Conglomerate Mergers: The Developing Antitrust Guidelines

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CONglomerate MERGERS: THE DEVELOPING ANTITRUST GUIDELINES

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One need not point out that conglomerate mergers, as well as other varieties, have been occurring at a record pace in recent years. Nor is it any secret that many congressmen and the antitrust enforcement authorities have grown increasingly concerned about these activities, fearing not only adverse economic effects, but adverse social and political effects as well.

Conglomerate mergers seem to attract special attention for two reasons. First, this is virtually the only kind of significant merger activity the very largest firms can engage in, and the conduct of these firms is always top news. Second, the conglomerate merger does not "fit" as neatly into antitrust doctrine as other mergers do, and hence, there is a good deal of mystery about what the operating rules are or should be. Exploring the development of those rules or guidelines will be the focus of this paper.

There are generally considered to be three kinds of mergers: horizontal, vertical and conglomerate. A horizontal merger is one between firms that compete directly. A vertical merger is one between a firm and one of its suppliers (a "backward" integration) or one of its customers (a "forward" integration). This leaves conglomerate mergers, which are simply mergers that are neither horizontal nor vertical.¹

Why do conglomerate mergers occur? There are many reasons, and no one would be so bold as to attempt a complete listing. One reason is a desire to diversify, which in itself can have several motivations. A firm that has grown large and profitable in a particular product line may wish to continue its growth but, because of the antitrust laws or other considerations, may be unable to grow horizontally or vertically. Or a firm tied to a single product or class of customer (the Government, for example) may be concerned about its vulnerability if, for reasons unrelated to the firm's competence, the single product should suddenly be made obsolete or the single customer class should cut back its purchases.² Viewed from the acquired company's standpoint, a conglomerate merger is often an effective method

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¹ One could quibble about classifying "market extension" mergers (between firms that sell the same product but do so in separate, distinct geographic markets and hence do not directly compete) as horizontal or conglomerate, but it seems to make more sense to classify them as conglomerates.

² A desire to reduce reliance on government purchases was an important factor in the decision of several companies to become conglomerates. An example is Ling-Temco-Vought, Inc., once heavily concentrated in defense production. Its chairman, James J. Ling, has said that he was urged by the Pentagon and other government sources to diversify if he wanted LTV to survive. See J. COMMERCE, Oct. 24, 1969, at 1, col. 4.
for the owners of a closely held company to convert their personal estates into more marketable securities. Conglomerate mergers between firms in related product lines also create opportunities for increased efficiencies through the meshing of production or marketing facilities or methods, and for the introduction of new and aggressive management into a stagnating industry. Access to available capital or tax loss advantages can also stimulate mergers of all types, but principally those of the conglomerate variety. It goes without saying, of course, that not all of these reasons are consistent with furthering the health of the economy in all cases, and further, that there are also distinctly anticompetitive reasons for some conglomerate mergers.

A question often asked is whether conglomerate mergers should be stopped. Of course, that is not a relevant inquiry at all, no more so than asking whether mergers of all kinds should be stopped. Instead, there are two questions that seem to be worth asking. The first is whether any conglomerate mergers can be stopped under present law and, if so, which ones. The second is whether the law should be amended to prohibit some mergers that are now beyond legal attack. The leadership of the Department of Justice's Antitrust Division has not been of a single mind on these questions, which is not surprising in view of their complexity.3

I. BASIC MERGER LAW

Let us turn first to the key statute, section 7 of the Clayton Act,4 the first paragraph of which states:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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.5

Whereas this provision is addressed to acquisitions by corporations engaged in interstate or foreign commerce (the word "commerce" being so defined

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3 Compare Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1315 (1965) with McLaren, Statement Before House Committee on Ways and Means, in 5 TRADE REG. REP. ¶ 50,283 (March 12, 1969).
5 Before the 1950 amendment (the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125), this part of section 7 dealt only with stock acquisitions and primarily with horizontal acquisitions:
[No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
in section 1 of the Clayton Act), the second paragraph broadens section 7's coverage:

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

Note that both paragraphs apply only where both parties to the merger are corporations and where the acquired corporation is engaged in interstate or foreign commerce. More important, both paragraphs prohibit only those mergers which "may" have either of two anticompetitive effects: (1) "substantially to lessen competition," or (2) "substantially . . . to tend to create a monopoly." Of course, the word "may" could be construed, perhaps more in accord with its natural meaning, as indicating a legislative purpose to proscribe any merger having the possibility of producing either of the stated anticompetitive effects. And since the Clayton Act, unlike the Sherman Act, is not enforceable through the criminal process, there would not be a compelling constitutional argument against use of the word "may" in this sense. Be that as it may, the Supreme Court has squarely held that the challenged merger must have a probability of producing one of the proscribed results before it can be barred under section 7. There must be "demonstrable and substantial anti-competitive effects." But since the Clayton Act (again unlike the Sherman Act) is designed to reach practices in their incipiency, a certainty that monopoly or reduced competition will occur is not required.

Moreover, and this is of special importance in the case of conglomerate mergers, the anticompetitive effect must be felt "in any line of commerce in any section of the country." Thus, proof of a section 7 violation

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7 15 U.S.C. § 18 (1964). This section underwent a change in 1950 similar to the change in the first paragraph.
8 For this reason, the "exemptions" in the third paragraph of section 7 — corporations' purchases of stock solely for investment and the formation of subsidiaries — do not seem terribly meaningful, as they apply only when there is no substantial lessening of competition.
9 The fourth paragraph of section 7 relates to the acquisition and construction of feeder lines and other extensions by common carriers. The fifth paragraph exempts mergers that occurred before October 15, 1914, when the original section 7 was enacted. The sixth paragraph exempts mergers duly cleared by certain federal administrative agencies or the Secretary of Agriculture.
seemingly must include definition of a product market ("line of commerce") and a geographic market ("section of the country").

II. ANTITRUST ARGUMENTS AGAINST CONGLOMERATE Mergers

There have been about 15 major conglomerate merger cases filed in the federal courts and at the Federal Trade Commission in the past few years. Through these cases and such other sources as the Department's so-called Merger Guidelines, released May 30, 1968, it is now possible to state the principal arguments that can be made against conglomerate mergers, insofar as the antitrust laws are concerned, and to make some evaluation of the kind of proof that might be germane to the issues thus raised.

The three principal arguments that have met with some success thus far are, in a somewhat descending order of clarity, those that involve mergers (1) which create a substantial danger of reciprocal dealing, (2) which create a substantial risk that the market position of an already dominant firm (one of the parties to the merger) in a concentrated market will be enhanced or entrenched, or (3) in which one party, but for the merger, would have been a potential entrant into the other party's market. The Government has also asserted in several cases that the merger under attack would contribute significantly to increasing concentration in industry generally.

A. Reciprocal Dealing

There are three basic kinds of reciprocal dealing that can and do occur. For convenience, they may be labeled coercive, apprehensive and mutual.

The first involves the actual or threatened use of economic power by a very large company. Where the company is an important buyer of the products of a small company and also, perhaps through a separate division or a subsidiary, sells products which the small company buys, the large company

may demand that the small company buy from the large company or risk losing it as a customer.

The second kind involves a similar situation but lacks the actual or threatened use of power by the large company. Instead, the small company apprehends or imagines that its position as a supplier of the large company will be more secure if it is also a customer of the large company.

A different situation creates the third kind of reciprocity. It occurs where neither company is significantly larger nor more powerful than the other or where neither is highly dependent upon the other's customer. However, the companies have grown accustomed to the mutual buyer-seller relationship and neither will work too hard to find an alternative source for the product it buys from the other.

All three situations contain an anticompetitive element, viz., the introduction of an extraneous factor into the competitive picture. In the first two instances, competitors of the large company cannot effectively compete for the small company's business, not because the large company's product or service is superior or lower priced but because it has a form of economic leverage. In the third case, the same element is present, though perhaps to a considerably lesser degree. The analogy to tying agreements is obvious.18

Over half of the conglomerate cases noted in this section19 involved reciprocity issues. FTC v. Consolidated Foods Corp.20 is an example. Consolidated, a giant food wholesaler, was an important outlet for a large number of food processors. It acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic, products which many of the food processors used. The FTC moved against the acquisition, demonstrating that Consolidated used its purchasing power to induce its suppliers to buy from Gentry. The Supreme Court unanimously affirmed a divestiture order,21 stating that reciprocity is "one of the congeries of anticompetitive practices at which the antitrust laws are aimed."22 United States v. General Dynamics Corp.23 involved similar evidence of practices that occurred after General, an industrial giant which sold most of its products to the Government, acquired Liquid Carbonic, Inc., a producer of carbon dioxide and other products which were used by many of the companies that sold their products to General. The district court held the acquisition illegal.


19 Cases cited note 16 supra.


21 62 F.2d 929 (1963), rev'd, 329 F.2d 623 (7th Cir. 1964).

22 380 U.S. at 594.


The General Dynamics case is notable for another reason. The Department of Justice sought a declaration by the court that reciprocal dealing is a Sherman Act violation, irrespective of the merger aspect of the case. The court drew the direct analogy to tying cases and, applying the standards of those cases, ruled against the Government. There was insufficient proof, the court held, that competition had actually been injured in the carbon dioxide market. Moreover, the volume of annual business actually involved in
An important question not involved in either Consolidated or General Dynamics is whether a mere structural relationship of the merging partners which creates an opportunity for reciprocal dealing is sufficient, without any evidence of actual coercion, to stop the merger. Two of the Third Circuit cases have answered this question in the affirmative. In United States v. Ingersoll-Rand Co., the principal defendant, a large manufacturer of industrial machinery, proposed to acquire three leading manufacturers of underground coal mining machinery. The Department of Justice sued and moved for a preliminary injunction, showing that Ingersoll-Rand was a large purchaser of steel, that the steel companies were large users of coal, and that coal producers, to retain the goodwill of the steel companies, might be induced to purchase their mining machinery from the companies Ingersoll-Rand was acquiring. The district court in Pittsburgh accepted this somewhat tenuous argument and enjoined the acquisitions. The Third Circuit affirmed, quoting the district court's observation that

the mere existence of this purchasing power [of steel] might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the goodwill of the possessor.

To the same effect is Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc. reversing the Delaware district court's denial of a preliminary injunction against the threatened takeover of Allis-Chalmers by White.

This, of course, involves the second kind of reciprocity listed above—or perhaps even the third. (The Department of Justice prefers to call this "reciprocity effect.") How can this argument be met? Four district court cases provide the answer. United States v. Penick & Ford, Ltd. was a suit

reciprocal dealing arrangements was only about one-third of the $500,000 worth of business foreclosed by the tying agreements in International Salt, which in turn was the smallest dollar volume that had resulted in a declaration that specific tying agreements were illegal even without specific proof that competition had been injured. But see United States v. Loew's Inc., 371 U.S. 38 (1962).

The Department has attacked reciprocal dealing directly in other non-merger cases. See, e.g., United States v. United States Steel Corp., Civil No. 69-728 (W.D. Pa., filed June 15, 1969); United States v. General Tire & Rubber Co., Civil No. C-67-155 (N.D. Ohio, filed March 2, 1967). U.S. Steel has consented to a sweeping judgment. Similarly, the FTC has obtained affidavits of voluntary discontinuance from several large companies.

The Department of Justice has stated that it will generally attack a merger on the ground of reciprocal dealing possibilities if the resulting company sells in a market whose members make 15 percent or more of their total purchases from the resulting company and its competitors, unless "some special market factor" clearly shows that the possibility of reciprocal dealing is "remote. . . ." Merger Guidelines, supra note 17, no. 19(a), at 6690.

24 320 F.2d 509 (3d Cir. 1963).
26 320 F.2d at 524 (3d Cir. 1963).
28 Cf. Turner, supra note 3, at 1390.
in the district court of New Jersey (which is also in the Third Circuit) to enjoin Penick's proposed acquisition by Reynolds Tobacco Company. Reynolds was a major buyer of paper, while Penick, the fourth largest seller of starch, sold starch to paper companies. Thus the case was stronger than Ingersoll-Rand because any reciprocity coercion could be exercised directly on the paper industry, rather than through the two-industry chain involved in Ingersoll-Rand. Moreover, there was evidence that reciprocity had been and was a common practice in the starch industry. However, Reynolds submitted testimony stating that it had a company policy against reciprocity and that Penick would be autonomously managed and would not even have data on Reynolds' paper purchasing. This evidence was not controverted by the Government, and the district court declined to enjoin the acquisition before trial.31

Roughly the same thing happened in United States v. Northwest Industries, Inc.,32 and again relief was denied the Government, this time by the district court in Chicago. Similar defense evidence in the two ITT cases in Connecticut,33 involving the proposed acquisitions of Grinnell and Hartford Fire, defeated the Government in those two cases as well (although the district court there was also rather dubious about the government's evidence that the acquisitions would create opportunities for reciprocal dealing).

Examination of these cases will show what kind of evidence the defense lawyer will have to marshal if the "mere existence" rationale of Ingersoll-Rand and Allis-Chalmers is followed. Many companies have adopted a definite policy against reciprocal dealing, and evidence of such a policy is important, buttressed, when possible, by testimony of key officials explaining the reasons for the policy. Evidence of steps the company has taken to enforce the policy, whether through education of its employees or announcements to its suppliers and customers, would also be helpful. It may even be that the corporate structure is antithetical to reciprocal dealing. For example, both Northwest Industries and ITT treat major divisions and subsidiaries as separate profit centers, with the management of each center having a financial stake in its profitability. Although reciprocal dealing might increase sales of one profit center, it might also increase the cost (or decrease

31 The history of this case is interesting. At first things moved along snappily. The complaint was filed on April 6, 1965, one day before the scheduled closing. The merging parties agreed to postpone the closing until determination of the preliminary injunction issue. Briefs and voluminous documentary evidence were submitted to the court before the actual hearing, which began on May 11. Eight witnesses testified. On May 21, Judge Coolahan issued his opinion and order denying the government's motion. There followed over four years of discovery and other maneuvering, and on September 22, 1969, the defendants entered into a consent order under which Reynolds divested itself of Penick and agreed not to reacquire Penick or, for a period of five years, to acquire any other starch producer or even enter that field through internal expansion.


the quality) of goods purchased by another, and the management of the latter profit center is not likely to be enamored of such a practice. Finally, there is negative evidence that is important. A company that engages in reciprocal dealing will generally have an official (called the Trade Relations Director, Special Sales Director, or other title) responsible for the coordination and subsequent distribution of sales and purchasing data to the appropriate purchasing and sales personnel. The absence of any official with such a role (and the absence of any alternative means of collecting and redistributing the data) will help negate a purpose to engage in reciprocity.

B. Acquisition of an Already Dominant Company

Just as the FTC was instrumental in developing the argument that reciprocal dealing can taint a conglomerate merger, it was the Commission that broke ground in another area.

In 1957 Clorox was the leading brand in the $80 million household liquid bleach market. Its share of the market was 48.8 percent, and it was the only bleach producer selling nationally. With two firms accounting for almost 65 percent of sales, and six for almost 80 percent, the market was highly concentrated. In that year Clorox was acquired by Procter & Gamble, a large diversified company and a giant in the field of soaps, detergents and cleansers (but not liquid bleach), with 54.4 percent of the $1 billion market. That market was also highly concentrated, with 80 percent accounted for by three companies. Procter saw in the Clorox acquisition a means of entry into a field with which it was already quite familiar—high-turnover, low-priced household products marketed chiefly through grocery stores but pre-sold to consumers through mass advertising.

The FTC proceeded against the merger and concluded that the substitution of Procter for the already dominant Clorox might substantially lessen competition by raising barriers to entry in the bleach market and by dissuading the smaller firms from competing aggressively.34 (Another conclusion, which will be discussed in the next section, was that the acquisition eliminated the potential competition of Procter.) The Sixth Circuit reversed,35 but the Commission prevailed in the Supreme Court.36

What difference would it make, it may be asked, if a firm like Clorox, already dominant in its field, were acquired by a still-larger firm which did not sell the same product? The critical fact in the case seemed to be advertising. All liquid bleach is apparently identical, which means that heavy advertising and sales promotion are extremely important in marketing the product. Clorox, with 1957 sales of just under $40 million, spent $3.7 million—nearly 10 percent of sales—on advertising, and another $1.7 million on other promotion. Similarly, Procter spent nearly 10 percent of its

35 358 F.2d 74 (6th Cir. 1966).
36 386 U.S. 568 (1967).
annual sales (of $1.1 billion) on advertising in 1957 and nearly 5 percent more on other promotion. In fact, Procter, the nation's largest advertiser, was also a multiproduct advertiser, which gave it the ability to command substantial volume discounts from the media and to achieve other economies. The Commission and the Court thought that these enormous advertising economies, coupled with Procter's financial resources generally, could make Clorox virtually impregnable: smaller bleach producers would not compete too aggressively for fear of retaliation, and prospective new bleach producers, faced with the prospects of huge short-term defensive advertising campaigns by Procter-Clorox, might be far less willing to enter the market. Also, retailers might give Clorox bleach preferred shelf space in recognition of Procter's overall market importance.  

_United States v. Wilson Sporting Goods Co._ presented a more mixed picture. Wilson, the nation's leading manufacturer of a wide variety of sporting goods (and also an LTV subsidiary), sought to acquire Nissen Corporation, the leading manufacturer of gymnastic equipment (a field Wilson was not engaged in prior to the acquisition). Thus, this was a "product extension" merger like that in Procter-Clorox. On the one hand, the advantages of advertising and promotion in the gymnastic business were shown by the record to be nil. (Apparently gym coaches and teachers are less subject to emotional appeals than the rest of us are.) On the other hand, the court saw three possible adverse results from the merger. One was that Nissen, whose share of the market had been slipping, might benefit from its alliance with Wilson, because the latter's importance to sporting equipment dealers could make the dealers receptive to suggestions that Nissen products be promoted with special vigor. Another was that Wilson would also benefit — and entrench its leading position — by being able to offer an even broader array of sports equipment. The third factor was that Nissen's smaller competitors, which had previously resisted offers to sell to other large sporting equipment manufacturers, might alter their position with Wilson in the picture, oligopoly being the possible result. These conclusions, when added to others (to be discussed below), led the court to enter a preliminary injunction against the proposed merger.

Thus far, the Government has had less success with this line of argument in the _ITT_ cases in Connecticut. The argument was in three principal parts. _First_, the Government claimed that the acquisition of Grinnell, the leading manufacturer of automatic sprinkler systems, would enable ITT, a leading factor in various heating and air conditioning fields, to gain a competitive

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37 The Third Circuit reached a similar conclusion on the appeal of General Foods, another diversified giant, from the FTC decision barring its acquisition of S.O.S., one of the two firms that dominated the soap pad industry. General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), _cert. denied_, 391 U.S. 919 (1968).
39 The injunctions entered in the _Allis-Chalmers_ and _Ingersoll-Rand_ cases discussed above were based in part upon this line of reasoning.
advantage by engaging in package or system selling. But defense affidavits (principally from Grinnell's competitors) took strong issue with the Government. They showed that sprinkler installation is a specialty business done by specialty contractors (the Government conceded this), that sprinkler contracts are generally awarded on the basis of bids solicited for sprinkler installation alone, and that Grinnell, which already distributed some heating and air conditioning products, was in a position to offer package deals but had not found it advantageous to do so. Second, the Government contended that the acquisition of both Grinnell and Hartford, an important fire insurance company, would give Grinnell an opportunity to increase its sprinkler sales to Hartford's fire insurance customers. But much of Hartford's fire insurance, the evidence showed, was written by independent agents who represented other companies as well, or was part of insurance pools on large buildings; in neither case would there be any strong likelihood that sprinklers manufactured by an affiliate of one of the insurance companies would be recommended. Moreover, the recommendations of fire insurance agents would not carry much weight with architects and general contractors, who do much of the selecting of sprinkler systems. The importance of competitive bidding in that selection process would also militate against Grinnell having any advantage because of the affiliation with Hartford. Third, the Government contended that the pair of acquisitions would injure competition by giving ITT access to Hartford's surplus (which was in excess of the surplus required by law to cover current insurance business), and by giving Grinnell, through access to ITT's financial resources, an opportunity to increase credit sales and leasing, as well as advertising and promotion. But again the facts suggested that no injury to competition was threatened. For one thing, ITT President Harold S. Geneen testified unequivocally that ITT does not intend to remove Hartford's surplus and that the company had made a commitment to that effect to Hartford. For another, defense evidence showed that it was possible for Grinnell to finance increased credit, leasing, advertising and promotion even without ITT's resources.

The Federal Trade Commission has also been unsuccessful in a recent case involving this issue. The merger involved was between the Bendix and Fram corporations. Bendix is a diversified manufacturer of components and assemblies for aerospace, automotive and other uses. Its sales are in the $1 billion class. Fram, one-fifteenth the size of Bendix, was third in the automotive filter line and also was a substantial producer of filter water separators and aerospace fuel filters. There were no horizontal or vertical aspects to the merger, and complaint counsel strove to bring the case within the Procter precedent. The hearing examiner ruled last September that the evidence did not measure up, however. Although a superficial relationship

41Id. Complaint counsel have appealed and the case is now pending before the full Commission.
between the companies' product markets existed, Bendix' automotive parts line is generally sold to repair garages, while Fram's filters are a "TBA" item generally sold through gasoline service stations. Thus, there was no built-in opportunity for Bendix to employ any leverage to achieve preferred dealer treatment for Fram filters. Nor was joint advertising likely, for Bendix was a small advertiser and, in any event, did not direct much of its promotional efforts at potential Fram customers. Finally, Fram did not enjoy Clorox' dominance in its market, and in fact some of its principal competitors were subsidiaries of large companies like General Motors, Textron and Tenneco.

Thus, knowing when a proposed merger will founder on the arguments discussed in this section is difficult. However, although market share percentages and other such numerical indices are not useful guides, some broad guidelines may be of assistance to acquisition-minded businessmen. A merger that would result in a very large increase in the absolute size (assets or sales) of a firm which is already dominant in its field is likely to be challenged, and might even be presumptively illegal. When the acquired firm is already dominant and gains any significant competitive advantage from the proposed acquisition — such as the advertising economies involved in Procter or a large supply of ready cash — the merger may be endangered. Product extension mergers in which the acquiring firm is also dominant and thus might have considerable leverage with dealers or other purchasers may also be in trouble. A merger that might substantially increase barriers to entry in the market of the acquired firm can also invite attack where the latter market is already concentrated or is becoming so.

C. Elimination of Potential Entrant

If a firm enters a new field by internal expansion, the new field theoretically becomes more competitive because the number of sellers increases by one. (Almost the same would be true if the firm entered by acquiring a small company and expanding it.) If, instead, it enters by acquiring an existing large firm, there is no increase in the number of sellers. Nor is there a decrease. However, if it would have entered by expansion but chooses to enter by acquisition, the possible increase in the number of sellers is eliminated. Thus, entry of such a firm by acquisition results in a market with fewer sellers than might have been there, and in a sense there has been a theoretical lessening of competition. Moreover, the existence of a firm that might enter if the market were ripe for entry (because of high profit margins, for example) would tend to keep the market competitive (by keeping prices and hence profit margins down, for example); entry of that firm by acquisition would eliminate that competitive force.\(^\text{42}\)

Just this reasoning was involved in Procter and Wilson, and it contributed to the conclusion that the mergers in those two cases should not be permitted. The difficult question, however, is not the economic theory but

the facts. When is a firm fairly characterized as a potential entrant? The Supreme Court in *Procter* upheld the Commission's findings on this point: (1) Procter had considered entering the liquid bleach market independently, but decided that the acquisition route would be a quicker and more economic means of achieving a dominant position; (2) Procter had recently, by developing a new abrasive cleaner, successfully entered an industry similar to liquid bleach; (3) Procter was engaged in a vigorous program of diversifying into other product lines closely related to its existing lines, and liquid bleach was a natural next step; (4) Procter had the marketing experience and advertising strength that would help assure its success in the bleach field; and (5) the bleach industry was comparatively easy to enter.43

*Wilson* was a much more difficult situation. Although the objective factors favoring entry by Wilson were present (including Nissen's relatively high profit margin), there was no evidence that it intended to enter through internal expansion and, indeed, the Wilson management vigorously denied having any such intention. The court concluded that Wilson's potential entry into the gymnastic equipment field was possible, but not strongly so. Had there been no other significant argument against allowing the merger, the potential-entrant argument probably would not have been sufficient. However, the court concluded that Nissen was a strong possible entrant into some of Wilson's fields, and there were other arguments, as we have seen, which led the court to enjoin the proposed merger.

Thus, a subjective intent by a large firm to enter a market by internal growth (or acquisition and expansion of a small firm already in the market) is, in most cases, a strong factor militating against allowing the entry by acquisition. Where this factor is absent, the Government will have a more difficult — but not impossible — task demonstrating that the acquiring firm is indeed a potential entrant. *Procter* and *Wilson* point to three factual showings that might be pertinent (relationship between the two companies' product lines, diversification pattern of the acquiring firm, and high profit margins in the acquired firm's market), and these are listed in the Justice Department's *Merger Guidelines*.44 It is difficult to foretell the result if only one of these three showings can be made, or if the evidence is not strongly

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43 386 U.S. at 574, 580-81; see also Filtrool Corp. v. Slick Corp., 5 TRADE REG. REP. ¶ 73,035 (C.D. Cal., Dec. 29, 1969).

44 The *Guidelines* also undertake to describe, in market share terms, the kind of firm whose acquisition by a "likely entrant" will ordinarily be challenged:

(i) any firm with approximately 25% or more of the market;

(ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50% or more;

(iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or

(iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm.

*Merger Guidelines*, supra note 17, no. 18, at 6687-88.
in favor of the Government on any of the three. Therefore, discriminating judgments are important, perhaps more so than where reciprocal dealing possibilities would be created or where the firm to be acquired is the dominant element in a concentrated market. But one kind of case described in the Guidelines seems almost a sure winner for the Government: "a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive 'disturbance' or 'disruption' that such entry might create."\(^{45}\) As in many other areas of antitrust law, an intent to prevent or hinder competition can make other evidence almost unnecessary.

D. General Increase in Concentration

The one argument against conglomerate mergers that has thus far had no judicial takers is the claim that a particular merger is illegal merely because it contributes in a significant way to the general increase in concentration in American industry.

Trends toward concentration are, it must be remembered, important in section 7 cases. An example is Brown Shoe.\(^ {46}\) In holding the acquisition of the Kinney retail shoe chain by Brown, a shoe manufacturer, to be illegal, the Supreme Court found it quite relevant that there was a trend of shoe manufacturers acquiring retail outlets. The same was true for the horizontal aspect of the case: the combination of Brown's retail outlets with Kinney's was held illegal in large part because the retail shoe business was already becoming increasingly concentrated. Likewise, in United States v. Von's Grocery Co.,\(^ {47}\) a merger of two retail grocery chains in the Los Angeles market which eliminate direct competition in less than 1 percent of that market was held illegal in light of the trend toward concentration there.

But this is not the same as saying that a merger involving two very large companies which produces no specific anticompetitive effects in any defined product market may nevertheless be illegal. Yet, this is just the position of the present Administration. Attorney General Mitchell, in a speech in Savannah on June 6, 1969, said very explicitly that the Department of Justice may very well oppose any merger between any two of the top 200 manufacturing firms or firms of comparable size in other industries (and will probably oppose any merger between one of the top 200 and any leading producer in any concentrated industry).\(^ {48}\)

It is not likely that this theory will be squarely tested for some time to come, if ever. As shown in the foregoing pages, more conventional antitrust theories have been successfully applied in all of the conglomerate merger

\(^{45}\) Id. no. 18(b), at 6688.

\(^{46}\) 370 U.S. 294 (1962).

\(^{47}\) 384 U.S. 270 (1966).

cases to date, and this is likely to continue to be true. The general concentration argument has been utilized as a supplementary theory in the *Northwest* and *ITT-Grinnell-Hartford* cases (and in *Bendix* as well), presumably to see what kind of judicial reaction it will meet and in the hope of picking up some favorable language for future cases, but thus far the reaction has been cool and the language unfavorable.

The trouble with this theory, of course, is that section 7, by its terms, seems to require a finding that competition is likely to be substantially lessened "in any line of commerce in any section of the country." Since the "section of the country" can be the entire nation, it is the other two parts of this requirement that make the theory difficult to accept. No court has yet held that the entire economy is a "line of commerce." Indeed, it can well be argued that such a holding would make those words meaningless. Congress, it is true, supplied a good deal of language in the key reports and the debate on the 1950 amendment to section 7 to verify its concern with rising concentration in the aggregate as well as in particular industries. But Congress is not incapable of enacting a statute proscribing all mergers that substantially lessen competition in the economy as a whole. That it did not do so seems fatal to the general concentration theory.

The other substantial defect in the theory is that it is effects on competition that must be examined in assessing a merger under section 7. Admittedly, Congress sought to arrest anticompetitive trends in their incipiency. Also, minute examination of possible anticompetitive effects is less necessary where a merger significantly increases concentration in an already concentrated industry. But that is because an oligopolistic market is known to be less competitive than one in which market shares are more evenly distributed among a large number of sellers. It certainly cannot be said, in our present state of knowledge, that an economy that is more concentrated in general is less competitive. As stated by the White House Task Force on Antitrust Policy, which was chaired by Chicago Law School Dean Phil C. Neal, in its July 5, 1968 report, "the level of economy-wide concentration and numbers of firms that would be incompatible with the maintenance of a competitive market system is not known." The Task Force on Produc-

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49 The Government is also taking the position that a number of possible anticompetitive effects (including general concentration) can be aggregated to produce a finding of illegality even if no one of them is sufficient. The court in *Wilson* reacted somewhat favorably to this but the courts in *Northwest* and *ITT-Grinnell-Hartford* did not.

50 The references are collected in a well-developed paper delivered last fall to an American Management Association briefing session by Roland W. Donnem, who is Director of the Antitrust Division's Policy Planning Section.


tivity and Competition appointed by President Nixon and chaired by Professor George J. Stigler took the same position in its report last June.55

What is important to recognize is that the chief objections to conglomerate mergers involving very large companies, and to increases in concentration generally, are predominantly social rather than economic.56 Our economic system is evaluated primarily by how well it allocates the nation's resources in satisfying consumer needs and wants in the most efficient manner. The major specific complaint made about increased concentration is that "local control" of business is thereby decreased: those who were formerly owners become salaried managers, altering their relationship with the local labor force and the community generally; the major decisions are made hundreds of miles away; local banks, accountants, lawyers and advertising agencies may be replaced. These are unfortunate consequences sometimes; other times they are not.57 But they are, in the main, consequences that do not necessarily affect the indicators of a healthy economic system.

It may be that Congress should supplement the antitrust laws and prohibit certain kinds of conglomerate mergers that do not violate traditional antitrust principles.58 Such an undertaking, however, would require a careful examination of the specific social implications of increased concentration, a careful evaluation of how those implications square with the nation's goals (which themselves could stand a major re-examination), and a careful drafting of legislation to achieve the objectives that were determined to be desirable with minimum impairment of other goals and policies. If that sounds like a tall order, so be it.

III. CLOSING OBSERVATIONS

The main purpose of this paper has not been to delve into the fundamentals of the conglomerate phenomenon, but instead to examine the antitrust laws and how they are being applied in this area. An assessment of the developing antitrust guidelines is useful to the businessman and his legal counsel only if it can help them predict with a reasonable degree of accu-


56 Some "competition" arguments have been suggested. One is that a conglomerate may adopt policies to promote its general overall interests and these might be less pro-competitive than the policies particular subsidiaries might adopt if they had only their own interests to consider. Another is that the trends toward more and larger conglomerates will increase the situations in which large firms, previously only competitors, find themselves also suppliers and customers of one another, with a consequent reduction of the pre-existing competitive rivalry. (This is what has been referred to above as mutual reciprocity.) Obviously, these arguments are difficult to evaluate in the abstract and probably remain so even in the context of specific cases.

57 For example, a locally owned business in the South might have far more difficulty eliminating racial discrimination in employment practices than if the business were owned by a national company.

58 There have been specific proposals for supplementary legislation designed to reach mergers that contravene the antitrust policies that underlie section 7, but that are not as easily reached under existing law as they might be. See, e.g., the proposals of the Neal group. NEAL TASK FORCE REPORT, supra note 54.
racy whether an acquisition being considered will be challenged in the courts or at the Federal Trade Commission. In some respects this is more important than attempting to predict how the acquisition will be viewed by an appellate court or even by a district court or hearing examiner after a full trial. There are several reasons for this:

First, the contemplated acquisition is more likely to receive prompt and thorough scrutiny than most other kinds of proposed business moves that might raise antitrust questions. Since April 1969 the FTC has required that it be notified of all agreements to merge or acquire assets involving companies with assets of $10 million or more, where the resulting corporation would have assets of $250 million or more. The notice is due within 10 days after the agreement is reached and no less than 60 days before consummation of the agreement. In addition, any merging party with assets of $250 million must automatically file a Special Report, while any smaller firm must do so if directed to by the Commission. The same notice and Special Report must be filed by any company with assets of $250 million or more within 10 days after it obtains 10 percent or more of the voting stock of a corporation having assets of $10 million or more. A notice and Special Report must also be filed by a $250 million corporation at least 60 days before it consummates a stock acquisition that would give it 50 percent of the voting stock of a $10 million corporation. In both cases the corporation whose stock is being acquired must also file a Special Report if the Commission so directs. Finally, even if neither party to a stock acquisition has assets of $250 million, these same notices, plus Special Reports if specifically directed, must be filed where the combined assets of the two corporations total $250 million or more.59

Second, the present head of the Justice Department's Antitrust Division is firmly of the view that section 7 applies to "pure" conglomerate mergers, and that the Merger Guidelines (which were issued under the previous Administration) should not be regarded as the limit of the Department's enforcement intentions.

Third, the result of a successful challenge to a merger is normally an order requiring divestiture of the acquired firm or a substantial part of it. Where it is likely that divestiture would be difficult to accomplish after a trial on the merits (and that is often the case), the complaint will be accompanied by a motion to enjoin the merger pendente lite. The granting of such a motion can kill the merger as effectively as a finding of illegality after a full trial.60


60 See, e.g., United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968). For this reason, extensive hearings might be held on the motion for a preliminary injunction. In United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969), a temporary restraining order was issued the day after the complaint was filed, and hearings began that day. The hearings took 18 court days, and in addition there were 2 days of depositions. A similar situation exists in the bank merger area. Under a 1966 amendment to the Federal Deposit Insurance Act, a merger involving a federally insured bank must
Fourth, even where the court declines to enjoin the merger before trial, the court might be sufficiently concerned about the possibility that the Government will prevail to enter a "hold separate" order — allowing the merger to be consummated but limiting the ways in which assets may be combined, preventing disposal of major assets, restricting the issuance of new securities, and otherwise smoothing the way for a possible divestiture after trial. This kind of order, and the uncertainty over a possible divestiture order after trial, can pose enormous financing or stockholder difficulties which can also kill the merger without a trial ever being held.

For these reasons, care must be taken to evaluate the possibility of antitrust challenge to a proposed acquisition involving substantial corporate parties. Where the merger is likely to be killed by the mere filing of a complaint by the Department of Justice, it may be prudent to solicit the Department's views at an early stage. If it is only the entry of a preliminary injunction that will terminate the merger, counsel should begin preparing his case as soon as he concludes that a complaint may be filed. Even if it is concluded that the merger will not be stopped prior to full trial on the merits, steps should be taken, if possible, to guard against the lapsing of financing arrangements and stockholder approval that might result if a "hold separate" order were to be entered.

One final note: not all mergers, whether conglomerate or not, are voluntary arrangements. The "take-over" has become an increasingly important phenomenon. The Allis-Chalmers and Filtro cases show that on the right facts the involuntary partner can effectively utilize the antitrust laws to prevent the threatened take-over. Thus, where this kind of acquisition is contemplated, there is yet another facet to the antitrust planning that must be considered.

have prior approval of the appropriate banking authority and the Department of Justice is automatically entitled to a preliminary injunction if it files suit within 30 days after the approval is secured. 12 U.S.C. § 1823(c), as amended, Pub. L. 89-356, 80 Stat. 7. Most proposed bank mergers are abandoned when this occurs.

61 Orders of this kind were entered in the Northwest and ITT-Grinnell-Hartford cases. In the case challenging LTV's attempted acquisition of the stock of Jones & Laughlin Steel Corporation in April 1969, the parties agreed to comparable restrictions pending trial. On March 6, 1970, agreement was reached on a consent decree under which the acquisition would be permitted if LTV would dispose of Braniff Airways, Inc. and the Okonite Company, and LTV and J & L would be barred from engaging in reciprocity. Also, LTV, which has meanwhile disposed of National Car Rental Systems, Inc. and Wilson Sporting Goods Company, would be prohibited from making any major acquisitions for 10 years without prior approval.

62 Compare the proposed acquisition of American Broadcasting Company by ITT. The merger agreement was approved by both companies' stockholders in April 1966. Because transfers of broadcast licenses were involved, prior permission of the Federal Communications Commission had to be obtained. A major battle occurred, with the Department of Justice intervening as a party before the FCC and opposing the transfers on antitrust grounds. The Commission approved the transfers twice, first in December 1966 and then in June 1967, American Broadcasting Co., Inc., 9 F.C.C.2d 546 (1967), but the Department of Justice appealed. United States v. FCC, Cir. No. 21,147, D.C. Cir. July 21, 1967). This process took so long that the proposed merger was abandoned in January 1968.

63 See note 16 supra.