Unwinding Investigated Consummated Mergers—Inconsistent with Merger Policy Since 1976

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Since the premerger notification program of Hart-Scott-Rodino (HSR) was passed in 1976, challenges to consummated mergers in the U.S. have dwindled and for good reason: Under HSR, antitrust enforcers can stop mergers that "may be" anti-competitive *before* they harm consumers. U.S. antitrust enforcers, however, might be considering more such challenges. While they are legally possible, regular use of such enforcement methods would disrupt the balance struck by the current statutory framework.

Statutory Framework

Sherman Act Section 1[1], passed in 1890, was the original U.S. statute used to challenge mergers thought to be anti-competitive. Its prohibition of "every contract, combination,...or conspiracy, in restraint of trade" could be used to prevent an anti-competitive merger agreement. In practice, however, early court interpretations narrowed the statute and allowed most mergers to proceed.

In response, the Clayton Act was passed in 1914, and then later amended, to close perceived loopholes. Section 7[2] was aimed directly at mergers whose "effect …

may be substantially to lessen competition, or tend to create a monopoly." Two aspects of the Act are important here. First, the Clayton Act was designed to stop *more* mergers than had Sherman Act Section 1: "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."[3] Second, the Clayton Act imposed an "incipiency standard." Enforcers need not show that the merger had already caused anti-competitive effects; instead, they need only show that the potential effect of the merger in the future "may be" anti-competitive.

To effectively implement such an incipiency standard and prevent mergers that "may be" anti-competitive, however, antitrust enforcers must learn of such mergers early and act quickly. For years, such early, quick action happened only rarely, and often was not effective, because of so-called "midnight mergers."[4]

To remedy these issues, HSR was enacted in 1976.[5] HSR requires parties to most transactions of a certain size to file a form, provide certain documentary materials to the U.S. antitrust enforcers, and then wait for agency review before closing. Most reviews are conducted within thirty days and the parties are permitted to close their transaction. A minority are subject to a much deeper and longer review before being challenged in court or permitted to close.[6] As a result of HSR, however, most mergers with effects in the U.S. are now investigated by the enforcement agencies and, if necessary, challenged before consummation.[7]

Premerger review provides several benefits to antitrust enforcers and the consumer welfare they protect. Enforcers can more efficiently and effectively enforce the Clayton Act's incipiency standard and prevent mergers that "may be" anti-competitive before they do any harm. Also, premerger review allows enforcers, if they can convince a court, to block "bad" mergers or force corrective divestitures without needing to "unscramble the eggs."

Premerger notification also provides benefits to merging parties. They obtain near-certainty that the federal antitrust enforcers will not later try to unwind the transaction on antitrust grounds.[8] Even the parties effectively forced to abandon or drastically change their proposed transaction at least avoid the costs of unwinding a transaction and recreating two different companies.

Those benefits of premerger notification are not cost-free. The relatively low thresholds necessary to obtain the premerger notification of most or all harmful

mergers also mean that many non-problematic mergers must be reported as well. Those competitively neutral or beneficial mergers must incur the delay and costs of filing preparation, submission, and fees. After more than forty years, merging parties and all participants in the premerger notification system now understand it well and have internalized the costs and benefits. The Federal Trade Commission, which handles administration of the program, has declared HSR "a success."[9]

Policy Changes?

Technically, clearance of any HSR-filed transaction does not mean that the enforcers will not later challenge the transaction: "a decision not to seek injunctive relief at [the time that of clearance] does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time."[10] Still, such delayed enforcement actions have been rare. But will that remain true?

In 2019, both the FTC and Department of Justice Antitrust Division formed special units to investigate "big tech" companies. Media reports speculated that potential actions of those units could include unwinding consummated mergers: "The new [FTC] scrutiny will be broad, officials said, and will include re-examining mergers that already have been approved by the government. That re-examination could eventually lead the FTC to try to unwind deals that it finds to be having anti-competitive effects now[.]"[11]

In March 2020, the worsening COVID-19 crisis brought renewed attention to a relatively small 2012 merger in the ventilator industry. Covidien, a maker of ventilators, purchased another smaller ventilator producer, Newport, and received HSR clearance from the FTC. Shortly after the transaction, the merged company and the federal government canceled a contract for relatively inexpensive ventilators. Medtronic, the current owner of Covidien, claimed that the cancellation decision was mutual and for technical reasons.[12] Others speculated that the 2012 deals was a typical "killer acquisition."[13] FTC Commissioner Rebecca Slaughter was quoted as saying "When we get new information that causes us to question our original analysis, then we should absolutely go back and take a second look to find out whether there's something we should have done differently or better".[14]

Finally, on April 1, 2020, the FTC filed an administrative complaint to unwind an investment by Altria into JUUL Labs.[15] Both companies made e-cigarettes. In

late 2018, Altria paid $12.8B for a 35% non-voting equity interest in JUUL. Simultaneously, the parties entered a non-compete agreement plus agreements by which Altria provided JUUL services and intellectual property. While the investment and agreements did not require HSR filings, the parties did submit a filing a few weeks later to convert the non-voting interest to a voting one. The complaint alleged violations of Sherman Act Section 1, FTC Act Section 5, and Clayton Act Section 7 and sought divestiture of Altria's equity stake in JUUL.

Legal, Business, and Policy Concerns

Former FTC Chairman Tim Muris and former FTC General Counsel Jonathan Nuechterlein described the difficult legal challenges that federal antitrust enforcers would face if either attempted to unwind an acquisition investigated under HSR.[16] In short, enforcers would need to go back in time, gaze into the crystal ball a second time, and convince a court that the but-for world in which the transaction was blocked before consummation would likely be more competitive than the actual world with the merger under the Clayton Act. Any attempt to reduce the burden by grounding the allegation in a Sherman Act Section 2 "monopoly maintenance" claim would fail because, as described above, the Clayton Act's test is meant to be less stringent than the Sherman Act's.[17]

Not only *would* such a challenge be difficult for the enforcers legally, it *should* be difficult. The Clayton Act/HSR regime has been in place for more than forty years to allow the enforcers to catch before consummation nearly all mergers that "may be" anti-competitive. Under this regime, enforcers can – and have incentive to – stop any consumer harm before it happens. Easing the burden on such post-consummation challenges would incentivize enforcers to sandbag the merging parties, allow the transaction to move forward, and wait for a more favorable set of facts or litigation burden years later. The result would be increased harms to consumer welfare during the time the anti-competitive merger operates.

More frequent challenges of investigated and consummated mergers also would create uncertainty for the business community and the financial entities that support it. While complying with an HSR investigation and, perhaps, successfully fighting off a challenge is costly, the parties do obtain some assurance that they will not need to repeat it a few years later. Also, any later forced divestitures would likely be at below-market prices. Parties might forego efficient mergers for fear of later litigation. Finally, the merged party would have the perverse incentive

to hold back on investing in the acquired entity, lest the merger be deemed "too successful" and those investments be stranded after a compelled divestiture forced by belated attention of antitrust enforcers. Again, the result would be bad for consumers who would have benefited from the proper use of the purchased assets.

These policy concerns do not leave antitrust enforcers powerless in the face of monopolists or other dominant actors. Enforcers can still invoke Sherman Act Section 2 and challenge today's conduct of a monopolist, including one that grew by mergers in the past, and seek divestitures as an appropriate remedy.[18] Timely challenges of mergers that did not require an HSR filing would still be appropriate.[19] But frequent post-HSR investigations and challenges would destroy the rationale for HSR, risk anti-competitive harm while some "bad" mergers are allowed to proceed, and create business uncertainty and damages to consumers while "good" mergers are foregone or incompletely implemented. The balance struck in 1976 would be completely upended. Such a sea change in how antitrust reviews of mergers are conducted should not be made without greater discussion of all the potential costs and benefits.

[1] 15 U.S.C. §1.

[2] 15 U.S.C. §18.

[3] *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 (1962).

[4] *See, e.g.,* William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 828 (1997) (quoting H.R. Rep. No. 94-1373, at 10 (1976)) ("[T]here were strong incentives for speedily and surreptitiously consummating suspect mergers and then protracting the ensuing litigation, thus creating the 'strong probability that the government will ultimately win only a partial or "token" divestiture order,'" given the difficulty of unscrambling the eggs.") and Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43 (1969).

[5] 15 U.S.C. §18(a).

[6] *See Hart-Scott-Rodino Annual Report Fiscal Year 2018* for latest statistics. For instance, in FY2018, only 2.2% of the more than 2000 HSR filings received a "second request" for more information.

[7] Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, supra note 4, at 832.

[8] State enforcer challenges to mergers are possible but rare. *See, e.g.,* Arriana McLymore and Diane Bartz, *T-Mobile-Sprint Merger Wins Approval from U.S. Judge*, Reuters, Feb. 10, 2020, https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile/t-mobile-sprint-merger-wins-approval-from-u-s-judge-idUSKBN2042MG

[9] Federal Trade Commission, *Introductory Guide I: What is the Premerger Notification Program,* at p. 2 (2009).

[10] *Id.*, at 13.

[11] John D. McKinnon, *FTC Aims New Task Force at Big Tech*, Wall St. J., Feb. 26, 2019, https://www.wsj.com/articles/ftc-aims-new-task-force-at-big-tech-11551209556

[12] *See, e.g.,* Manne and Auer, *The Covidien/Newport Merger: Killer Acquisition or Just a Killer Story*, Truth on the Market, April 3, 2020, https://truthonthemarket.com/2020/04/03/the-covidien-newport-merger-killer-acquisition-or-just-a-killer-story/.

[13] *See, e.g.,* Diana L. Moss, *Can Competition Save Lives? The Intersection of COVID-19, Ventilators and Antitrust Enforcement*, American Antitrust Institute, Mar. 31, 2020 https://www.antitrustinstitute.org/can-competition-save-lives-the-intersection-of-covid-19-ventilators-and-antitrust-enforcement/; Matt Stoller, *The Danger of No Antitrust Enforcement: How a Merger Led to US Ventilator Shortage*, ProMarket, Apr. 2, 2020, https://promarket.org/the-danger-of-no-antitrust-enforcement-how-a-merger-led-to-the-us-ventilator-shortage/

[14] David McLaughlin, *Ventilator Maker's 2012 Merger Spurs Query from FTC Official*, Bloomberg, Mar. 30, 2020, https://www.bloomberg.com/news/articles/2020-03-30/covidien-ventilator-merger-needs-new-look-ftc-official-says

[15] *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.*, Docket No. 9393, Apr. 1,

2020.

[16] Muris and Nuechterlein, *First Principles for Antitrust Review of Long-Consummated Mergers*, 5 Criterion J. on Innovation 29 (2020); *See also* ABA Antitrust Law Section Competition/Consumer Protection Policy and North American Comments Task Force, *Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Scrutiny,* April 2020, avail at https://ourcuriousamalgam.com/event-schedule/white-paper-from-members-of-competition-consumer-protection-policy-and-north-american-comments-task-force-analyzing-the-scope-of-enforcement-actions-against-consummated-mergers-in-a-time-of-2/

[17] *See also* Muris and Nuechterlein, *First Principles for Antitrust Review of Long-Consummated Mergers,* supra note 16, at 38-41; and Ginsburg and Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, George Mason University Law and Economics Paper Series 20-14, May 2020, avail. at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703&download=yes both commenting on D. Bruce Hoffman, Dir., Bureau of Competition, U.S. Fed. Trade Comm'n, *Remarks at GCR Live Antitrust in the Digital Economy—Antitrust in the Digital Economy: A Snapshot of FTC Issues* 9–11 (May 22, 2019), avail. at https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf.

[18] *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

[19] *E.g., St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.,* 778 F.3d 775 (9th Cir. 2015*); United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014-1 Trade Cases ¶78,641, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).