



UNWINDING CONSUMMATED MERGERS—JUST BECAUSE YOU CAN DOES NOT MEAN YOU SHOULD

by Steven Cernak

Since the premerger notification program of Hart-Scott-Rodino (HSR) was fully implemented in 1978, the number of challenges to consummated mergers in the U.S. has dwindled to next to nothing. Some recent media reports, however, indicate that U.S. antitrust enforcers are considering expanding their use. While such challenges are legally possible, any extensive use would disrupt the legal, policy, and business 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 prevent mergers thought to be anti-competitive. Its prohibition of “every contract, combination, ... or conspiracy, in restraint of trade” has been interpreted to cover anti-competitive agreements. Certainly, an agreement to merge between two major competitors is at least a potential Section 1 violation. In practice, however, early court interpretations narrowed the statute and allowed most mergers to proceed.

In response, Congress originally passed the Clayton Act in 1914 and subsequently updated the law in 1950 to close perceived potential loopholes. Congress aimed Section 7² directly at mergers whose “effect ... may be substantially to lessen competition, or tend to create a monopoly.” Two aspects of that language and the Supreme Court’s interpretation of it 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 must peer into their crystal ball and 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, especially because of so-called “midnight mergers”:

[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.⁴

Even when such a challenge forced a divestiture, many of them were too late or too small to effectively solve

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 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)).

the competitive issues.⁵

To remedy these issues, Congress enacted HSR in 1976.⁶ HSR requires most parties engaged in 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. Regulators conduct the vast majority of such reviews 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.⁷ Some practitioners, including several “present at HSR’s creation,” have complained that the reviews are longer and more burdensome on the parties than HSR originally envisioned.⁸ 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.⁹

Premerger review provides several benefits to antitrust enforcers and the consumer welfare they are supposed to protect. The most obvious is the one intended by HSR: enforcers can more efficiently and effectively enforce the Clayton Act’s incipency standard and prevent mergers that “may be” anti-competitive before they do any harm. No more need to try to unscramble the eggs: premerger review allows enforcers to challenge potentially harmful mergers and, if successful in convincing courts, to block them or force corrective divestitures.

Premerger notification provides benefits to both merging parties and financial markets. They obtain near-certainty that the federal antitrust enforcers will not later try to unwind the transaction on antitrust grounds. While challenges by state enforcers or private parties are possible (as in the recent Sprint/T-Mobile transaction),¹⁰ these too are rare. 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. Also, premerger examination requires the enforcers and courts to gaze even more deeply into their crystal balls and attempt to determine with less real-world experience whether a proposed merger “may be” anti-competitive. Thus, an already difficult prediction can be even more problematic.

After more than forty years, 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.”¹¹ HSR also has become a successful American export. While their systems usually differ from HSR in many details, many other countries have observed the U.S. experience and decided the benefits of premerger notifications outweigh the costs. For instance, a recent edition of *Getting the Deal Through* published by Law Business Research covered the premerger notification regimes of seventy-one jurisdictions, from Albania to Zambia.

⁵ Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969).

⁶ 15 U.S.C. § 18(a).

⁷ 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.

⁸ Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865 (1997).

⁹ Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, supra note 4, at 832.

¹⁰ See, e.g., Arriana McLymore and Diane Bartz, *T-Mobile-Sprint Merger Wins Approval from U.S. Judge*, Reuters, Feb. 10, 2020, <https://reut.rs/35iqBzF>.

¹¹ Federal Trade Commission, *Introductory Guide I: What is the Premerger Notification Program*, at p. 2 (2009).

Changes Coming?

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 of clearance] does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.”¹² Still, such delayed enforcement actions have been rare. But recent actions by the agencies and public speculation hint that such challenges to consummated mergers might become more common.

In the face of rising public concern about the alleged market power of so-called “big tech” companies, both the FTC and Department of Justice Antitrust Division formed special investigative units in 2019. Some 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[.]”¹³

As the COVID-19 crisis worsened in March 2020, the supply of ventilators became a hot topic and brought renewed attention to a relatively small 2012 merger in the industry. At the time, Covidien, a maker of ventilators, purchased another smaller ventilator producer, Newport, for just over \$100M 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, states that the cancellation decision was mutual and for technical reasons. As the country conducted a frantic search for ventilators early in the pandemic, others speculated that the 2012 deal was a typical “killer acquisition” where a larger company purchases a smaller one only to shut it down to end the competition.¹⁴ 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.”¹⁵

Finally, on April 1, 2020, the FTC filed an administrative complaint to unwind an investment by Altria into JUUL Labs.¹⁶ 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; a services agreement, whereby Altria provided certain support services; and an intellectual property agreement, whereby Altria licensed its e-cigarette IP to JUUL. Neither the investment nor the agreements required HSR filings; however, the parties did submit a filing a few weeks later to convert the non-voting interest to a voting one. The complaint alleges violations of Sherman Act Section 1, FTC Act Section 5, and Clayton Act Section 7 and, among other requests, sought divestiture of Altria’s equity stake in JUUL.

Legal, Business, and Policy Concerns

As former FTC Chairman Tim Muris and former FTC General Counsel Jonathan Nuechterlein discussed in a recent paper, federal antitrust enforcers would face a severe legal challenge if either attempted to

¹² *Id.* at 13.

¹³ 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>.

¹⁴ 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/>; Geoffrey Manne and Dirk Auer, *The Covidien/Newport Merger: Killer Acquisition or Just a Killer Story?*, Truth on the Market, Apr. 3, 2020, <https://truthonthemarket.com/2020/04/03/the-covidien-newport-merger-killer-acquisition-or-just-a-killer-story/>.

¹⁵ 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>.

¹⁶ *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.*, Docket No. 9393, Apr. 1, 2020.

unwind an acquisition investigated under HSR.¹⁷ As the authors see it, an antitrust enforcer would face three difficult evidentiary burdens. First, the enforcer would need to show that the but-for world in which the transaction was blocked prior to consummation would likely be more competitive than the actual world with the merger. In other words, the enforcer would need to go back in time and take a second look into a crystal ball to determine (and convince a court that it had correctly determined) that the transaction was going to be anti-competitive. 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 test is meant to be less stringent than the Sherman Act’s.¹⁸

Second, the enforcer would need to show that the basis for unwinding the merger was foreseeable at the time of consummation. Any unwinding done because of unforeseeable actions of third parties, such as an unexpected exiting of the market, would impose a system of no-fault antitrust liability. Finally, the enforcer would need to show that the prospective benefits from this point forward of unwinding the merger outweigh the considerable costs of unscrambling the eggs.¹⁹

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 enforcer to catch before consummation nearly all mergers that “may be” anti-competitive. Under this regime, enforcers can—and have incentive to—stop any harm to consumers 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 is allowed to operate.

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, at least there is some assurance that the merged party 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.

These legal, business, and policy concerns would 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.²⁰ Timely challenges of mergers that did not require an HSR filing would still be appropriate as the enforcer’s “first bite at the apple.”²¹ But frequent attempts at a second bite 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.

¹⁷ 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*, Apr. 2020, <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/>.

¹⁸ See also Muris and Nuechterlein, *First Principles for Antitrust Review of Long-Consummated Mergers*, supra note 17, at 38-41.

¹⁹ *Id.* at 41-48.

²⁰ 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).

²¹ *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 WL 203966 (N.D. Cal. Jan. 8, 2014).