A CARPENTER IS ONLY AS GOOD AS HER TOOLS:
THE IMPORTANCE OF USING OUR FULL TOOLBOX AS ANTITRUST ENFORCERS
Global Antitrust Enforcement Symposium
Washington, D.C.
September 28, 2015
Keynote Remarks of Commissioner Terrell McSweeny

Good evening. I am honored to be here and I would like to thank Georgetown Law, this evening's sponsors, and the Global Antitrust Enforcement Symposium for the invitation to speak.

I am delighted to be amongst some of the best and brightest in competition law from around the globe. Before I begin, I will offer the standard disclaimer that the views I express here this evening are my own and do not reflect the Commission's views or the views of any other Commissioner.

Serving on the Commission at this time is an extraordinary privilege. Not only because of the historic milestones of the last year – celebrating the 100th anniversary of the Commission and the Clayton Act, issuing our Section 5 statement, and being part of the first FTC led entirely by women – but also because of the important role antitrust law and competition policy are playing not just domestically but globally. As the world becomes increasingly interconnected, the Commission continues its close ties with foreign competition authorities – not only on particular matters, but also more broadly to ensure consistent policies and analytical frameworks. We continue to establish bilateral relationships, like the recent agreement between the U.S. antitrust agencies and the KFTC, and take part in international organizations, such as ICN and OECD.

There is plenty to talk about – and I look forward to the discussions tomorrow.

This evening I am going to focus on areas in merger enforcement which, within the last year, have been the subject of deliberation within the Commission: the role and nature of empirical evidence, the continued role of structural presumptions, and the level of evidence the *Horizontal Merger Guidelines* requires to support coordinated effects theories. While these topics are at the forefront of conversation in the United States, I believe certain takeaways are relevant to those outside of the U.S. as well.

Over the past several decades, there has been an increased emphasis on the value of avoiding "false positives" – that is, bringing inappropriate cases. Indeed, some have suggested that we seem to have developed something of a preoccupation with false positives in modern antitrust.[1] Provocative new academic research suggests, however, that many close mergers,

[1] Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 51, 57 (Robert Pitofsky ed.) (2008). ("I am troubled that the concern about false positives (bringing inappropriate cases) has tended to trump worries about false negatives (failing to bring appropriate cases). Losing cases or cases that are seen as inappropriate often come under visible attack, whereas one has to listen carefully to hear about cases that should have been pursued that were not." *See also* Jonathan B. Baker, *Taking the*

which the antitrust agencies either did not challenge or which they challenged but lost in court, led to post-merger increases in price.[2] The prospect of systematic under-enforcement, rather than false positives, concerns me, and I believe should be a concern more broadly.

Raising the threshold for action in merger cases could make under-enforcement even more likely, threatening worse outcomes for consumers as a practical matter. And it may be that the threshold is raised, intentionally or not, by the selection of the instruments we use for measurement of potential competitive effects. Certainly we are fortunate to have increasingly sophisticated tools and a wealth of data by which to evaluate transactions. But new tools are not necessarily definitive, especially where data aren't complete. Therefore, we must not forget those tools that have been at the disposal of antitrust enforcers for decades.[3] Our goal should not be to have more challenges or less, but to make the best decisions that lead to the best results for consumers and competition. Unlike enforcement actions in conduct cases, merger reviews are inherently predictive. And, in my judgement, smart prediction requires a careful look at all the facts using *all* the tools in our toolbox.

The Role of Economic Evidence in Merger Analysis

First, let me turn to the role of quantitative evidence in merger cases. I believe that the Commission should base its decisions on the best reasonably available and reliable economic evidence. Econometric modeling and merger simulations can fulfill this role, and often do. But economic evidence is not limited to regression analysis or sophisticated modeling. Quantitative data such as market shares, levels and trends in prices, and margins provide important economic evidence. In using these tools, we should be careful not to toss out the kind of evidence that common law has used for centuries on the grounds that it may seem anecdotal because, on the contrary, it can be the most probative. Party documents and declarations by industry participants that shed light on how a market operates are also important pieces of economic evidence. A two-page party document explaining the strategic rationale for a transaction might well be the best available evidence of the transaction's likely competitive effect. Moreover, the probative value of contemporaneous documents far surpasses self-serving oral statements made after an investigation is underway.

Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right, 80 ANTITRUST LAW JOURNAL No. 1 (2015), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publishing/antitrust_law_journal/at_journal_80i1_baker.pdf.

[2] *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015), 94, 155; *see also id*. at 158 ("Without much obvious evidence, a view has arisen that most large mergers produce efficiencies and consumer benefits and hence that merger policy at the margin should avoid challenges because of the high likelihood of preventing efficiency-enhancing consolidations. The data compiled in this project demonstrate that relatively few Type I errors are in fact made by the antitrust agencies. Far more common are Type II errors – clearing anticompetitive mergers – with considerable adverse effects on competition and consumers.").

[3] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) ("The Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.")

The Commission's challenge last December to Verisk Analytics' proposed acquisition of EagleView Technology provides a particularly good example of the central role that internal documents and other non-quantitative factors can play in making the right decision.[4] The FTC's investigation focused on the market for rooftop aerial measurement products, or "roof reports." Roof reports use aerial images to calculate the dimensions of rooftops, primarily for insurance purposes. EagleView is the leading U.S. provider of "roof reports." Verisk, the leading provider of downstream software platforms, had also recently entered into the roof report business. There was strong qualitative evidence that Verisk was uniquely well positioned to compete against EagleView in providing roof reports.

One of the things the FTC examined was the future trajectory of competition between the merging parties to offer customers ever more innovative products. Verisk had made substantial investments in capturing high-resolution aerial images of rooftops, which allowed it to provide more accurate measurement tools to customers. To me, the documents and testimony in the case were compelling. Moreover, the market concentration and qualitative evidence provided a more than sufficient basis to challenge that merger. After the FTC filed for an injunction last December, the parties promptly abandoned the deal.

Developments since that time have demonstrated the wisdom of the Commission's action. Verisk publicly announced last month that it was actually *accelerating* its collection of aerial images.[5] In its press release, Verisk characterized its initiative as merely "the most recent step [in the company's] ongoing efforts" in the area, and cited Verisk's "long-term commitment to the highest-quality imagery and data." [6]

So while sophisticated economic models can be valuable tools, we have many other excellent tools available to us as antitrust enforcers. An inability to run a regression does not imply an inability to compellingly identify a threat to consumer welfare. Even in this age of big data, sufficiently reliable data are frequently unavailable, and certain features of a market may limit the feasibility of useful modeling. In those cases, it is important not to ignore the wide array of other types of economic evidence regarding likely competitive effects. The Agencies' *Horizontal Merger Guidelines* support this approach.

For example, the FTC's recent challenge to the proposed Sysco-U.S. Foods merger was based on a variety of types of evidence. As in *Verisk*, these included standard market definition and concentration analyses, party documents and admissions, customer complaints, and declarations. However, because of differences in the availability of data, the FTC also submitted merger simulation and local event study analyses performed by an outside economic expert, Dr.

---

[4] *See* Fed. Trade Comm'n, FTC Challenges Verisk Analytics, Inc.'s Proposed Acquisition of EagleView Technology Corporation (Dec. 16, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition.

[5] Xactware: Verisk Insurance Solutions Announces Expansion of Imagery Database (Aug. 4, 2015), http://www.marketwatch.com/story/xactware-verisk-insurance-solutions-announces-expansion-of-imagery-database-2015-08-04.

[6] *Id*.

Mark Israel. That said, the pricing data available to us in Sysco-U.S. Foods were limited, which in turn limited the type of economic modeling that could be reliably performed.

This fact was not lost on Judge Mehta, who commented in his opinion that the pricing evidence was "far weaker" than that put forth in *Staples* and *Whole Foods*[7] – previous merger challenges in which the FTC had robust store-level pricing data with which to work. Judge Mehta also noted that the empirical studies put forth both by the FTC and the parties were "imperfect."[8] However, ultimately Judge Mehta determined that the FTC's *prima facie* case, which synthesized complimentary forms of evidence into a clear narrative, was not convincingly rebutted by the parties and concluded, "based on *all the evidence presented*," that the merger "would eliminate head-to-head competition between the number one and number two competitors in the market for national customers" and was therefore "likely to lead to unilateral anticompetitive effects in that market."[9]

The Continuing Role of Presumptions in Merger Analysis

I was also encouraged that Judge Mehta reaffirmed the long-standing and widely accepted role of the market concentration presumption in merger analysis. In his opinion, Judge Mehta explained that "the FTC can establish its *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels."[10] While the FTC certainly did not rest on the presumption in *Sysco*, Judge Mehta's clear statement reaffirms the continuing significance of the presumption, and its role in suggesting the likelihood of anticompetitive harm.

There are those who insist that there is no place in modern antitrust for the presumptions endorsed by the Supreme Court in *Philadelphia National Bank*[11] and set forth under the

---

[7] *Fed. Trade Comm'n v. Sysco*, No. 1:15-cv-00256 (D.D.C., June 23, 2015) Memorandum Opinion, 99 [hereinafter "Sysco Opinion"].

[8] Sysco Opinion, 87. Judge Mehta found that Dr. Israel's analysis was "more consistent with the *business realities* of the food distribution market" when "evaluated against the record as a whole." *Id*. at 39 (emphasis added).

[9] *Id*. at 89 (emphasis added).

[10] *Id*. at 66.

[11] *See, e.g.*, Timothy J. Muris and Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, THE ANTITRUST SOURCE 15 n.66, April 2010, http://www.law.gmu.edu/assets/files/publications/working_papers/1256ThreeKeyPrinciples.pdf (describing an article by Professors Michael Katz and Howard Shelanski that suggests retaining the structural presumption only in cases of merger to monopoly and commenting: "We disagree that a presumption is appropriate even in this context"); Joshua Wright, Truth on the Market Blog, "The Guidelines Should Be Revised to Reject the PNB Structural Presumption," Oct. 26, 2009, http://truthonthemarket.com/2009/10/26/the-guidelines-should-be-revised-to-reject-the-pnb-structural-presumption/ (stating that "The Agencies should revise the Guidelines to affirmatively abandon use of the structural presumption to demonstrate a substantial lessening of competition"); John Harkrider, *Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions*, 2005 COLUM. BUS. L. REV. 317 (2005), at 12-13, http://www.axinn.com/media/article/27_Moving_20Past_20Merger_20Guidelines_20Presumptions.pdf (recommending that the Guidelines' market concentration presumption "should be eliminated").

Horizontal Merger Guidelines.[12] Criticisms of the market concentration presumption tend to focus on its assumed potential for generating false positives. Defenders of the presumption, like Judge Posner, argue that simple rules properly put the onus on parties to present their best evidence justifying a proposed merger.[13]

The *Guidelines* establish a presumption of market power for mergers that cause a significant increase in concentration and result in highly concentrated markets. But the Agencies don't stop there – instead the presumption is the beginning of a more extensive analysis. The Agencies consider the feasibility of entry, efficiencies, and other factors to identify instances in which application of the presumption might be misplaced and harmful to consumers. As *Sysco* shows, the FTC considers the entire range of evidence available to us.

Abandoning the presumption could only be harmful to consumers if critics have correctly concluded that it is unreliable, even when considered together with other evidence, and hence prone to lead to false positives. Therefore, the best way to assess the use of the tool is to ask whether it is yielding bad results, like blocking procompetitive mergers. Yet the available data suggest that U.S. enforcers rarely block procompetitive mergers.[14] To me, that means that the recommendation to eliminate the presumption is thus very much a solution in search of a problem. Though the market concentration presumption may be a rough tool,[15] the evidence suggests that it is one that benefits consumers as a starting point, not an end point, of analysis.

Moreover, the use of presumptions is hardly unique to antitrust law. The entire legal system is filled with them.[16] The fundamental question is *not* whether a legal rule will perform its sorting function correctly in all instances. Rather, as Professor Andy Gavil has explained, an economic analysis of legal rules suggests that rules of competitive conduct "should be designed to minimize the incidence of false positives and false negatives (incorrect decisions), while also

---

[12] *See* HORIZONTAL MERGER GUIDELINES § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

[13] *See Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST LAW JOURNAL No. 2 (2015) (forthcoming), http://www.americanbar.org/content/dam/aba/publishing/antitrust_law_journal/at_journal_80i2_posner.authcheckdam.pdf.

[14] *See* KWOKA, *supra* note 2 at 94-95.

[15] *See, e.g.*, Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2015), http://scholarship.law.georgetown.edu/facpub/1304 (explaining that although factors other than market shares and concentration are also "relevant for determining the intensity of competition," nonetheless "the economic evidence is consistent with a positive but weak relationship between market concentration and price.").

[16] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION, 104 (Harvard Univ. Press 2008), 104. Similarly, Professors Philip Areeda and Herbert Hovenkamp state in their seminal antitrust treatise that "there is a strong need to judge mergers on the basis of generally applicable rules or presumptions framed in terms of a limited number of factual issues that appear to be both significant and capable of practical resolution," and that merger presumptions should be accorded "considerable deference, even if one might quibble about the underlying economics applied or their precise fit with the statutory mandate." 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶905g2 (3d ed. 2009).

taking into account the costs of gathering, presenting, and processing the information needed to decide cases."[17] Presumptions serve an important purpose – especially in a world where information is almost limitless and gathering it is far from costless. Professor Gavil again notes that "[e]stablishing presumptions is critical to the process of allocating burdens of production and, perhaps most importantly, to the process of shifting burdens from one party to another."[18]

It is important that the antitrust agencies continue to apply the *Horizontal Merger Guidelines* rigorously. We should continue to avoid challenging deals where we lack persuasive evidence of competitive harm – even if the market shares are large. At the same time, we should not shrink from bringing structural cases where persuasive countervailing evidence is absent.

The Role of Coordinated Effects in Merger Analysis

Similarly, antitrust enforcers, in my view, should not abandon coordinated effects theories. Following the 1992 *Horizontal Merger Guidelines*, unilateral effects analysis has overtaken coordinated effects as the predominant theory on which the U.S. antitrust agencies challenge mergers. Perhaps one reason for this is that econometric techniques for predicting unilateral effects have developed considerably over time and the *Horizontal Merger Guidelines* now devote additional attention to them. While that may be true, coordinated effects analysis remains a valuable tool for enforcers in protecting consumers.

It can be difficult in some cases to predict the precise point at which a market vulnerable to coordinated conduct will reach a "tipping point" when coordination is more likely to occur. Once a concentrated market *does* reach a tipping point, however, there is little antitrust enforcers can do to remedy conscious parallelism and other forms of tacit coordination.[19] This is why merger reviews require prediction.

The issue of the threshold for coordinated effects challenges has come up in a number of recent Commission matters and accompanying statements, most notably in the Holcim-Lafarge[20] and ZF-TRW[21] statements issued earlier this year. Both matters involved consent orders. The FTC's concerns in Holcim-Lafarge focused on local markets for cement; in ZF-TRW, the focus was on the manufacture of heavy vehicle tie rods in North America. The markets at issue in both

---

[17] Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 125, 129 (ABA Section of Antitrust Law 2008).

[18] *Id.* at 128.

[19] HOVENKAMP, *supra* note 16 at 212. ("[Section] 1 of the Sherman Act has not been very effective at reaching oligopoly coordination absent evidence of a traditional 'agreement.' This shortcoming makes an effective merger policy especially important, and may justify somewhat overdeterrent merger rules in concentrated markets. We cannot have confidence that any tacit collusion that occurs after a merger will be reachable under the antitrust laws; thus it is better to condemn marginal mergers in order to prevent high concentration levels from occurring in the first place, particularly if the merger has not been shown to produce significant efficiency gains.")

[20] *See* Holcim Ltd. and Lafarge S.A., FTC File No. 141-0129, https://www.ftc.gov/enforcement/cases-proceedings/141-0129/holcim-ltd-lafarge-sa-matter.

[21] *See* ZF Friedrichshafen and TRW Automotive, FTC File No. 141-0235, https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

cases were highly concentrated and vulnerable to coordinated conduct. Absent remedy, the proposed mergers would have reduced the number of significant competitors in the relevant markets to three or two and increased the ability and incentives of the combined firms to engage in coordinated conduct.[22]

These decisions weren't unanimous. In his dissent, my former colleague Commissioner Wright argued that the FTC lacked a "credible basis" to believe that even a three-to-two merger would enhance the vulnerability of the relevant markets to coordination, thus failing the third prong of the three-part test articulated in the 2010 Horizontal Merger Guidelines. As a refresher, the *Guidelines* explain that:

> The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.[23]

The question is whether the "credible basis" language in the *Guidelines* compels the Commission to develop "additional" and "particularized" evidence unrelated to market concentration "that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate."[24]

The language of the *Guidelines* themselves makes no mention of a requirement of particularized evidence independent of market concentration factors. The *Guidelines* recognize that "the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof"[25] and further explain that the Agencies may challenge mergers "even without specific evidence showing precisely how the coordination likely would take place."[26] Inferring an unwritten requirement of particularized evidence regarding the risk of coordination makes little sense in this context.

There is a reason for this approach. Predicting whether a transaction is likely to raise concerns about coordination can be trickier than predicting unilateral harm. Whereas unilateral effects only require us to have a sense of how competition takes place, the likelihood of increased coordination depends on how many different factors change with market structure, such as: the ease of colluding, the benefits to colluding relative to competing, and the expected

---

[22] The majority statements in both matters noted that there was also evidence that the mergers would have produced unilateral effects.

[23] HORIZONTAL MERGER GUIDELINES § 7.1 (internal cross-references omitted).

[24] *See* Dissenting Statement of Commissioner Joshua D. Wright at 4, ZF Friedrichshafen and TRW Automotive, FTC File No. 141-0235 (May 8, 2015) (emphasis added); Concurring & Dissenting Statement of Commissioner Joshua D. Wright at 8, Holcim Ltd. and Lafarge S.A., FTC File No. 141-0129 (May 8, 2015) (emphasis added).

[25] HORIZONTAL MERGER GUIDELINES § 7.1.

[26] *Id.*

costs from being caught.[27] A change in concentration might affect each of these factors differently.

It is true that the empirical evidence available to enforcers linking concentration and coordination can be frustratingly opaque. This is why the Commission has – I believe quite appropriately – also looked to a number of additional specific market factors, such as the possibility of entry or expansion, homogeneity of products, market elasticity, customer switching costs, duration of contracts, and transparency in determining whether a merger is likely to increase the risk of coordination. I think it is fair to say that we are reasonable to be concerned that reductions in the number of competitors to four, three, or two, may enable the remaining firms to more successfully coordinate on prices and other key dimensions of competition.[28] If we can show that the nature of competition in the industry of interest is such that higher concentration raises the premium yielded by collusion, then we should almost certainly feel better about concluding that the merger increases the risk of coordination.

The majority statements in Holcim-Lafarge and ZF-TRW explained that a merger that reduces the number of firms in a relevant market to two or three should be viewed differently in the coordinated effects context from a merger that only reduces the number of firms to six or seven.[29] In the words of the ZF-TRW majority statement, it is a "well-accepted view that markets with only two or three firms are more conducive to anticompetitive outcomes than markets with four or more firms."[30]

Relative to mergers in less concentrated markets, three-to-two and four-to-three mergers present a heightened risk of successful coordination. However, even when the Commission relies strongly on this presumption, it considers additional specific market factors and evidence before concluding that a merger will enhance a market's vulnerability to coordination.

---

[27] *See id.* at § 7.2 (describing types of evidence to show a market vulnerable to coordinated conduct).

[28] *See* Janusz A. Ordover, *Coordinated Effects*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1368-69 (ABA Section of Antitrust Law 2008).

[29] *See, e.g.*, Majority Statement at 3, Holcim Ltd. and Lafarge S.A., FTC File No. 141-0129 (May 8, 2015).

[30] Majority Statement at 4, ZF Friedrichshafen and TRW Automotive, FTC File No. 141-0235 (May 8, 2015) (citing Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), http://scholarship.law.georgetown.edu/facpub/1304 ("[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices.… Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*."); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding "clear evidence that there is a qualitative difference between two and four or more firms"); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 1006 (1991) (finding, in a study of tire prices, that "[m]arkets with three or more dealers have lower prices than monopolists or duopolists," and noting that, "while prices level off between three and five dealers, they are higher than unconcentrated market prices").

Conclusion

In conclusion, the antitrust enforcer's toolbox is stocked with an array of tools. These tools should be used as the particulars of an investigation require; the Agencies should rely upon not only the latest economic modeling but also more traditional tools, including presumptions, in assessing a merger's potential for competitive harm. Recent cases at the Commission and before the courts have reinforced this important lesson.

Thank you again for inviting me here tonight, and I look forward to your questions.