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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by the United States --

14-15 June 2016

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*More documents related to this discussion can be found at
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UNITED STATES

1. Summary of submission

1. The U.S. antitrust agencies review mergers under a statutory standard focusing exclusively on competitive consequences. The agencies do not consider public interest factors beyond the public interest in the enforcement of the antitrust laws, and believe that enforcement decisions should be based solely on the competitive effects and consumer benefits of the transaction under review. The agencies' actions are not subject to review under a general public interest standard by any other agency or government body, including the courts. However, certain mergers may also be subject to a separate review by a specialized or sector-specific government agency or body that considers public interest or national security grounds. In short, U.S. antitrust law and policy, including merger review, are implemented based on the belief, borne out by our economic history, that the public interest is best served by focusing exclusively on competition considerations.

2. The Standard for Merger Review in U.S. Law

2. Section 7 of the Clayton Act provides that:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, *where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*¹

3. Congress intended Section 7 to serve as “an effective tool for preventing” anticompetitive mergers.² The federal agencies that share merger enforcement responsibilities—the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), collectively referred to as the Agencies—believe that Section 7 can and does serve as intended. Section 7 covers “the entire range of corporate amalgamations”³ as well as all anticompetitive effects flowing from them.

4. Section 7 broadly prohibits mergers and acquisitions that may substantially lessen competition.⁴ All mergers and acquisitions are “tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other.”⁵ “Merger enforcement, like other areas of

¹ 15 U.S.C. § 18 (emphasis added).

² *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

³ *United States v. Philadelphia National Bank*, 374 U.S. 321, 342 (1963). Since 1980, Section 7 also covers non-corporate amalgamations.

⁴ The Supreme Court has held that Section 7 reaches mergers that eliminate only potential competition. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). Similarly, the Court has indicated that a merger could violate Section 7 by leading to unlawful exclusionary conduct. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

⁵ *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

antitrust, is directed at market power.”⁶ “The lawfulness of an acquisition turns on the purchaser’s potential for creating, enhancing, or facilitating the exercise of market power”⁷

3. Consideration of Non-Competition Factors in the Review of Mergers

5. Competition through free enterprise and open markets is the organizing principle for the U.S. economy. Other than in the few cases of true natural monopolies, competition among firms is the best vehicle to achieve optimum prices, quantity, and quality of goods and services for consumers. The antitrust laws seek “to maximize consumer welfare by encouraging firms to behave competitively.”⁸ U.S. courts have expressed that there is a public interest in enforcement of the antitrust laws⁹ and that public equity outweighs private equities.¹⁰

6. Section 7’s explicit and single-minded focus on competition is critical. The Supreme Court observed that the law was designed for “the protection of *competition*, not *competitors*” and reflects “the desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”¹¹ Also critical is the insight that focusing on competition implies focusing on market power.

7. The Agencies do not consider non-competition factors in their antitrust analysis. The Agencies have learned that, while such considerations “may be appropriate policy objectives and worthy goals overall . . . integrating their consideration into a competition analysis . . . can lead to poor outcomes to the detriment of both businesses and consumers.”¹² Instead, the Agencies focus on ensuring competition that benefits consumers,¹³ and they leave other policies to other parts of government that may be specifically charged with or better placed to consider such objectives.

⁶ *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* 511 (2000)).

⁷ *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

⁸ Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶100a at 4 (2000). *See also* *FTC v. Univ. Health*, 938 F.2d 1206, 1225 (11th Cir. 1991) (antitrust laws “are intended to safeguard competition, and, hence, consumers,” so denying the injunction “would frustrate the FTC’s ability to protect the public from anticompetitive behavior”).

⁹ *See, e.g., Swedish Match*, 131 F. Supp. 2d at 173 (D.D.C. 2000) (“There is a strong public interest in effective enforcement of the antitrust laws.”); *U.S. v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) (“By enacting Section 7, Congress declared that the preservation of competition is always in the public interest.”).

¹⁰ *See, e.g., Weyerhaeuser Co.*, 665 F.2d at 1083 (D.D.C. 2000) (“Private equities do not outweigh effective enforcement of the antitrust laws.”)

¹¹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis added).

¹² “Core Competition Agency Principles: Lessons Learned at the FTC,” Keynote Address by FTC Chairwoman Edith Ramirez, May 22, 2014, *available at* https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf. *See also* “International Antitrust Enforcement: Progress Made; Work To Be Done,” Keynote Address by DOJ Assistant Attorney General of the Antitrust Division Bill Baer, September 12, 2014, *available at* <http://www.justice.gov/atr/speech/international-antitrust-enforcement-progress-made-work-be-done> (“We must continue to seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed.”).

¹³ *See id.*

4. Historical Development and Modern Treatment in U.S. Antitrust Law

8. U.S. antitrust laws¹⁴ are broadly worded and rely on judicial interpretation to delineate their contours.¹⁵ Until the 1970s, courts often construed antitrust laws broadly, considered many types of conduct to be illegal *per se*, and sometimes found mergers to be anticompetitive based on small changes to the structure of the market.¹⁶ For example, in an early decision, *U.S. v. Trans-Missouri Freight Ass'n*,¹⁷ the U.S. Supreme Court expressed a concern that, even if lower prices result from a merger, “[t]rade or commerce ... may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein.”¹⁸

9. During this period, academics and others began to question the extensive rules of *per se* illegality created by the U.S. Supreme Court, arguing that many forms of conduct that courts deemed *per se* illegal, such as vertical restraints, often are pro-competitive. This led to a significant change in the interpretation of the U.S. antitrust laws based on greater reliance on economic analysis that focused on harm to competition and consumer welfare.

10. Beginning in the 1960s, academic literature explained that using antitrust law to achieve non-competition goals, which often resulted in the protection of inefficient competitors, was inimical to consumer welfare and was not Congress’s intent in enacting the U.S. statutes.¹⁹ This scholarship argued that the Sherman Act was not intended “to achieve ... broad noncommercial goals”²⁰ and that the “test of illegality was entirely the effect upon commerce, not an effect upon some other thing or condition, such as a supposed social or political evil.”²¹ This emphasis on competition and consumer welfare as the primary goals of antitrust consistently has been reflected in the subsequent literature.²²

¹⁴ 15 U.S.C. §§ 1-7 (Sherman Act); 15 U.S.C. §§ 12-27 (Clayton Act); 15 U.S.C. §§ 41-58 (FTC Act).

¹⁵ Scholars have described the U.S. antitrust statutes as “consciously evolutionary.” See William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 58 (2000).

¹⁶ See, e.g., *U.S. v. Von’s Grocery Co.*, 384 U.S. 270, 276-77 (1966) (upholding FTC determination of illegality of a merger of two grocery store chains with a combined market share of seven percent, in part to prevent “concentration [from] gaining momentum in the market”).

¹⁷ 166 U.S. 290 (1897).

¹⁸ *Id.* at 323.

¹⁹ See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

²⁰ *Id.* at 13.

²¹ *Id.* at 33.

²² See, e.g., Robert Pitofsky, *The Political Context of Antitrust*, 127 U. PENN. L. REV. 1051, 1059 (1979) (“Non-economic concerns play no useful role because it is not possible to achieve those goals to any significant extent through antitrust interpretation.”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) (the pursuit of populist goals is inappropriate for antitrust analysis because they “would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved”); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J. L. PUB. POL’Y 217, 222-23 (2010) (“[T]he Court should answer questions of antitrust law by promoting consumer welfare and economic efficiency and not by making political judgments about economically irrelevant matters.”). Accord, Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L. J. 229, 239-45 (2010) (discussing difficulty in predicting and comparing short-run and long-run effects of competition measures during an economic crisis).

A similarly persuasive article, in the context of dominant firm pricing, was published in 1975 and argued that a dominant firm can be presumed to be operating within the bounds of the antitrust laws if

Similarly, economics literature published during the 1960s began to focus on balancing cost savings from merger efficiencies with consumer harm from possible merger-related price increases.²³

11. By the 1970s, those principles gained judicial approval in the U.S. Supreme Court, as reflected in cases such as *Continental T.V., Inc. v. GTE Sylvania Inc.*,²⁴ *Nat'l Soc'y of Prof. Engineers v. United States*,²⁵ and *Nat'l Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla.*²⁶ The Agencies have incorporated this learning and these judicial interpretations into their analysis of mergers and conduct, precluding the consideration of non-competition factors in their analysis and decisions.

5. Public Interest Standard in the Review of Mergers by Other Regulatory Agencies

12. Certain mergers may also be subject to a separate review by a specialized regulatory agency; that agency may be charged with applying different standards, which may include a broader public interest in addition to competition goals. For example, the Federal Communications Commission (FCC) employs a “public interest, convenience, and necessity” standard in the review of transactions involving licenses and authorizations in the telecommunications sector.²⁷ In cases of concurrent review of telecommunications mergers, the DOJ and FCC work in close cooperation, consulting extensively to coordinate their reviews and to create remedies that are both consistent and comprehensive.

13. As part of a process separate and apart from the Agencies’ review of mergers, acquisitions of U.S. businesses by foreign persons that may affect national security may be reviewed by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee chaired by the Secretary of Treasury.²⁸ Parties may voluntarily notify CFIUS of a proposed merger, but

it sets its prices at or above its average variable costs. Philip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). This influential article was frequently cited in judicial opinions during this period. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.).

²³ See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECONOMIC REV. 18 (1968).

²⁴ 433 U.S. 36 (1977). *GTE Sylvania* overturned the Supreme Court’s holding in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), by determining that a location restriction for franchisees should be judged under the rule of reason rather than under a *per se* standard. See also *GTE Sylvania Inc. v. Continental T.V. Inc.*, 537 F.2d 980 (9th Cir. 1976). Beyond its holding in the specific case relating to territorial restraints, the opinion is widely viewed as a signal of the U.S. Supreme Court’s “determination to anchor antitrust rules in microeconomic analysis and to insist on proof of anticompetitive effects as a condition to subjecting business conduct to *per se* condemnation.” William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 60 (2007).

²⁵ 435 U.S. 679, 692 (1978). (“[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring **competition** is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.”).

²⁶ 468 U.S. 85 (1984). *NCAA v. Board of Regents* concluded that because the activity involved was one in which “horizontal restraints on competition are essential if the product is to be available at all,” such activity should be analyzed using a rule of reason, rather than a *per se*, analysis. 468 U.S. at 103.

²⁷ See FCC Blog, Jon Sallet, General Counsel, FCC Transaction Review: Competition and the Public Interest (Aug. 12, 2014), available at <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest>.

²⁸ See <https://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx>.

CFIUS has the power to review transactions regardless of whether they are notified. If a transaction raises national security concerns, CFIUS can apply mitigation measures or recommend that the President block or suspend the transaction.

14. As discussed, however, public interest considerations other than the public interest in enforcement of the antitrust laws play no role in the Agencies' review of mergers, and no other agency or government body is responsible for reviewing the Agencies' actions from a public interest perspective.