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Antitrust Enforcement and Consummated Mergers: The Role of Postmerger Economic Evidence

A look into the role of postmerger evidence, and particularly postmerger expert evidence, in retroactive enforcement actions.

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A recent announcement by the Federal Trade Commission (FTC) regarding potential "adjustments" to merger review policy was accompanied by a reminder that the agency could challenge a merger "even after the companies have merged and even if the merger was subject to premerger review." *See* Holly Vedova, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FTC (Aug. 3, 2021). The announcement also referenced the FTC's recent trend of issuing "warning letters" at the expiry of the waiting period under the Hart-Scott-Rodino Act (HSR Act) of 1976 stating that the investigation will remain ongoing, giving rise to concerns that the FTC might be more willing to target and potentially challenge consummated deals. *See* Bryan Koenig, *Merging Cos. Incorporating FTC's 'At Own Risk' Warnings*, Law360 (Sept. 14, 2021). While such retroactive challenges have long been permitted under the federal antitrust laws, they have played a relatively small role in merger enforcement since premerger filing requirements were established by the HSR Act. *See* Scott A. Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 Santa Clara L. Rev. 41, 41, 54 (2004).

Past enforcement trends aside, an increase in consummated merger challenges now seems more likely. The FTC noted that a "tidal wave of merger filings" this year "is straining the agency's capacity to rigorously investigate deals" before they close. *See* Vedova, *supra*. And at least one recent merger was consummated despite an open FTC investigation. *See* Bryan Koenig, *7-Eleven Sparks FTC Uproar with Close of Speedway Deal*, Law360 (May 14, 2021). Relatedly, the idea that past acquisitions by large technology companies should be unwound has gained traction among antitrust scholars and commentators in recent years. *See* Menesh S. Patel, *Merger Breakups*, 2020 Wis. L. Rev. 975, 994 (detailing the

theoretical justifications for challenging previously cleared mergers); *see also* *FTC to Examine Past Acquisitions by Large Technology Companies*, FTC (Feb. 11, 2020).

Against this backdrop, this article explores the role of postmerger evidence, and particularly postmerger expert evidence, in retroactive enforcement actions.

Background

Under section 7 of the Clayton Act, a merger is unlawful if "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18. The admissibility and relevance of postmerger evidence in section 7 cases was established by the Supreme Court over 60 years ago. In *United States v. E. I. du Pont de Nemours & Co.*, the Supreme Court held that the government may bring a section 7 suit at "any time when the acquisition threatens to ripen into a prohibited effect." 353 U.S. 586, 597, 607 (1957). More importantly, *E. I. du Pont* established the "time of suit" doctrine—which allows the government to rely on market conditions at the time of suit (i.e., postmerger evidence) to prove a section 7 violation.

Some scholars and commentators have argued against the use of postmerger evidence of actual harm in section 7 cases. The argument goes that challenges based on market conditions at the time of suit are unfit for a predictive statute like section 7 and should instead be brought as monopolization claims under Sherman Act section 2, which requires proof of actual harm. *See* Sher, *supra*, at 66–67. After all, the Supreme Court has observed that Section 7 is a prophylactic statute that is violated upon proof that a merger's effect "*may be* substantially to lessen competition." *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (emphasis added by court). In another case concerning price discrimination under the Robinson-Patman Act, the Supreme Court held that a violation of Clayton Act section 2(a) or section 7 does not establish the existence of actual harm under Clayton Act Section 4—a required element for private parties asserting a claim under Sherman Act Section 2. *J. Truett Payne Co., Inc., v. Chrysler Motors Corp.*, 451 U.S. 557, 561–62 (1981).

Setting aside the statutory provision being invoked, postmerger evidence can be a significant factor in section 7 challenges to consummated mergers.

The Role of Postmerger Evidence

Consistent with *E. I. du Pont*, the 2010 Horizontal Merger Guidelines make clear that "[e]vidence of observed post-merger price increases or other changes adverse to customers

is given substantial weight" and "can be dispositive." *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines at 2.1.1 (2010) [hereinafter Merger Guidelines]. The FTC has relied on evidence of postmerger harm in several recent challenges to consummated mergers under section 7. *See Opinion of the Commission, In Re Otto Bock HealthCare N. Am., Dkt. No. 9378*, at 24, 33–36 (Nov. 1, 2019) (citing "changed incentives and reduced competition following the Acquisition" as evidence of competitive harm). In another case, the FTC alleged postmerger harm through substantial price increases and reduced innovation before ultimately settling the complaint. *See* Complaint, *In re Axon Enter., Inc. & Safariland, LLC*, Dkt. No. D9389, at 8 (Jan. 3, 2020).

Postmerger evidence is also admissible when postmerger section 7 claims are litigated in federal court. *See Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) ("Post-acquisition evidence is admissible since the probability of anticompetitive effects is judged at the time of trial."). In *Polypore International v. F.T.C.*, evidence of the merger's anticompetitive effects was established in part through testimony from a customer that it would pay "millions of dollars more" than it did before the merger. *See* 686 F.3d 1208, 1216 (11th Cir. 2012). In *Steves & Sons, Inc. v. JELD-WEN, Inc.*, a rare section 7 claim brought by a private plaintiff, the U.S. Court of Appeals for the Fourth Circuit upheld the jury's finding that the merger violated section 7, specifically citing expert testimony that the merger enhanced JELD-Wen's market power and enabled it to raise prices after the merger. *See* 988 F.3d 690, 704 (4th Cir. 2021).

While evidence of postmerger harm can be used to establish a section 7 violation, it is not a required element under the Merger Guidelines, which provide that "a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct." Merger Guidelines at 2.1.1. Even so, the availability of postmerger evidence can provide the government with proof of actual harm that would not exist in a premerger enforcement action. Therefore, rebutting the probative value of any such evidence from the government will be a critical task for respondents and their economists.

Rebuttal: Structural Evidence

Respondents can present their own postmerger expert evidence to rebut the accuracy of the government's evidence as predictive of future effects. But the probative value will vary depending on the nature of the postmerger evidence relied upon and the unique circumstances of each case. Probative value can be limited when the evidence is actually or could arguably be subject to manipulation by the respondent, e.g., when the evidence

concerns a transaction that could have been made by the respondent to improve its litigation position or "bolster the market's appearance of competitiveness." *See, e.g.*, *Chi. Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 434–35 (5th Cir. 2008) (noting the risk that "violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending"); Opinion of the Commission, *In re ProMedica Health Sys., Inc.*, Dkt. No. 9378, at 54 (June 25, 2012) (discounting evidence that respondent's postmerger contracts did not charge supracompetitive prices).

Respondents should instead rely on structural evidence that is not subject to their own control, such as overall market share or pricing trends. In *United States v. General Dynamics Corp.*, the Supreme Court held that rebuttal evidence relating to postmerger changes in the patterns and structure of the coal industry was admissible and probative because it was not subject to the defendant's control. *See* 415 U.S. 486, 506 (1974); *see also Lektro-Vend Corp.*, 660 F.2d at 276 (finding that postacquisition evidence regarding defendant's market share and profits was "the type which cannot arguably have been subject to the defendant's deliberate manipulation"). Evidence from third parties, industry analysts, or other neutral sources should also be considered and incorporated as expert evidence when possible.

Rebuttal: The Causation Issue

Another option for rebutting postmerger evidence of anticompetitive effects is to break the causal chain between the merger and the postmerger harm by establishing alternative explanations for the harm. Evidence of observed postmerger harm can be relevant to proving a section 7 violation only when such harm results from the merger. *See* Merger Guidelines at 2.1.1. The question of causation—whether the alleged harms are caused by a merger and not by subsequent and unrelated changes in the market—has been recognized as a significant issue in postmerger antitrust reviews. *See* Sher, *supra*, at 64 (noting that proof of postmerger harm alone does not demonstrate that the merger caused the harm).

The respondent hospital in an FTC administrative proceeding, *In re Evanston Northwestern Healthcare Corp.*, tried to rebut the government's evidence of postmerger price increases on causation grounds. In support of this causation argument, the respondent's expert submitted an econometric analysis of exogenous factors that affected other hospitals in the relevant market and not just the merging parties. *See* Opinion of the Commission, Dkt. No. 9315, at 65 (Aug. 6, 2007) (these exogenous factors include cost increases, changes in regulation, increases in hospital demand or hospital quality, and changes in the mix of patients). The FTC ultimately prevailed, but only after submitting its own expert

econometric evidence that "ruled out the most likely competitively-benign explanations for a substantial portion of the merger-coincident price increases." *Id.*

Conclusion

Postmerger antitrust challenges seem more likely now, and the importance of postmerger evidence, especially expert evidence, in such actions cannot be overstated. Evidence of postmerger harm may provide the government with proof that would be unavailable in the context of a premerger challenge. However, past enforcement actions provide a potential road map for respondents to overcome such evidence by establishing an alternative cause for the harm that is unrelated to the merger.

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