

In short, the numerous changes in the FTC's merger review process – even if not matched by the Department of Justice – will affect business decisions. Inevitably, these process changes will impact not just harmful deals, but beneficial ones as well. Of course, it is not clear to me that the current FTC majority views *any* deals as beneficial. But I believe a premise that M&A activity tends to be anticompetitive is flawed. Indeed, as the Department of Justice recognizes, "most mergers are not anticompetitive and may benefit consumers."[15] Under merger review

[10] *See* Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, Competition Matters blog (Sept. 21, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive.

[11] *See* Bryan Koenig, *Merging Cos. Incorporating FTC's 'At Own Risk' Warnings*, Law360 (Sept. 14, 2021, 7:44 PM EDT), https://www.law360.com/articles/1419392/merging-cos-incorporating-ftc-s-at-own-risk-warnings.

[12] *See* FTC News Release, *FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers* (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

[13] *See* Wilson, *supra* note 8 (describing FTC's nine-year litigation with Coca-Cola over prior approval provision).

[14] In some circumstances, the FTC disfavors such actions. For instance, if parties sell particular assets before submitting their pre-merger notification, the Commission is unable to ensure that the assets are divested to a buyer that would ensure competition is maintained in the market.

[15] U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL, 1 (Sept. 2020).

standards applied by both Democrat and Republican administrations over time, roughly 95 percent of deals have been viewed as benign or beneficial.[16]

I will close this section with one final prediction about the impact of the process changes. Historically, merging parties have been best served by a cooperative, interactive approach during the HSR review process. This approach typically involves granting timing agreements, doing rolling productions, and submitting white papers. Given the strong anti-merger rhetoric of some of my colleagues on the Commission, together with the procedural changes I have described, I anticipate that parties rationally will choose to shift away from this historical approach. I am already seeing signs that merger review is becoming less of an interactive regulatory process and more of a hard-nosed litigation process. I expect that more merging parties will keep us on the statutory clock and will save their arguments for trial. Frankly, I can't say that I blame them.

Because of this shift, I also believe we will see more litigators and fewer regulatory lawyers appearing before the Commission. I understand the reluctance of repeat players before the agency to speak out about the realities of the merger review process at the FTC these days. But if they do not speak out, they may soon become obsolete.

II. Anticipated Shifts in Substantive Merger Review Standards

By word and deed, the new majority at the FTC has created significant uncertainty regarding the substantive standards that will govern merger analysis. The Commission withdrew the 2020 Vertical Merger Guidelines, leaving a vacuum regarding its enforcement intentions.[17] The DOJ announced that those guidelines "remain in place" at the Department of Justice, but identified topics in the Guidelines on which it plans to seek public comment. [18] Following President Biden's Executive Order on Competition,[19] Chair Khan and Acting Assistant Attorney General Richard Powers announced their intention to take a "hard look" at the guidelines to determine whether they are "overly permissive."[20] The 2010 Horizontal Merger Guidelines

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[16] Over the ten-year period from 2010-2019, Second Requests were issued in 2.2%-3.9% of reportable transactions per year. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019 at 6 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureaucompetition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf

[17] *See* Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca; Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

[18] *See* Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[19] *See* Executive Order on Promoting Competition in the American Economy, §5 (c) (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[20] Lina M. Khan & Richard A. Powers, Chair, Fed. Trade Comm'n & Acting Ass't Atty. Gen'l, U.S. Dep't of Justice Antitrust Div., Statement on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

remain in place, but for how long? I also suspect that the analysis they describe may be incomplete under the current regime.

Contrary to good government principles, there is little guidance regarding the standards that will be applied at the FTC going forward.[21] One important guidepost may have been offered by Tim Wu, who serves on the National Economic Council, advising on competition policy. Mr. Wu has described modern antitrust as a "failed" 40-year experiment.[22] What if we take the new administration at its word, and assume that it plans to turn back the antitrust clock four decades? Considering the state of merger analysis from that era may shed light on their intentions.

Let's consider five areas in which there may be an imminent change in substantive merger policy.

A. Concentration Thresholds and Presumptions

The first potential shift concerns presumptions and concentration thresholds. Many progressives, including Chair Khan's former colleagues, urge a return to the 1968 Department of Justice Merger Guidelines. For instance, during the Commission's Hearings on Antitrust and Consumer Protection in the 21st Century, the Open Markets Institute told the FTC, "The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal."[23]

The 1968 Guidelines stated that "[m]arket structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market."[24] Notably, the 1968 Guidelines did not speak of collusion, coordinated interaction, or oligopoly.[25] "They did not insist on a high degree of

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[21] To date, there does not appear to be a similar level of uncertainty regarding merger enforcement at the Department of Justice.

[22] *See* Matthew Perlman, White House Advisor Touts 'Revitalization of Antitrust,' Law360 (September 30, 2021, 7:04 PM EDT), https://www.law360.com/competition/articles/1426882/white-house-adviser-touts-revitalization-of-antitrust-?nl_pk=48735b94-4403-42a1-962d-46d88ef87101&utm_source=newsletter&utm_medium=email&utm_campaign=competition. *See also* President Joe Biden, Remarks at Signing of Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/ ("We're now 40 years into the experiment of letting giant corporations accumulate more and more power.").

[23] Open Markets Institute, The Failure and Potential Redemption of Federal Merger Policy at 2, Comments Submitted to the U.S. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century, Comment #FTC-2018-0053-D-0021 (filed Aug. 20, 2018). *See also* Sandeep Vaheesan, Two-and-a-Half Cheers for 1960s Merger Policy (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/; Peter C. Carstensen, 53 Rev. Indus. Org. 477 (2018).

[24] U.S. DEP'T OF JUST., 1968 MERGER GUIDELINES § 2, https://www.justice.gov/archives/atr/1968-merger-guidelines.

[25] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 901d (5th ed. 2021).

specification of the possible modes of anticompetitive behavior but only on a showing of a structure that was deemed to be anticompetitive in and of itself."[26]

The FTC majority appeared to echo this perspective when withdrawing the Vertical Merger Guidelines. They appeared dismissive of case-by-case and fact-specific analysis. Instead, they endorsed greater reliance on the use of presumptions in merger analysis, downplaying the importance of predicting which specific mechanisms may lead to a lessening of competition. [27]

The majority's endorsement of presumptions is a significant departure from recent Commission practice. As a screening device, agency staff certainly give some weight to presumptions in merger analysis. Moreover, complaints in merger challenges routinely cite *Philadelphia National Bank*[28] to gain a litigation advantage. But the analysis does not end with the presumption. Instead, the Commission's analysis is rigorous, fact-intensive, and based in sound economics that explains the specific mechanisms that may lead to a lessening of competition.

Indeed, the Commission's approach to presumptions is important. Economic research in the 1970s and 1980s led to the rejection of the Structure-Conduct-Performance paradigm. That research revealed that accounting rates of return did not provide reliable support for claims that profits were higher in concentrated industries than in unconcentrated industries.[29] It also demonstrated that if a correlation between concentrated markets and higher returns can be found, it is driven at least partially by returns that reflect firms' efficiency. Research demonstrated that firms were winning competitive battles and achieving large shares because they were more efficient than other firms. Efficient firms grew and earned higher profits, whereas less efficient firms earned lower profits and perhaps dropped out of the market.[30] And firms with larger market shares often benefitted from economies of scale.[31]

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[26] *Id.*

[27] *See* Khan, Chopra, & Slaughter, Statement on the Withdrawal of the Vertical Merger Guidelines, *supra* note 17 (Commenters suggested numerous candidate screens that pick out mergers deserving of additional focus – or a presumption of illegality – based on a variety of market characteristics. In reviewing our approach to merger analysis, we will seek to identify objective factors that presumptively indicate that a merger is likely to reduce competition.).

[28] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[29] *See* Harold Demsetz, *Accounting for Advertising as a Barrier to Entry*, 52 J. BUS. 345, 355–56 (1979); Franklin M. Fisher & John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 Am. Econ. Rev. 82, 89–91 (1983).

[30] *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & Econ. 1 (1973); Harold Demsetz, *Two Systems of Belief about Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974); Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J.L. & Econ. 229 (1977).

[31] *See* ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 92-93 (5th ed. 2004) (*citing* Harold Demsetz, *Two Systems of Belief about Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974)); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979) (summarizing this work in economics).

What would merger enforcement look like in a throwback world? Pursuant to the 1968 Guidelines, in an unconcentrated market[32] the DOJ would challenge a firm with a 5 percent market share acquiring another firm with a 5 percent market share.[33] Assuming firms in the market are equally sized, the 1968 Guidelines support challenging a merger that reduces the number of firms from 20 to 19. In today's parlance, this unlawful merger would have a post-merger HHI of 550 and a delta of 50. In a concentrated market where the four-firm concentration ratio exceeds 75 percent, the 1968 Guidelines would condemn a merger between firms that each possess a 4 percent market share.[34] Under simplifying assumptions,[35] this unlawful merger would correspond to a post-merger HHI of 1524 and a delta of 32.

If we continue looking back 40 years, the 1968 Merger Guidelines reflect the prevailing case law of the time. Case law followed the Supreme Court's holding in *Philadelphia National Bank*[36] in which the Court explained that a merger that results in "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined" absent clear evidence that anticompetitive effects were unlikely.[37] While the shares in *Philadelphia National Bank* are not trivial,[38] subsequent cases implementing that case's analysis required only marginal changes to market concentration to condemn transactions.[39] For instance, in *Rome Cable*, the Court condemned the acquisition of a firm with only 1.3 percent of the market;[40] in *Von's Grocery*, the Court condemned the acquisition of a firm with a 4.2 percent share by a firm that had 4.7 percent share;[41] and in *Pabst Brewing*, in one relevant geographic

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[32] A market was considered unconcentrated in the 1968 Guidelines when the four-firm concentration ratio was lower than 75 percent. *See* 1968 Guidelines at § 6.

[33] *Id.*

[34] *Id.* at § 5.

[35] The HHI calculation assumes four equally-sized firms account for 75 percent of market sales, the merging firms each account for 4 percent of sales, and the remaining 17 percent of sales are supplied by a competitive fringe.

[36] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[37] *Id.* at 363.

[38] The Supreme Court condemned a merger of the second and third-largest banks with a combined market share of 36 percent of total bank assets and deposits in the four-county Philadelphia area, a market where the four-firm concentration ratio already exceeded 70 percent. *Id.* at 331.

[39] *See* United States v. Aluminum Co. of America (Rome Cable), 377 U.S. 271 (1964) (firm with 27.8% share acquired firm with 1.3% share, with pre-merger 4-firm concentration ratio of 76.0%); United States v. Continental Can Co., 378 U.S. 441 (1964) (firm with 29.1% share acquired firm with 3.1% share, with pre-merger 4-firm concentration ratio of 63.7); United States v. Von's Grocery Co., 384 U.S. 270 (1966) (firm with 4.7% share acquired firm with 4.2% share, with pre-merger 4-firm concentration ratio of 24.4%); United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (3 markets, where firm with 11% share acquired firm with 13% share, with pre-merger 4-firm concentration ratio of under 50%; firm with 5.5% share acquired firm with 5.8% share, with pre-merger 4-firm concentration ratio under 40%; and firm with 3% share acquired firm with 1.5% share, with pre-merger 4-firm concentration ratio under 30%); United States v. Third Nat'l Bank in Nashville, 390 U.S. 171 (1968) (firm with 33.6% share acquired firm with 4.8% share, with pre-merger 4-firm concentration ratio of 93.2%); United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970) (firm with 11.2% share acquired firm with 8.1% share, with pre-merger 4-firm concentration ratio of 74.7%).

[40] *See* United States v. Aluminum Co. of America (Rome Cable), 377 U.S. at 278.

[41] *See* United States v. Von's Grocery Co., 233 F. Supp. 976, 980 (S.D. Cal. 1964).

market, the Court condemned the acquisition of a firm with a 1.5 percent share by a firm with a 3 percent share in a national market.[42]

These standards appear nonsensical to modern antitrust practitioners. To state the obvious, implementing market share thresholds and presumptions based on the standards of 40 years ago would represent a dramatic departure from the 2010 Horizontal Merger Guidelines.

B. Issues to be Considered During Merger Review

In a recent blog post, the FTC announced that merger investigations would no longer follow an "unduly narrow approach" but instead would investigate a broader range of market realities.[43] New topics include "how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete."[44] Although these new lines of inquiry are clothed in antitrust vernacular, I am left to wonder how far afield we plan to go.

Even before this blog post, the press reported that FTC second requests and merger investigations sought information on factors unrelated to traditional antitrust considerations.[45] Practitioners reported that clients were asked about unionization, equity, franchising, and environmental, social, and governance issues.[46] These press reports led me to request copies of second requests issued under Chair Khan.[47] As of today, the "new process" that was implemented[48] has given me access to one – yes, one – Second Request issued under Chair Khan. I continue to rely on external sources to gain a window into our merger review process.

To be clear, the FTC's merger review process under Chairman Joe Simons analyzed the competitive effects of mergers in labor markets, where labor is an input to a product or service. In other words, we assessed whether mergers would create monopsony power that could lessen the intensity of competition for labor. This analysis is consistent with the 2010 Horizontal

[42] *See* United States v. Pabst Brewing Co. 384 U.S. at 551-52.

[43] Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During This Unprecedented Merger Wave, Competition Matters blog (Sept. 28, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[44] *Id. See also* Bryan Koenig, *'Nontraditional Questions' Appearing in FTC Merger Probes*, Law360 (Sept. 24, 2021, 9:44 PM EDT), https://www.law360.com/articles/1425218.

[45] *See* Koenig, *supra* note 44 (describing inquiries during merger investigations regarding the presence of unions within the company, whether noncompete agreements are used in worker contracts, franchising, equity and the inclusion of women in the workforce); Ben Remaly, FTC broadens the scope of its merger probes, Global Competition Rev. (Sept. 29, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/ftc-broadens-the-scope-of-its-merger-probes?utm_source=FTC%2Bbroadens%2Bthe%2Bscope%2Bof%2Bits%2Bmerger%2Bprobes&utm_medium=email&utm_campaign=GCR%2BUSA%2BBriefing.

[46] *See* Koenig, supra note 44.

[47] *See, e.g.*, Letter from Commissioner Christine S. Wilson to Clarivate Plc (Sept. 3. 2021), https://www.ftc.gov/system/files/documents/public_statements/1595685/wilson_second_request_copy_letter_clarivate.pdf ("I regret any imposition this request may cause. Unfortunately, I have been unable to obtain a copy of the Second Request from internal sources. As you will understand, as a Commissioner, I am obligated to exercise due oversight of Commission business. Absent receipt of the Second Request issued to your client, I cannot fulfill this role.").

[48] *See* Vedova, *supra* note 43.

Merger Guidelines, which devote a section to explaining that "[m]ergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market."[49] Notably, the 2010 Horizontal Merger Guidelines provide that monopsony concerns may arise "even if the merger will not lead to any increase in the price charged by the merged firm for its output."[50]

This inquiry differs from concerns about levels of employment. Labor unions and local government officials have asked the agency to consider employment levels and possible layoffs, but we have not viewed these issues as relevant for competition analysis. And, during his confirmation hearing yesterday, Jonathan Kanter appeared to reject this approach as well.

The FTC's newly broadened scope of inquiry harkens back to the mid-century approach to merger analysis. Then, courts considered the impacts of mergers beyond those on competition. For example, *Von's Grocery* spoke of "competition among many small businesses" and expressed concern that the "number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards."[51] Similarly, *Brown Shoe* spoke of "the protection of viable, small, locally owned business," even when "occasional higher costs and prices might result from the maintenance of fragmented industries and markets." [52]

I have warned against alternatives to the consumer welfare standard that insert non-competition issues into the analysis.[53] Inserting additional goals in merger analysis – protection of jobs, promoting workforce diversity, or preserving small inefficient businesses – will render antitrust less administrable and less predictable. The pursuit of multiple goals necessarily requires tradeoffs among the different goals, which is a difficult task when there is ambiguity regarding the list of goals to be pursued and how to weight those goals. The assignment of weights necessarily makes antitrust enforcement subjective and more susceptible to political whims and influence. In addition, the subjectivity regarding weights assigned to competing goals makes implementing enforcement in a consistent way impossible.

Absent an effect on competition, these new areas of exploration will not support a merger challenge. As of today, nearly four months into her tenure, Chair Khan has not voted on any

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[49] See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (Aug. 19, 2010).

[50] *Id.* at Ex. 24.

[51] United States v. Von's Grocery, 384 U.S. at 277-78 ("Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies" and "The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt. The number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards. . . . [A merger violates Section 7] when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors.").

[52] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

[53] Christine S. Wilson, Thomas J. Klotz, & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 Geo. Mason L. Rev. 1435, 1453-55 (2019).

merger challenges.[54] Time will tell whether the majority is willing to base a complaint on these non-competition factors.

C. Treatment of Efficiencies

When the Commission withdrew the Vertical Merger Guidelines, the new FTC majority announced its intention to narrow the role of efficiencies in merger analysis.[55] The majority's statement explains that "efficiencies are only relevant insofar as they shed light on the level of post-merger competition" and concludes that even if a merger creates efficiencies, it will be condemned if it lessens competition.[56] The statement also explains that many efficiencies should not be credited because they "simply make the merged firm more profitable, without affecting the level of competition in the market."[57] The statement issued by Chair Khan appears to go further, suggesting that there is no role for consideration of efficiencies in merger analysis.[58] She stated that the Vertical Merger Guidelines "contravene statutory text, improperly suggesting that efficiencies or 'procompetitive effects' may rescue an otherwise unlawful transaction."

The reaction of Carl Shapiro and Herbert Hovenkamp to these propositions is noteworthy.[59] They pose a hypothetical involving two of the smaller firms in a concentrated market. The elimination of competition between those firms, in the absence of efficiencies, may well be illegal. But if the same merger permits those firms to obtain economies of scale, with higher output and lower prices, there is "no logical sense in which that merger would lessen competition."[60] They note that the legality of the merger "must hinge on those efficiencies, yet the new FTC would ignore them."

Shapiro and Hovenkamp also question Chair Khan's dismissal of "procompetitive effects" in merger analysis. They ask, "[i]f a merger will generate procompetitive effects and thus will *promote* competition, on what basis can the Chair claim that the merger will substantially *lessen* competition, a requirement that is explicit in the text of the statute?" They further observe that "if mergers never produced procompetitive effects they could be condemned

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[54] Chair Khan did not participate when the Commission accepted the consent agreement in Seven & i Holdings, Inc. *See* FTC News Release, FTC Orders the Divestiture of Hundreds of Retail Stores Following 7-Eleven, Inc.'s Anticompetitive $21 Billion Acquisition of the Speedway Retail Fuel Chain (June 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven.

[55] *See* Khan, Chopra, & Slaughter, Statement on the Withdrawal of the Vertical Merger Guidelines, *supra* note 17.

[56] *Id.*

[57] *Id.*

[58] Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Proposed Rescission of the FTC's Approval of the 2020 Vertical Merger Guidelines (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596392/remarks_of_chair_lina_m_khan_regarding_the_proposed_rescission_of_the_ftcs_approval_of_the_2020_vmgs.pdf.

[59] *See* Carl Shapiro & Herbert Hovenkamp, How Will the FTC Evaluate Vertical Mergers?, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.

[60] *Id.*

under a per se rule, but neither the statutory language nor a century of enforcement history permits that."[61]

This dismissal of efficiencies is reminiscent of the state of the law decades ago. Forty years ago, not only were efficiencies unlikely to be recognized as a possible procompetitive effect in merger analysis—they were often viewed as anticompetitive. In the 1970s, in eight of the 25 cases litigated to disposition at the Commission level, efficiencies were viewed as anticompetitive.[62]

This view was confirmed by the Supreme Court in *FTC v. Procter & Gamble Co.*[63] In that case, Procter & Gamble sought to acquire Clorox, the leading liquid bleach manufacturer, in a product line extension merger. The Supreme Court found that, after the merger, acquired firm Clorox would enjoy a larger marketing budget and volume discounts on advertising. The Court concluded these advantages could cause entrants and the 200 small sellers of liquid bleach to pull their competitive punches to avoid retaliation from Procter & Gamble.[64] The Court condemned the merger.

I have long championed the rigorous assessment of credible efficiency claims during the merger review process.[65] The Horizontal Merger Guidelines, which remain in place at both agencies (at least for now), include efficiencies in merger analysis. I agree with the Guidelines that evidence of efficiency claims must come from the parties[66] and that efficiency claims must be more than "vague" and "speculative," and must "be verified by reasonable means."[67] But I also believe that the agencies should employ symmetry in evaluating both potential harms and benefits arising from mergers. Although the uncertainty attendant to projecting future events is applicable to both benefits and harms, the agencies readily credit harms but consistently approach potential benefits with extreme skepticism.[68]

In a similar vein, to the extent that the Bureau of Competition has announced that Second Requests will seek information on cross-market effects, which presumably is intended to inform

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[61] *Id.*

[62] Wesley J. Liebeler, *Antitrust Law and the New Federal Trade Commission*, 12 Sw. U. L. Rev. 166, 225-26 (1981) ("Arguments that efficiencies created by the merger should be counted *against its legality* or that the apparent absence of such efficiency creation should be counted for *its legality* appear in one form or another, at either the Commission or administrative-law-judge level, in eight of the twenty-five cases litigated to disposition at the Commission level. Not one of these twenty-five cases even considered the possibility that increased efficiency should count in favor of the merger's legality").

[63] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[64] *Id.* at 578-79.

[65] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies, Remarks at Bates White Antitrust Webinar: The Other Side of the Coin: Proper Evaluation of Efficiencies in Merger Analysis, June 24, 2020, https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf.

[66] *Id.* at 4.

[67] Horizontal Merger Guidelines, *supra* note 49, at § 10.

[68] *See* Wilson, Breaking the Vicious Cycle, *supra* note 65, at 9-11.

anticompetitive effects analysis,[69] then a symmetrical approach would entail consideration of cross-market effects for efficiencies. And if we are truly determined to return to the 1968 rules of the road, then antitrust analysis should include all components of that era's analysis—no cherry-picking! I did a study with Keith Klovers demonstrating that in that era, relevant markets were defined more broadly.[70] Efficiencies that today would be considered out-of-market and thereby discounted would have fallen within the relevant market and received credit in that bygone era.

D. Remedies

Our fourth area of potential substantive change in merger analysis pertains to remedies. In a letter to Senator Elizabeth Warren, Chair Khan addressed whether and to what extent remedies will be accepted by the Commission majority.[71] Commissioners Chopra and Slaughter previously raised concerns about remedies,[72] but Chair Khan seemed to go further. Chair Khan cited studies that purport to show that divestitures may prove inadequate to remedy unlawful mergers. These studies led her to conclude that "the antitrust agencies should more frequently consider opposing problematic deals outright."[73] Chair Khan also has expressed skepticism regarding the successful use of behavioral remedies, particularly for vertical mergers, again warning that she may prefer to block mergers in their entirety.[74]

As an aside, the FTC does not accept remedies lightly; our compliance team works closely with our merger shops to craft effective and viable remedies. They ensure that merger remedies replace the competition otherwise lost by the merger and flow from the theory of competitive harm.[75] To ensure that remedies are achieving their goals, and to glean insights into potential refinements, the Commission has undertaken substantial remedy retrospectives. In January 2015, the FTC commenced a study of the effectiveness of the Commission's orders in

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[69] *See* Vedova, *supra* note 43.

[70] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *From Von's Grocery to Whole Foods: How Narrowing Product Markets Have Quietly Changed Antitrust*, Remarks at Seventh Annual Berkeley Spring Forum on M&A and Governance (March 5, 2021), at 21-24; Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Rules*, 84 Antitrust L.J. 801 (forthcoming 2021).

[71] Lina M. Khan, Chair, Fed. Trade Comm'n, Letter to Senator Elizabeth Warren 1 (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

[72] See Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Dissenting Statement in the Matter of AbbVie/Allergan (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf; Rohit Chopra, Comm'r, Fed. Trade Comm'n, Dissenting Statement in the Matter of AbbVie, Inc./Allergan plc (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf; Rohit Chopra, Comm'r, Fed. Trade Comm'n, Dissenting Statement in the Matter of Linde AG, Praxair, Inc., & Linde PLC (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

[73] Khan, *supra* note 71.

[74] *See id.* at 3 ("I am skeptical that behavioral remedies alone are sufficient to prevent a vertical merger from causing harm. This is especially true for vertical mergers involving large firms with substantial market power at one or more levels of the supply chain. . . . For that reason, I prefer structural remedies that prevent the harmful integration of assets, or would support the Commission moving to block the merger altogether.).

[75] *See* MERGER REMEDIES MANUAL, *supra* note 15, at 2.

merger cases involving divestitures or other remedies.[76] This study updated and expanded on the divestiture study the FTC issued in 1999.[77]

For previous topics, we have examined the state of the law 40 years ago. With respect to merger remedies, only 45 years ago, the HSR Act did not exist. The agencies faced the uphill battle of challenging consummated mergers and then attempting to "unscramble the eggs." Those efforts frequently led to suboptimal results. A study by Ken Elzinga showed that 35 of 39 pre-HSR orders, issued in cases involving mergers that occurred prior to 1960, did not establish an independent competitor in a timely fashion.[78] Robert Rogowsky came to the same conclusion after examining 104 divestiture orders that were issued between 1969 and 1980.[79]

These studies remind us that it is difficult to achieve effective relief post-consummation. Indeed, these challenges led to the passage of the Hart-Scott-Rodino Act. Given this history, the FTC's new reliance on pre-consummation warning letters and continuing investigations after expiration of the waiting period is even more questionable.

To close out this topic, let me be clear: I have not seen evidence of a systemic failure of divestitures and I have not seen evidence that justifies the rejection of behavioral remedies in appropriate circumstances. Moreover, I disagree with calls by my colleagues to require relief unrelated to established theories of liability directly attributable to the merger. Remedies must be based on evidence-based theories of liability; a belief that there must be more is insufficient to justify imposing a remedy on parties.[80]

E. Non-horizontal Mergers

The final area in which we can anticipate a substantive shift in merger policy involves vertical mergers. Giving ammunition to the sponsors of legislation that would strip the FTC of its antitrust authority and consolidate enforcement at DOJ,[81] the agencies now employ different approaches. While the Commission voted 3-2 to withdraw the Vertical Merger Guidelines and Commentary on Vertical Merger Enforcement,[82] the Department of Justice stated that the

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[76] The FTC's Merger Remedies 2006 – 2012, Jan. 2017, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[77] A Study of the Commission's Divestiture Process (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

[78] *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. L. & Econ. 43 (1969).

[79] R. Rogowsky, An Economic Study of Antimerger Remedies, Dissertation Thesis, U. Va. (1982).

[80] *See* Joseph J. Simons, Noah Joshua Phillips, & Christine S. Wilson, Chairman & Comm'rs, Fed. Trade Comm'n, Statement Concerning the Proposed Acquisition of Allergan plc by AbbVie Inc., at 9 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574619/abbvie-allergan_majority_statement_5-5-20.pdf.

[81] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-TheHouse-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[82] *See* Khan, Chopra, & Slaughter, *supra* note 17.

Vertical Merger Guidelines "remain in place."[83] The DOJ did identify topics on which it may invite public comments.[84]

One specific area of disagreement between the agencies may concern the treatment of the elimination of double marginalization ("EDM"),[85] a frequent procompetitive effect of vertical integration. When the FTC withdrew the Vertical Merger Guidelines, the Commission majority claimed that the Vertical Merger Guidelines' treatment of EDM was improper. In particular, they asserted that consideration of EDM is inconsistent with statutory requirements and "the economic model predicting EDM is limited to very specific factual scenarios: mergers that involve one single-product monopoly buying another single-product monopoly in the same supply chain, where both charge monopoly prices pre-merger and the product from one firm is used as an input by the other in a fixed-proportion production process."[86]

Notably, Shapiro and Hovenkamp also took the FTC majority to task on its critique of EDM, observing that Chair Khan et al's statement is "flatly incorrect as a matter of microeconomic theory."[87] Shapiro and Hovenkamp noted that in fact, "EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions."[88] They point out that these principles have "been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler."[89]

It appears that the DOJ views EDM differently; when announcing that the Vertical Merger Guidelines remain in place, the Antitrust Division indicated that its only question for public comment regarding EDM was whether the Guidelines "create confusion as to the merging parties' burden to establish that the elimination of double marginalization is verifiable, merger specific and will likely be passed through to consumers."[90] This question implies that DOJ may wish to subject EDM to the efficiencies requirements of the 2010 Horizontal Merger Guidelines, rather than view EDM as a procompetitive effect that the agencies will automatically consider because it arises from a change in incentives and is not dependent on information possessed only by the merging firms.[91]

What does a 40-year lookback teach us about what we can expect in the coming years? Not quite 40 years ago, in 1984, the DOJ issued the first set of vertical merger guidelines. Those

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[83] *See* Justice Department Statement on the Vertical Merger Guidelines, *supra* note 18.

[84] *Id.*

[85] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 6 (2020) ("mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger. This is because the merged firm will have access to the upstream input at cost, whereas often the downstream firm would have paid a price that included a markup.").

[86] Khan, Chopra & Slaughter, Statement on Withdrawal of Vertical Merger Guidelines, *supra* note 17.

[87] Shapiro & Hovenkamp, *supra* note 59.

[88] *Id.*

[89] *Id.* (citing Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. Pol. Econ. 347 (1950)).

[90] *See* Justice Department Statement on the Vertical Merger Guidelines, *supra* note 18.

[91] *See* Roger D. Blair, Christine S. Wilson, et. al, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically about Efficiencies*, 27 Geo. Mason U. L. Rev. 761 (2020).

guidelines contained far fewer theories of harm than the "overly permissive" 2020 Vertical Merger Guidelines recently rejected by the FTC majority. Looking back 40 years, we find cases like the one the FTC brought against Fruehauf Corp. that might give us a more accurate picture of the new FTC majority's approach. The Commission's approach to foreclosure in *Fruehauf Corp.*[92] was described by one commentator as "a partial or modified per se approach" holding that "once some amount of foreclosure above de minimis appears likely in a concentrated market, it is automatically to be assumed that the anticompetitive impact required by Section 7 is present."[93] The Second Circuit rejected the Commission's approach, explaining that "we are unwilling to assume that any vertical foreclosure lessens competition" and finding that the factual record did not support a conclusion that foreclosure was likely.[94] I have a feeling that the new FTC majority will be more comfortable with the 1970s FTC approach than with the Second Circuit's treatment of the case.

If we continue to turn back the clock a bit further, we find instances in which courts supported challenges of conglomerate mergers. Let's look again at the case of *FTC v. Procter & Gamble Co.* Procter & Gamble sought to acquire Clorox, the leading liquid bleach manufacturer. Before the acquisition, Procter & Gamble did not previously manufacture and market liquid bleach; the transaction was a product extension merger. Nonetheless, the Supreme Court found that, as a large seller of multiple products, Procter & Gamble received advertising discounts from media due to volume that it would be able to use when marketing bleach, which would provide an advantage to Clorox and could cause the 200 smaller competitors to become more cautious in their competitive efforts.[95] Based on this conclusion, it found the merger to be unlawful.

Might we see conglomerate merger challenges in our future? Unfortunately, your guess is as good as mine, but I wouldn't be surprised.

III. Conclusion

The new FTC majority has already implemented changes to the merger review process. And they appear ready to implement sweeping changes in substantive merger policy. Buckle up, folks. It's a brave new world.

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[92] Fruehauf Corp., 91 F.T.C. 132 (1978).

[93] Liebeler, *supra* note 62, at 210.

[94] Fruehauf Corp. v. FTC, 603 F.2d 345, 352 n.9, 352-55 (2d Cir. 1979).

[95] FTC v. Procter & Gamble Co., 386 U.S. at 578-79.