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FEDERAL TRADE COMMISSION
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Remarks of Commissioner Rebecca Kelly Slaughter¹

Merger Retrospective Lessons from Mr. Rogers
Hearings on Competition and Consumer Protection in the 21st Century:
Merger Retrospectives
April 12, 2019

Thank you to the Chairman for convening today's hearing and these hearings writ large, and to everyone at the FTC, particularly our staff in the Office of Policy and Planning, for the monumental effort they have put into carrying out this ambitious endeavor. Thank you to the panelists who are here today to share their knowledge, expertise, and views about merger retrospectives. Some of you have been repeat players at our hearings and we appreciate the time and effort that you have given to this task.

Today's discussion of retrospectives is a key way these hearings can fulfill their mission, as described by Chairman Simons, to examine and evaluate the effectiveness of our enforcement and, where we identify areas for improvement, to implement reforms.

As I said at the second hearing session in September, these hearings cannot simply reaffirm our current policies and practices with a pat on our back. Any serious and credible wide-scale review of our enforcement and policy record must be able to identify ways in which we can improve.

This morning's panels involved extremely sophisticated and detailed economic and legal discussions of merger retrospectives. I'm going to take us in a completely different direction for a moment.

If any of you are or have recently been the parents or relatives of preschool age children, you may be familiar with the show Daniel Tiger. Daniel is the cartoonized son of the puppet tiger on Mr. Rogers' Neighborhood with whom many children of the 1960s, 70s and 80s grew up. Anyway Daniel is the current generation's version, and using the concepts and themes pioneered by Mr. Rogers, he teaches extremely helpful life lessons in fifteen minute segments, each punctuated by a unique summarizing song.

¹ 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.

And I have discovered that there is a Daniel Tiger song for basically any situation - including, as it turns out, how to think about antitrust enforcement and merger retrospectives. A very frequently cited Daniel Tiger refrain in my house is one about making mistakes - and I will embarrass myself by singing it for you. Daniel teaches us:

“It’s okay to make mistakes, try to fix them and learn from them too.”

These are wise words for children, but they are important for adults as well, including antitrust enforcers. And while I would not say enforcement mistakes are “okay,” they are certainly inevitable, since merger review is generally an exercise in predictive analysis about how markets will operate after a proposed transaction is consummated.

This predictive nature provokes reference to the well-worn quote that: “Prediction is hard, especially when it’s about the future.” This quote has been variously attributed to Yogi Berra, Mark Twain, and apparently, Neils Bohr has a claim to it as well. It resonates because, even though we use our best economic and legal tools to make the most accurate predictions we can, we know that sometimes we may make mistakes. Of course, sometimes the evidence gathered in a merger investigation unambiguously predicts clear competitive harm that requires enforcement action.

For example, in the Tronox matter, the Commission successfully argued before several courts that the elimination of Cristal in the North American titanium dioxide market would have harmed competition. Just this week, the Commission announced a unanimous settlement that required a clean sweep divestiture of the relevant Cristal assets.²

In other instances, accurate prediction is substantially more difficult. While our predictions need not be absolute, correctly divining how a proposed merger will change firm behavior and market outcomes—especially on non-price factors, like quality and innovation—can be extremely challenging. Recent vertical mergers illustrate this well.

In the vertical merger context, predictions about how changes in firm behavior will influence competition are often more complicated and may be less clear. Two people in good faith can disagree about the merits of a given prediction and ultimately the propriety—or legal viability—of enforcement action.

But what I think we can all agree on is that the Commission’s predictions and its enforcement decisions can profoundly impact competition and consumers for many years. There is an enormous weight on our shoulders to make the right decision about the fate of a merger. This responsibility extends beyond the time at which we evaluate proposed mergers; it also requires us to improve upon our predictions and to correct erroneous decisions that resulted in competitive harm.

And that is where we do well to heed Daniel’s call to try to fix our mistakes, and learn from them too. That is precisely what merger retrospectives can do. They can help us to “check our work”

² In the Matter Tronox/Cristal USA, File No. 171-0085 (April 10, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristal-usa>.

to test the accuracy of our predictions about a given merger. They can help test the usefulness of models and other tools of analysis to inform future merger investigations, which, as Chairman Simons noted this morning, affirmatively helps our enforcement efforts. The hospital merger retrospective study initiated by Chairman Muris, which resulted in a new strategy for successfully challenging anticompetitive hospital mergers can and should serve as a model for how to tackle other enforcement challenges facing the Commission.

Another good example of how retrospective analysis can be useful to improve prospective enforcement is the recent remedies study Angelike discussed in the last panel, from which the Commission learned several important lessons about ensuring the success of divestitures.³ Importantly, retrospectives may also be able to help us determine not only how to handle new cases in the future but whether, in a specific case, further enforcement action—such as unwinding a consummated merger or challenging anticompetitive conduct—is necessary to protect and restore competition.

I appreciated the discussions this morning of different types of retrospective analysis, including not only the traditional economic modelling that relies on control markets but also simulation models. I am particularly interested in retrospective reviews that allow us simply to compare a market post-merger to our own predictions about what would happen at the time we evaluated the transaction.

This type of review may be particularly useful in vertical cases when our merger analysis rests on assumptions not merely about price but also about the behavior of the merged firm. Did we rest our conclusions on an assumption that the merged firm would not engage in a foreclosure strategy when later we can observe that it did? Did we assume entry by third parties that would keep competition vibrant when no such entry in fact occurred?

To the extent that retrospectives can help us improve our predictive tools and analysis or correct prior decisions, we need to do more of them. And given the increased complexity of analyzing vertical integration, I believe we should focus our resources on reviewing our enforcement decisions regarding vertical mergers.

Furthermore, if we make clear at the time a vertical transaction is cleared that it will be the subject of a future retrospective review, that may have the benefit of a disciplining effect on the merged firm. This may be unsatisfying from the academic perspective of looking for robust data, but I would be willing to assume that cost for the benefit of protecting competition.

I actually don't think anyone disagrees with the idea that more retrospectives would be a good thing. But I recognize the significant resources that retrospective examinations require. I support Chairman Simons' advocacy for more resources and his willingness to find ways to work with outside researchers who wish to conduct value-add merger retrospective studies.

³ The FTC's Merger Remedies 2006-2012, Report of the Bureau of Competition and Economics (January 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf

I know I sound like a broken record on the point of resources, but that is because it bears repeating again and again. When I first got to the agency, almost a year ago now, I spent time meeting the staff across the bureaus. I asked everyone about the greatest challenges they felt their enforcement efforts face, and “resources” was the resounding refrain. The numbers bear this concern out.

Over the past several years, merger filings have increased and the cost to investigate and challenge anticompetitive mergers has skyrocketed. Yet, our funding levels have largely remained flat—which in reality is not flat but declining, because each year to the cost of compensation and benefits for the same number of employees rises, so “flat” funding provides for fewer staff.

This means that the Bureau of Competition staffing levels have decreased in recent years. Despite this headcount decline, the FTC’s workload has increased. Since 2010, the number of premerger filings has more than doubled, and this statistic does not reflect the many additional mergers we investigate that fall beneath the Hart-Scott-Rodino Act’s reporting threshold. That said, the FTC’s dedicated staff works tirelessly to do more with less – since last March, they have litigated four conduct cases and three merger challenges, and prepared to litigate an additional three mergers before the parties abandoned the transactions.

What does this have to do with merger retrospectives? As Bruce Kobayashi, the Director of the Bureau of Economics, said on a recent ABA panel, the resource crunch has required the Bureau to devote more resources to investigations and enforcement. This means less research and fewer merger retrospectives.

We should work with Congress to reverse this trend and ensure that we are able to devote an ample and reliable stream of additional resources to our merger retrospectives program. With an increase in funding of \$50 million annually, the Commission could not only supplement its merger and conduct division staffing, it would be able to reboot its retrospective analysis by adding more attorneys and ten economists to the effort. But we cannot and should not wait for our resources to increase to consider whether and how we can retool our enforcement efforts, including our retrospective analysis.

The panels today will be incredibly useful to informing the Commission on how we can be most effective in undertaking retrospectives and how they should inform our enforcement mission. The questions in which I am most interested include:

- 1) Should we look more at mergers that were *not* challenged following significant investigations?
- 2) How would a vertical mergers retrospective program help hone our investigatory techniques?
- 3) What kinds of information would best assist our retrospective efforts and what are the sources of and most effective means of obtaining such information?
- 4) How should we think about retrospectives in industries that are marked by rapid and significant technological change?

On this last question, I want to emphasize an additional point. The Commission often must review mergers in technology-intensive industries well before they have matured. Retrospectives may be particularly useful to inform our understanding of how these industries evolve and how mergers in the early stages of such industries' life cycles effect nascent competition and influence industry structure, growth, and dynamism.

In this way, merger retrospectives can support our other technologically focused enforcement efforts, such as the Bureau of Competition's Technology Task Force.

I look forward to hearing from this afternoon's panelists and thank you again to all of today's participants.