Vanderbilt Law Review

Volume 11
Issue 1 *Issue 1 - A Symposium on Trade Regulation and Practices*

Article 3

12-1957

Legal, Economic and Political Considerations Involved in Mergers

Joseph W. Burns

LEGAL, ECONOMIC AND POLITICAL CONSIDERATIONS INVOLVED IN MERGERS

JOSEPH W. BURNS*

INTRODUCTION

Although the merger statute—section 7 of the Clayton Act[1]—was enacted in 1914, it was forty years before it assumed any importance in the antitrust field. The original statute, applicable to acquisitions of stock but not to acquisitions of assets, was wholly ineffective to prevent mergers. Enforcement efforts were insignificant.

In 1950 Congress amended section 7,[2] making three basic changes:

(1) With respect to all corporations subject to the jurisdiction of the Federal Trade Commission (FTC), the scope of the ban was extended to include acquisitions of assets as well as acquisitions of stock.

(2) The legal test concerning the effect on competition, which under the old law had applied explicitly to competition between the acquired and acquiring corporations and somewhat ambiguously, if at all, to competition generally, was clarified so as to make it apply broadly to any acquisition which might have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce in any section of the country.

(3) The test concerning restraint of commerce in any section or community was eliminated.

If Congress expected the 1950 amendment to solve all the merger problems which were discussed prior to its enactment, this expectation has not been realized. Congressional committees in both the House and Senate have instituted investigations and held public hearings which have indicated considerable dissatisfaction with the effectiveness of section 7 as amended. These hearings, reports and discussions in and out of Congress disclose wide differences of opinion as to what the objectives of the merger statute are, what the objectives should be, and whether the two enforcement agencies are doing as effective a job as some people think they should.

Since section 7 of the Clayton Act was amended in 1950, three significant actions by the executive, legislative, and judicial branches of the government have occurred in the field of corporate mergers and acquisitions: (1) the FTC Report in May, 1955;[3] (2) the Senate Anti-

* Member of the bars of New York and the District of Columbia. Formerly Chief Counsel, Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

1. 38 STAT. 731 (1914), as amended, 15 U.S.C. § 18 (1952).
2. 64 STAT. 1125 (1950), 15 U.S.C. § (1952), amending 38 STAT. 731 (1914).
3. FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS (1955).

trust and Monopoly Subcommittee Staff Report in March, 1957;[4] and (3) the Supreme Court decision in the *du Pont-General Motors* case in June 1957.[5]

The FTC, acting in its executive or administrative capacity, made a special study of those mergers and acquisitions which occurred between 1948 and 1954. Its report does not purport to be comprehensive or complete in its coverage of mergers, and endeavored to ascertain the economic forces and motives underlying mergers and acquisitions. It considered the statutory standards, and the economic and legal problems involved in determining competitive consequences under those standards.

The interest of the legislative branch was indicated by the late Senator Harley M. Kilgore, Chairman, in opening the Senate Subcommittee hearings on mergers, when he stated:

> One of the most important and difficult questions before the country today is what the national economic policy should be with respect to Big Business. A responsible body of opinion points to the very high standard of living which we now enjoy, and attributes it in large part to achievements of Big Business. These persons refer to the steady flow of new appliances and labor-saving home products, constantly improved automobiles, radios, and other products. A great deal of our technological progress is attributed to Big Business.
>
> Conversely, another responsible body of opinion believes that the growth of Big Business threatens the economic foundation of a free society. These persons see a progressive concentration of economic power in the hands of fewer and fewer corporate giants, which they consider monopolistic and likely to exploit the public. They feel that there has been a progressive decline in competition.
>
> On the problem of mergers, Congress enacted the Celler-Kefauver Antimerger Act of 1950 primarily for the purpose of plugging a loophole in Section 7 of the Clayton Act in order to slow down the merger movement and stop those which might substantially lessen competition. We wish to learn why mergers have continued at a great pace. Is it because Section 7 is still not adequate to prohibit undesirable mergers? Is it because the law has not been vigorously enforced? Or can it be said that most of the mergers do not substantially lessen competition and should not be prohibited?[6]

The purpose of the Clayton Act was to prohibit certain trade practices in order to stop the creation of monopolies in their incipiency.[7] In requesting Congress to enact legislation, President Wilson had expressed the need for specifying prohibited anticompetitive practices

4. Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, *Corporate Mergers and Acquisitions*, S. Rep. No. 132 85th Cong., 1st Sess. (1957).
5. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).
6. *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on The Judiciary*, 84th Cong., 1st Sess., pt. I, at 84 (1955).
7. H. R. Rep. No. 627, 63rd Cong., 2d Sess. 1 (1914).

"in such terms as will practically eliminate uncertainty."[8] Even after the 1950 amendment his hope has not been realized.

One learned authority in the antitrust field recently expressed the hope that some authoritative judicial construction "would put an end to the 'interminable guessing game in which all analysts of section 7 have perforce been engaged.' "[9]

When a judicial construction was ultimately announced in June 1957 in the *du Pont-General Motors* case, while it was authoritative enough, it increased rather than relieved the uncertainty. In a strong dissent, Justice Burton stated:

> The Court . . . disregards the language and purpose of the statute, 40 years of administrative practice, and all the precedents except one District Court decision. . . .
>
> The Court ignores the all-important lawfulness or unlawfulness of the stock acquisition at or about the time it occurred, and limits its attention to the probable anticompetitive effects of the continued holding of the stock at the time of suit, some 30 years later. The result is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments.[10]

PURPOSE OF SECTION 7

In the uncharted, and perhaps unchartable, sea of the antitrust laws, there is not likely to be agreement on the "purpose" of any one of their provisions. But since the courts do endeavor to ascertain a statute's broad purpose, it may be well to set forth some of the sources to which the courts go.

In discussing the 1950 amendment, the Senate Report stated that the amendment was designed "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions" and to "limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."[11] The House Report likewise expressed concern about the broad economic problem of high and increasing concentration, and the dangers to small business.[12]

The FTC Report stated:

> The 1950 amendment to Section 7 represents an attempt to achieve a balance between a broadening of antitrust legislation to cover incipient lessening of competition or tendency to monopoly through acquisitions without going to the extreme of prohibiting all acquisitions between competing companies. The act is designed as a preventive measure to

8. President Wilson's message to Congress, January 29, 1914, 51 CONG. REC. 1163 (1914).
9. Handler, *Annual Antitrust Review,* 11 Record 367, 381 (1956).
10. 353 U.S. at 611, 622.
11. S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950).
12. H. R. REP. No. 1191, 81st Cong., 1st Sess. 2-3 (1949).

arrest substantial threats to competition before competition is itself eliminated; it is designed to apply to acquisitions that are economically significant.[13]

LEGALITY IS DETERMINED BY PROBABLE CONSEQUENCES AS OF THE TIME OF SUIT, NOT THE TIME OF ACQUISITION

There is little doubt that the Supreme Court's decision in the *du Pont-General Motors* case was a shock to the entire country.[14] The Court created an entirely new legal principle, which had not been requested by the government. It held that the lawfulness or unlawfulness of an acquisition is to be determined *not* as of the time of acquisition, but as of the time of suit. The extremeness of the ruling is illustrated by the fact that the du Pont suit was commenced thirty years *after* the stock was acquired. The majority ruled:

> [T]he test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.[15]

Since the Supreme Court itself is unpredictable, no one can predict the effect this new legal principle will have in merger litigation. The mere fact that the *du Pont* case interpreted the old section 7 prior to amendment, and involved stock, not assets, is of little comfort.

The Department of Justice has acknowledged that the significance of the decision is difficult to gauge. In evaluating the effect of the decision the Department sees real limitations. For one thing, prior to 1950, most acquisitions took advantage of the loophole and involved assets rather than stock, and are therefore immune. Even for stock or asset acquisitions consummated after the 1950 amendment, enforcement practicalities may complicate seriously any move against them. The power to sue is meaningless unless effective relief can be obtained. Generally, the assets of the merged companies may be so scrambled that effective divestiture may be unfeasible. Accordingly, action against long-consummated acquisitions may be more the exception than the rule.[16]

The vice of the Supreme Court's ruling that "the time of suit" rather than "the time of acquisition" determines the lawfulness of the acquisition is that it introduces an entirely new principle into the antitrust laws. Heretofore, the antitrust laws related only to "acts," "conduct," or "practices," which were considered unlawful, when

13. FTC, *op. cit. supra* note 3, at 148.

14. The decision was "quite unanticipated" by the Department of Justice. See Address by Robert A. Bicks, First Assistant, Antitrust Division, Department of Justice, Antitrust Section of the American Bar Association, July 13, 1957.

15. 353 U.S. at 607.

16. Bicks, *supra* note 14.

undesirable restraints or probable restraints on competition were found. A person was held responsible for his acts, even though he did not intend the anticompetitive consequences which a judicial tribunal found to be present as a result of those acts. Under this new principle a person may be held to be guilty of a violation of law, as a result of a "condition" which develops in the future, even though it be conceded he was not guilty of a violation at the time he performed the acts which "ultimately" were involved in the "condition."

The majority opinion stated:

> "Incipiency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Trans-America Corp. v. Board of Governors*, 206 F.2d 163, 166 [1953]. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce. Even when the purchase is solely for investment, *the plain language* of § 7 contemplates an action at any time the stock is used to bring about, or in attempting to bring about, the substantial lessening of competition.[17] (Emphasis added.)

The minority opinion stated:

> But the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 *is the acquisition*, not the holding or use, of stock. When the acquisition has been made, the offense, if any, is complete. *The statutory language is unequivocal.* It makes the test the probable effect of the acquisition at the time of the actual acquisition, and not at some later date to be arbitrarily chosen by the Government in bringing suit.[18] (Emphasis added.)

No better illustration can be found of the confusion and uncertainty confronting all lawyers, businessmen and enforcement agencies endeavoring to comply with the merger law than this statement by the majority that "the *plain language* of § 7" supports its conclusion, and the statement by the minority that "the statutory language is *unequivocal*" to the contrary. (Emphasis added.)

Probably the most authoritative interpretation of the effect of the majority ruling is the minority statement:

> The result is that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock. In such an action, the Government need only prove that *probable* rather than *actual* anticompetitive effects exist as of the time of suit. The Government may thus set aside a transaction which was entirely lawful when made, merely by showing that it would have been unlawful had it occurred at the time of suit, many years later. The growth of the acquired corporation, a fortuitous decline in the number

17. 353 U.S. at 597.
18. *Id.* at 620.

of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*. Strikingly enough, all of these factors are involved in this case.

The Court's holding is unfair to the individuals who entered into transactions on the assumption, justified by the language of § 7, that their actions would be judged by the facts available to them at the time they made their decision.[19]

While it is extremely hazardous to say "it is clear," in view of the above discussion, it is at least reasonable for a lawyer to assume that although the ruling was made with respect to acquisition of stock under the original section 7, it applies to *all* acquisitions under the statute as amended.

If this be so, the legal implication of the decision is that no lawyer can advise his client an acquisition of stock or assets is positively legal, without the aid of a crystal ball.

LACK OF LEGISLATIVE GUIDES AND STANDARDS FOR DETERMINING ECONOMIC CONSEQUENCES

The "time of suit" principle enunciated in the *du Pont-General Motors* decision added a new legal complication to the merger statute. But there have always been present—in the original statute and as amended—serious economic problems. The merger statute suffers from the same deficiency as all other antitrust statutes—lack of adequate legislative guides or standards. Nowhere has Congress made clear what *kind* of competition the antitrust laws are supposed to foster. Nowhere has Congress stated what *kind* of mergers are legal, and which are illegal.

In making public the Senate Subcommittee Staff Report, Senator Joseph C. O'Mahoney stated:

[T]he subcommittee has recognized in the uninterrupted trend of corporate mergers in the last few years a danger signal of which it must take cognizance in view of the unmistakable intention of the Congress to establish a more stringent control over corporate growth by merger or acquisition than by internal expansion.[20]

Assuming that Congress has made a distinction between growth by merger or acquisition and by internal expansion, a major question arises as to the economic justification for the distinction. A further question has been asked—what standards or guides has Congress furnished business, the enforcement agencies, and the courts as to what is legal under the statute? The Senate Report stated:

19. *Id.* at 622-23.
20. S. REP. No. 132, *supra* note 4, at iii.

> The justification for singling out business growth via merger or acquisition for special attention under the antitrust laws is that regardless of the competitive or other economic effects, such a transaction, by definition, results in the elimination of a previously independent business enterprise or of a portion of such an enterprise. Although considerable business risks may be present regardless of the type of business growth involved, Section 7 of the Clayton Act, since its inception, has properly recognized that from a fundamental antitrust standpoint expansion of a company's market position by the acquisition of a going business represents a somewhat lower order of enterprising activity than similar expansion through investment of new funds or the reinvestment of earnings, superior production or distribution efficiency, technological or product innovation, or competitive skill.
>
> At the same time, an effective policy in this field must recognize that a merger or acquisition may be, and frequently is, an economic and efficient route for the expansion of a particular business enterprise. In itself, a merger or acquisition is merely one form of competitive activity, which may have salutary or unsalutary competitive results, depending upon the individual circumstances. Furthermore, as with other business transactions, a merger or acquisition may have economic effects of a noncompetitive nature which may be either beneficial or injurious.[21]

The FTC Report discussed the nature of the problem facing the Commission and the courts in judging the legality of mergers. It said:

> Because section 7, as amended, is intended to prevent incipient substantial lessening of competition through acquisitions from becoming actual, it is concerned with economic issues and market consequences. While proof of such consequences, under the law, is a matter of legal evidence, the facts to be taken into account are economic and statistical facts and analysis of these facts is economic and statistical analysis. Only insofar as economic and statistical information can be obtained and analyzed in forms that meet legal standards of relevance, materiality and probative value, can the economic and legal problems arising under the act be solved in ways that permit effective enforcement of the law.[22]

The Senate Report stated that there is a serious deficiency with respect to the availability of comprehensive statistical and analytical data concerning the facts of size and concentration in industry and finance. It stated it is disturbing that reliable current data are lacking with which to evaluate with any degree of precision the significance of recent merger trends from the standpoint of business concentration. More adequate intelligence of this kind is urgently needed to facilitate understanding of the economic significance of individual mergers as well as of broad merger trends or movements, and to permit a continuing appraisal as to whether or not the objectives of public policy concerning mergers and acquisitions are being achieved.[23]

---

21. *Id.* at 69.
22. FTC, op. *cit supra* note 3, at 148.
23. S. REP. No. 132, *supra* note 4, at 73-74.

It further stated:

> This problem is a fundamental one. The lack of data concerning the concentration effects of recent mergers is but part of a serious deficiency of basic statistical and analytical data concerning the nature and extent of concentration in industry and finance generally.[24]

Several leading economists discussed this problem before the Senate Subcommittee. Professor M. A. Adelman, of the Massachusetts Institute of Technology, felt that a stringent prohibition on mergers is justified, and expressed the hope that when the courts or the FTC consider the legality of a merger, "other things being equal, they make it somewhat tougher, the larger is the acquiring company."[25] His reason for imposing stricter requirements upon the larger firms where mergers or acquisitions are involved is based upon the more ready availability to such firms of funds needed for expansion. Professor Adelman observed that the FTC Report provides no basis for judging the effects of such transactions upon the degree of concentration in the various industries, and gives no indication whether the effects of mergers or acquisitions may have been reinforced or counteracted by other developments.

Professor Clare E. Griffin, of the University of Michigan, observed that although there may be a number of good reasons for mergers, "growth by merger has a different economic significance than growth by increased consumer acceptance."[26] He felt, therefore, that the policy inherent in section 7 of the Clayton Act which distinguishes between external and internal forms of growth was reasonable and wise.[27]

Professor J. Fred Weston, of the University of California, expressed the belief that despite the large numbers of mergers there is no clear case that these have had undesirable economic consequences and that, on the contrary, much evidence exists for believing that the consequences have been desirable. He also cited the following reasons why mergers or acquisitions, rather than internal growth, may be used to accomplish business goals:

(1) New facilities may be acquired more quickly through mergers.

(2) The desired facilities may be obtained more cheaply by purchasing the ownership stock of an existing company. For many reasons the securities of a company may be selling below replacement costs of the firm's assets.

(3) The desired new product, new process, or new organization may be developed with less uncertainty of investment loss. The

24. *Id.* at 74.
25. *Hearings, supra* note 6, pt. I, at 221.
26. *Id.* at 391.
27. S. Rep. No. 132, *supra* note 4, at 21-22.

purchased facility may already have demonstrated its revenue-yielding capacity.

(4) Sometimes it is possible to finance an acquisition when it would not be possible to finance internal growth. A large steel plant, for example, involves a tremendous investment. Steel capacity may be acquired through merger through an exchange of stock more quickly and, under certain price-cut conditions, more cheaply than could be obtained by the facilities themselves.

(5) The development of new products and market areas may be accomplished through mergers, thereby avoiding the necessity of combating difficult competition in the early stages of development.

(6) Mergers may represent the most effective method of achieving stability and progress at certain stages of industrial development. It may represent the most efficient method of combining facilities and disposing of obsolete and inefficient properties.

(7) Market control may be obtained more rapidly and with less risk through mergers than by internal expansion. The merger of two large firms may result in market dominance by the combined firms. Coordinated price and output policies that might be illegal by separate firms would be entirely respectable for a single, consolidated enterprise.[28]

Professor Louis Schwartz, of the University of Pennsylvania Law School, proposed that the Government be empowered to prevent integration, unless a satisfactory demonstration is made that such integration is justified by production or distribution economies. Professor Corwin Edwards, of the University of Chicago, expressed doubts concerning the reliability of such a standard in view of inadequacies of present economic knowledge in this field.[29]

The differences of opinion expressed by these leading economists and lawyers illustrates the lack of legislative guides as to the economic objectives of the merger law. The courts have been given the responsibility for making legal determinations of issues which are essentially economic and political. The Senate Antitrust and Monopoly Subcommittee addressed a questionnaire to all federal judges to obtain their views with respect to this responsibility. The questionnaire elicited several profound reflections on the fundamental question whether Congress has sufficiently determined and stated the basic economic policy underlying the antitrust laws. One particularly thoughtful reply suggested that Congress should take a more definite position on the "political" decision as to what form it wishes industry to take. This judge stated:

28. *Id.* at 23-24.
29. *Id.* at 26.

> I believe, that the evils covered by the phrases, "restraint of trade" and "monopoly," ought not to be left to the courts, until after Congress has taken a more definite position as to what it wants. There are, as everyone knows, two interests involved: economic and political. I mean by "political" the indirect social effects of a change from an industry operated by a member of small independent units to an industry operated by a few great units—even though these compete. Courts are competent to decide the first question: i.e., whether the prices charged by a combination are greater or less than those that would be charged if it did not exist; in short, whether the combination is beneficial to the consumer. True, there are formidable difficulties even about that: e.g., the appraisal of existing plants. Nevertheless, these are not insurmountable; and they present only questions of fact, little competent as a jury often is to decide them from evidence which may be extravagantly voluminous and baffling....
>
> However, although the economic question is vital, it is not as important as the "political" one, and as to that much more searching questions arise. What will be the impact upon the social habits of these affected by the proposed combination? Obviously, a completely nationalized industry makes the most far-reaching changes, which it needs no argument to prove that Congress alone should impose, even though only one industry be involved. I do not see why the same considerations that are relevant to that question are not relevant to steps in that direction. For one reason I am quite sure that the nationalization of any industry becomes more and more likely as the competing units become larger and fewer. Moreover, even if the final step be never taken, it is certainly one thing to be independently engaged in business and another to be employed by others. Again, to be employed in a small business is different from being employed in a very large one. It is not necessary to elaborate these differences, and I agree that conflicting interests are involved; but my point is that the relative appraisal of these and an eventual decision between them are of the very essence of what we ordinarily call "legislation." To substitute a court is not to ask it to interpret any "law"; but to impose upon it a duty that should presuppose a responsiveness to current needs, desires, and habits, strikes at the foundations of its most important attribute—detachment from social pressures.[30]

This comment is particularly pertinent to the merger law which the Supreme Court held may be invoked "at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly."[31]

Vertical and Conglomerate Mergers

Acquisitions have been classified as horizontal, vertical, and conglomerate. An acquisition is classified as horizontal where the firms involved are engaged in roughly similar lines of endeavor; an acquisition is classified as vertical where it represents a movement either backward from or forward toward the ultimate consumer; an

30. S. Rep. No. 128, 85th Cong., 2d Sess. 14-15 (1957).
31. 353 U.S. at 597.

acquisition is classified as conglomerate where there is no discernible relationship between the business of the acquiring and the acquired firms.

Horizontal mergers (through stock acquisition) were prohibited under the original section 7 where the prohibited restraints were found to affect competition between the acquired and the acquiring company. The amendment changed the test to the effect on competition "in any line of commerce."[32] Thus, share of the market became a more important factor. An acquisition which is itself not substantial may impair competition substantially, if it is part of a cumulative process. The new "time of suit" doctrine may become important where the cumulative effect of a series of acquisitions indicates a probability of market control which was not apparent at the time of the early acquisitions. The ruling may authorize breaking up any corporation where the acquired assets have been kept separate, either as plants or subsidiaries.

In the *du Pont-General Motors* decision the Supreme Court announced a second new legal principle—that the original section 7 was applicable to vertical acquisitions.[33] Until the Supreme Court decided that it was so applicable, it was generally assumed it was *not*. The Court conceded that the Government had never invoked section 7 against vertical acquisitions, and that the FTC had stated flatly in its 1955 Report that it did not apply.[34] The House Report[35] in 1950 also acknowledged that the original statute applied solely to horizontal mergers, and urged the enactment of the amendment to make it applicable also to vertical and conglomerate acquisitions. In view of the fact that the 1950 amendment does apply to vertical acquisitions, this part of the ruling of the Supreme Court will have very little effect on the law of mergers. However, other aspects of the Court's ruling are important.

The dissent pointed out that in a vertical acquisition:

> [T]o make its case the Court requires no showing of any misuse of a stock interest—either at the time of acquisition or subsequently—to gain preferential treatment from the acquired corporation. All that is required, if this case is to be our guide, is that some court in some future year be persuaded that a "reasonable probability" then exists that an advantage over competitors in a narrowly construed market may be obtained as a result of the stock interest. . . .
>
> The Court concludes only that du Pont has been given an unlawful preference with respect to paints and fabrics. By limiting the issue to these products, it eliminates from deserved consideration those products

32. See note 2 *supra*.
33. 353 U.S. at 590-92.
34. FTC, *op. cit. supra* note 3, at 166.
35. *House Judiciary Committee Report*, H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1950).

> which General Motors does not buy in large quantities or proportions from du Pont. Yet the logic of the Court's argument—that the stock relationship between du Pont and General Motors inevitably has or will result in a preference for du Pont products—requires consideration of the total commercial relations between the two companies. Du Pont "influence," if there were any, would be expected to apply to all products which du Pont makes and which General Motors buys.
>
> However, the evidence shows that du Pont has attempted to sell to the various General Motors' divisions a wide range of products in addition to paint and fabrics, and that it has succeeded in doing so only when these divisions, exercising their own independent business judgment, have decided on the basis of quality, service and price that their economic interests would best be served by purchasing from du Pont. Six such groups of products were considered in detail by the District Court: plastics, brake fluid, casehardening materials, electroplating materials, safety glass, and synthetic rubber and rubber chemicals. . . .
>
> It is true that § 7 of the Clayton Act does not require proof of actual anticompetitive effects or proof of an intent to restrain trade. But these matters become crucial when the Court rests its conclusion that du Pont's stock interest violates the Act on evidence relating solely to an alleged du Pont intent to obtain a noncompetitive preference from General Motors, and on a finding that such a preference was actually secured through the unlawful use of du Pont's stock interest. Preference and intent are also relevant because the Government has brought this case 30 years after the event. If no actual restraint has occurred during this long period, the probability of a restraint in the future is indeed slight.[36]

In discussing vertical acquisitions, the House Report stated:

> If, for example, one or a number of raw-material producers purchases firms in a fabricating field (i.e., a "forward vertical" acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw materials) and the acquired (fabricating) firms.
>
> The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.[37]

Problems with respect to conglomerate mergers were pointed up in the Senate Staff Report, which stated that although the language of the law is now broad enough so as not to exclude the possibility of its being applied to conglomerate mergers, and the legislative history reveals evidence of an explicit intention in the House that the law be so applied, and at least the absence of a contrary intention in the Senate, it is not yet clear whether from a practical standpoint section 7 in its present form is an effective instrument for dealing with conglomerate mergers.

Neither the legislative history nor the law itself provides any clue as to the legal or economic theory under which the acquisition by one

36. 353 U.S. at 611, 640-42, 646.
37. H.R. REP. No. 1191, Cong., 1st Sess. 11 (1950).

company of another engaged in an unrelated or noncompeting geographical or product market might result in a "substantial lessening of competition" or in a "tendency to create a monopoly."[38]

The report of the Attorney General's Committee recognizes

> as the House report makes clear, that the new section 7 applies to "all types of mergers and acquisitions, vertical and conglomerate as well as horizontal," which have the specified effects[39]

prohibited by section 7, but throws no light on the crucial question as to the circumstances under which a conglomerate merger might be deemed to have such effects.

Professor Richard B. Heflebower, of Northwestern University, told the Senate Subcommittee that two types of mergers are not now clearly covered under section 7 of the Clayton Act. The first refers to mergers of companies between which there may have been no actual competition in any geographic or product market prior to the merger, but there is a substantial amount of potential competition in the sense that one of the companies was a potential entry into the market of the other. The second refers to conglomerate mergers of companies between which there is neither actual nor potential competition. He told the Senate Subcommittee:

> While the report of the committee of the Congress which sponsored the new Section 7 states that the amendment did cover conglomerate mergers, I cannot see that the law as enacted actually deals with them except in extreme cases.[40]

In Professor Heflebower's opinion, the conglomerate mergers are as much a socio-political problem as an economic one and the enforcement of section 7, by blocking other merger routes, may augment the tendency toward mergers of this sort.[41]

RELEVANT MARKET

Regardless of the criticisms of the two new legal principles announced by the Supreme Court with respect to the applicability of the statute to the "time of suit," and "vertical" acquisitions, these rulings are at least clear and definite. Not so with respect to the Court's ruling as to the "relevant market" in which the effect of du Pont's acquisitions was to be gauged. The Court stated:

> Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area

38. S. REP. No. 132, *supra* note 4, at 44.
39. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 119 (1955).
40. *Hearings, supra* note 6, pt. III, at 982.
41. S. REP. No. 132, *supra* note 4, at 25-26.

> of effective competition." Substantiality can be determined only in terms of the market affected.[42]

Du Pont and General Motors contended before the Supreme Court that the "relevant market" was the total national market for finishes and fabrics, and that du Pont's sales to General Motors constituted only "a negligible percentage" of that total market—3.5% in the case of finishes, and 1.6% in the case of fabrics. Rejecting this contention, the Supreme Court held that the "relevant market" encompassed, not finishes and fabrics generally, but only the narrower area of *"automobile* finishes and fabrics." It ruled that the record showed that "automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."[43]

Having defined the limited market, the Court stated:

> Because General Motors accounts for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise du Pont supplies the largest part of General Motors' requirements, we must conclude that du Pont has a substantial share of the relevant market.[44]

The dissent took strong issue with this conclusion, stating that the majority failed to state what these peculiar characteristics are. It contended:

> Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record.
>
> The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary. The sales of the four products principally involved in this case—Duco, Dulux, imitation leather, and coated fabrics—support this conclusion.[45]

The failure of the Court to mention the *Cellophane* case[46] raises two questions: (1) has the Court modified the definition of "relevant market" applied in *Cellophane?* or (2) is there a narrower definition of "relevant market" in Clayton Act cases than in Sherman Act cases? Both the majority and minority cited the *Standard Stations*[47] decision under the Clayton Act that the relevant market is the "area of effec-

42. 353 U.S. at 593.
43. *Id.* at 593-94.
44. *Id.* at 596.
45. *Id.* at 650.
46. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
47. Standard Oil Co. v. United States, 337 U.S. 293, 299 (1949).

tive competition" within which the defendants operate.[48] But the minority also quoted from *Cellophane*, "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."[49] In *Cellophane*, the Supreme Court held that in a monopolization case under section 2 of the Sherman Act,[50] the test for determining the "relevant market" is whether the commodities are "reasonably interchangeable by consumers for the same purposes,"[51] or are "functionally interchangeable."[52] Does the Supreme Court now hold that products which are "functionally interchangeable" or "reasonably interchangeable by consumers for the same purpose" within *Cellophane*, nevertheless may have "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct" from other related products to make them a "line of commerce" under section 7? Robert A. Bicks, First Assistant to the Assistant Attorney General, Antitrust Division, indicated that the Department of Justice is not certain of the answers to these questions. He stated that even though it was not clear from the Supreme Court's opinion whether a narrower definition was intended since no analysis of the facts was made, nevertheless strong arguments can be made from Clayton Act goals for stricter market definition under section 7.[53]

The extent of the market is a crucial element, and the outcome of a case will often depend upon this factor alone. While the Supreme Court used a narrow definition in the *du Pont* case, the District Court for the Southern District of New York used a broader definition of the market in order to find a violation in the *American Crystal Sugar* case.[54] In determining whether competition was affected by a stock acquisition the issue was whether beet sugar and cane sugar were interchangeable. The court held that they were, and that the relevant market was for refined sugar.

The FTC has stated that there are essential differences between the Clayton Act and Sherman Act tests concerning the legality of acquisitions. It stated that the Clayton Act requires a lower standard of proof of the same kinds of facts—evidence which is quantitatively or qualitatively less impressive than where the Sherman Act is invoked.[55]

48. 353 U.S. at 593, 649.
49. *Id.* at 649.
50. 28 STAT. 209 (1890), 15 U.S.C. § 2 (1952).
51. 351 U.S. at 395.
52. *Id.* at 400.
53. Bicks, *supra* note 14.
54. American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957).
55. FTC, *op. cit. supra* note 3, at 157.

There is considerable controversy as to whether the "quantitative substantiality" test of the *Standard Stations* case governs section 7. Congressman Emanual Celler, Chairman of the House Judiciary Committee, has contended that the quantitative substantiality test accorded to section 3 of the Clayton Act in the *Standard Stations* case is the test which should be used in interpreting section 7.[56] In opposition to this view, Professor Milton Handler contends that Congress intended a qualitative test, "that is, that the lawfulness of a merger should depend on whether it will in all reasonable probability so alter the structure of the industry and the quality of its competition as to deprive the public of the advantages of the competitive organization of the particular market."[57]

Assistant Attorney General Stanley N. Barnes stated in April, 1956, that all of the merger cases brought by the Department of Justice up to that date "involved acquisition by industry leaders. Not only have the acquiring firms been major market factors, but acquired concerns also bulk large. Finally, present generally has been some market history of shrinking competition."[58]

Analyzing this statement, Professor Handler observed:

> Judge Barnes does not define what he means by the terms, "industry leader," "major market factor," or "bulk large." By "industry leader," does he mean one of the five, ten or twenty top-ranking companies? What is the dividing line?
>
> Is there any difference between an "industry leader" and a "major market factor"?
>
> Is there a permissible inference that acquisitions by companies which are neither leaders nor major factors are beyond the purview of the statute?
>
> How big must the acquired company be to "bulk large"?
>
> Is there any correlation between this concept of industrial girth and quantitative substantiality?
>
> By "history of shrinking competition," is anything more meant than that there have been prior acquisitions? How many such acquisitions does it take to make a "history"?
>
> Wholly apart from the fuzzy meaning of these concepts, what is their legal significance?
>
> Do we have a new *per se* rule in the making that any acquisition by an industrial "leader" or "major market factor" which is not *de minimus* is unqualifiedly unlawful regardless of its probable effect on competition?
>
> Is there an intimation here that because there is a record of prior purchases by the acquiring company, any additional acquisition is of necessity unlawful?
>
> Unfortunately, the cases to which Judge Barnes refers leave these questions unanswered.[59]

56. Celler, *Corporation Mergers and Antitrust Laws*, 7 MERCER L. REV. 267 (1956).
57. Handler, *supra* note 9, at 382.
58. Address by Stanley N. Barnes, Assist. Att'y Gen., American Bar Association, Section of Antitrust Law, April, 1956 (PROC. SPRING MEETING, p. 10.)
59. Handler, *supra* note 9, at 384.

Professor Handler concluded that the Department of Justice does consider quantitative substantiality as the controlling index of illegality.[60] Other practitioners have come to the same conclusion, contending that not only did the Supreme Court apply the Standard Stations test in the *du Pont* case, but that the Department of Justice is placing increasing reliance upon the quantitative share test.[61]

The FTC has not adopted the quantitative substantiality test. In its Report it stated that separate sections of the Clayton Act deal with four types of business activities. Section 2 (the Robinson-Patman Act) deals with price discrimination; section 3 deals with exclusive dealing or tying contracts; section 7 deals with acquisitions; and section 8 with interlocking directorates.[62]

The *FTC Report* said:

> Each of the other activities covered by the Clayton Act is prohibited when it may result in specified competitive consequences. However, the language concerning competitive consequences is different for each section of the act. Furthermore, the conditions under which an acquisition may be expected to lead to a substantial lessening of competition or a tendency to monopoly may be different from the conditions under which price discrimination or exclusive dealing contracts will have such consequences.[63]

In its ruling in the *Pillsbury* case,[64] the FTC held that the types of acts required to support a conclusion of a probable lessening of competition under section 7 of the Clayton Act are different from those required to support such a conclusion under section 3. It stated that competitive problems must be approached in terms of the particular facts relevant for a determination as to competitive consequences and held that the respective tests prescribed by section 3 and section 7 are to be determined in the light of the purpose of each section. It pointed out that the primary purpose of section 3 is the protection of buyers and sellers. Section 3 is designed to gnarantee the buyer's right to handle any goods he sees fit and the seller's opportunity to obtain the business of any buyer whose trade he wishes to seek. Section 7, by contrast, is said to be directed toward adverse changes in competitive patterns that may result from mergers.[65]

> It is concerned with the effects of acquisitions on the character of competition, with the maintenance of competition in every market to the end that business rivalry may produce better products at lower costs.[66]

60. *Id.* at 386.
61. Address by Bruce Bromley, American Bar Association Meeting, July 15, 1957.
62. FTC, *op. cit. supra* note 3, at 160.
63. *Id.* at 161.
64. In the matter of Pillsbury Mills, Inc., F.T.C. Docket No. 6000, Dec. 21, 1953 (Interlocutory opinion).
65. FTC, *op. cit. supra* note 3, at 104.
66. See note 64 *supra*.

In its *Pillsbury* opinion, the Commission accordingly endorsed the statement of the Court in the *Trans-America* case[67] concerning the difference between the competitive consequences tests in section 3 and section 7 of the Clayton Act.[68]

The Report of the Attorney General's National Committee to Study the Antitrust Laws recommended that the legal test for vertical acquisitions under section 7 be whether there is a "reasonable probability that the merger will foreclose competition from a substantial share of the market."[69] It suggested that the legal test for horizontal mergers under section 7 be "whether the competition lost as a result of the merger may, in the context of the market as a whole, constitute a substantial lessening of competition or tend toward monopoly."[70]

There is some opinion that, while opposing the quantitative substantiality test for horizontal mergers, recognizes a justifiable analogy to exclusive contract situations in vertical mergers. There it is possible to infer probable harm to competing sellers from the fact that a substantial percentage of their "natural market" is blocked off. Yet they must compete for the remaining market with the vertically integrated seller. When general demand falls, the vertically integrated seller has the cushion of his captive market.[71]

TEST OF EFFECT ON COMPETITION

An acquisition may be held illegal under the amended section 7 only where the effect "may be substantially to lessen competition, or tend to create a monopoly."

The FTC Report stated the words "may be" have a double significance: they signal the fact that the act applies to an incipient substantial lessening of competition and they assume that the probability of such consequences can be predicted. This is so because incipient substantial lessening of competition is tested not by the mere possibility, but by the probability, of substantial impairment of competition.[72]

The difference in purposes of the Sherman and Clayton Acts is important. The Sherman Act deals with *accomplished* restraint of trade, monopolizing, and attempts to monopolize. The Clayton Act, by contrast, deals with specific activities and with their *probable future* effects in terms of a substantial lessening of competition or a tendency to monopoly. Clayton Act tests are, therefore, related to Sherman Act tests as a prediction of an event is related to an account

67. Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.) *cert. denied* 346 U.S. 901 (1953).
68. FTC, *op. cit. supra* note 3, at 164.
69. REPORT, *op. cit. supra* note 39, at 122.
70. *Id.* at 123.
71. Bromley, *supra* note 61.
72. FTC, *op. cit. supra* note 3, at 154.

of the same event, and all Clayton Act tests have an element of contingency which Sherman Act tests lack.[73]

The following language of the Supreme Court is applicable to amended section 7:

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.[74]

Section 7 is addressed to the probable competitive consequences of an acquisition rather than to the character of the acquisition, as such. An acquisition is neither legal nor illegal in itself; it becomes so only after determination of the character and magnitude of its effects upon the competitive incentives and opportunities of other companies. This determination requires study of the companies involved, the market effects, and the resulting difference in competitive incentive and opportunity.[75]

Information concerning the character of an acquisition in terms of the size of the acquiring or the acquired company, the classification of the acquisition as horizontal, vertical or conglomerate, or the percent of a specified product or geographical market accounted for by the output of the acquiring or the acquired company is relevant to an appraisal of violation of law only to the extent that it bears on a determination of whether the acquisition may result in a substantial lessening of competition or a tendency to monoply. This is so because competition is a complex and constantly changing phenomenon. The meaning and relative importance of competitive activities varies from industry to industry and from market to market. Since competition cannot be directly measured, no single standard is applicable to the whole range of American industries and markets. Conclusions as to the probable effects of an acquisition must, therefore, rise out of facts concerning the acquiring and the acquired companies and the competitive pattern of the markets which the acquisition will affect, particularly in the period preceding, and directly following, the acquisition.

By virtue of the incipiency clause, the Act is focused on the long-range effects of acquisitions on the pattern of competition. It is not necessary for the Government to wait until a substantial lessening

---

73. *Id.* at 157.
74. 353 U.S. at 589.
75. FTC, *op. cit. supra* note 3, at 170.

of competition or monopoly has, in fact, been accomplished; it may act whenever it finds that the direct consequences of an acquisition, working themselves out in the markets affected, may lead to long range substantial deterioration in the competitive opportunity of other companies.[76]

An acquisition which substantially reduces the opportunity or the incentive of sellers (or potential sellers) or buyers (or potential buyers) to enter new markets, to experiment with new channels of sale or distribution, or to exercise choice among products and prices, may substantially lessen competition. The range of opportunities and incentives is determined by such facts as the kind and number of sources and outlets, the range of purchasing and selling prices, the extent to which buyers or sellers are dependent upon competitors for supplies or outlets, and the relative restrictiveness of long-term contractual arrangements tying suppliers and customers or groups of competitors to each other in more or less stable relationships which cannot be penetrated by other companies.

The FTC took the position that all of such facts cannot and need not be investigated in each case; only those facts which are relevant in particular market contexts, and can be obtained at reasonable cost, should become a part of the record. In certain cases the facts that can be obtained at reasonable cost may leave gaps in the information that would be helpful in reaching greater certainty as to the competitive consequences of an acquisition. While sufficient data to support a conclusion is required, sufficient data to provide absolute certainty as to competitive consequences would nullify the words "where the effect may be" in the Clayton Act and convert them into "where the effect is."[77]

The FTC recognized that although administration of section 7 of the Clayton Act, as amended, requires market facts, special problems are connected with the use of such information (a) for economic conclusions and (b) as legal evidence. In its Report the FTC stated that use of the market data in reaching economic conclusions raises special fact-finding problems because relevant information is not always available in published sources. Indeed, there is no systematic publication of the mergers themselves as they occur. Since information obtained through interviews with representatives of companies not parties to a case (third companies) may not be representative of the market in question and may contain a high degree of unverifiable opinion, new market information may have to be built up through surveys of third companies. However, such surveys may,

76. *Id.* at 171.
77. *Id.* at 14.

when complete, contain the element of contingency associated with all mass economic data.

Use of market information as legal evidence raises problems in connection with the admissibility, relevance and weight of data concerning the activities of companies which are not parties to a case. Such problems are particularly acute where the legitimate desire of the government or of a respondent or defendant to verify individual items of information must be reconciled with the need of third companies for protection from the injury that may occur if confidential information is disclosed to their competitors, suppliers or customers. The FTC said:

> In fitting its responsibilities under Section 7 of the Clayton Act with its other administrative obligations, the Federal Trade Commission must perform a case selection and market analysis function separate from its general economic reporting and its direct trial work. This is so because, unlike its general economic reports, results of acquisition surveys must meet standards of legal evidence; at the same time, however, questions for investigation must be selected in terms of their relevance for appraisal of competitive consequences in the market affected and in no other terms.
>
> Although the use of market information in the administration of Section 7 of the Clayton Act raises special problems, refusal to use such information will not solve these problems. Conclusions concerning the competitive consequences of particular acquisitions cannot be reached on the basis of rules-of-thumb; they must be reached on the basis of the market facts relevant for an understanding of such consequences.[78]

PROBLEMS OF ENFORCEMENT

When the Department of Justice and FTC have been criticised for inadequate enforcement of section 7, they have quickly pointed out that Congress has not supplied them with adequate enforcement tools. The two agencies have concurrent responsibility for enforcement of section 7, yet their powers and procedures are different.

The procedural problem faced by both agencies is how to stop mergers before it is too late. They learn about mergers by reading newspapers and trade journals. When a particular merger or acquisition is illegal, the law cannot be applied until the transaction has been consummated. The violation does not occur until there is an acquisition. That makes any effort to prevent a merger from taking place very difficult, if not impossible. The procedure which Congress has provided is only to attack, the illegal merger after it has occurred.

There is an important procedural difference in the authority of the two agencies. The Department of Justice has the right to go into court and seek a preliminary restraining order or injunction to require the acquiring corporation to keep the status quo, until a final

78. *Id.* at 15.

determination on the merits. Such a request may even be made prior to actual consummation of a merger, where there is sufficient evidence of the intention of the parties. However, it is in the sole discretion of the court whether to grant the request. Where the court does not grant a preliminary injunction, it may be unable to unscramble the assets by the time a final judgment is rendered in favor of the Government.

The FTC has no power to seek an injunction, or to prevent a merger, so it is always faced with the possibility of being unable to unscramble the assets after a final decision, no matter how promptly it institutes a proceeding. This difficulty was poignantly stated in the Commission's decision in *The Farm Journal, Inc.*,[79] on July 17, 1956:

> It would be difficult, indeed, to find an acquisition which would point up the procedural inadequacy and ineffectiveness of section 7 of the Clayton Act as amended, when its objectives are considered, than that presented here. It is not just a case of too little and too late, from a trial standpoint. A preacquisition waiting and examination period, made mandatory by statute, coupled with the power to seek injunctive relief from the courts, would have kept the eggs in the basket until it had been determined whether it was to the public's interest to scramble them, instead of, as here, trying to unscramble them....
>
> Divestiture is only half the objective of the statute, as the examiner construes it, and its legislative history and purpose. It does take away, and prevent the further use of competitive tools and weapons illegally acquired, but the aim, it would seem, is broader than that—namely, to restore to the relevant markets those competitive weapons to an active and vigorous use in the hands of the seller, or into those of a new entrant, so that competition may continue with its former vigor. This . . . is impossible. Country Gentleman is dead, and the "assets" which it turned over to respondent are now without value to any newcomer or, indeed, to any farm publication now in the field. . . .[80]

Proposals for more effective enforcement of section 7 have included: (1) requiring advance notification by companies proposing to merge; (2) requiring advance approval by the government of certain types of mergers of a high degree of economic significance; (3) granting to the FTC the same power to obtain a pre-merger injunction as the Department of Justice already has; and (4) minimizing uncertainty by permitting business to obtain advance approval of the proposed merger.

The Department of Justice and the FTC have both requested Congress to enact legislation requiring advance notice be given to them of pending mergers. Several bills were introduced in the 84th Congress which embodied proposals for requiring all companies over a given size plauning a merger or acquisition to file a notification of such

79. Farm Journal, Inc., F.T.C. Docket No. 6388, June 30, 1955.
80. S. REP. No. 132, *supra* note 4, at 6.

plan with the enforcement agencies, in advance of the transaction, and to furnish supplementary information requested by these agencies. During a stipulated waiting period thereafter the merger or acquisition could not legally be consummated. Similar provisions were contained in bills considered by the Congress prior to the 1950 amendment, but apparently were omitted from the latter in the interest of facilitating its passage. The President recommended such legislation in his Economic Report transmitted to the Congress in January 1956.

On April 16, 1956 the House passed H.R. Res. 9424[81] embodying these proposals. An amended version was reported out by the Senate Judiciary Committee on July 27, 1956, but Congress adjourned without any action by the Senate on this bill. No attempt was made to bring a similar bill to a vote during the first session of the 85th Congress.

The principal advantages which have been cited for the advance notification requirement are that it would provide a more systematic stream of intelligence to the Department of Justice and the FTC concerning proposed mergers or acquisitions, and would assure these agencies of a timely opportunity to challenge the legality of a questionable transaction before it became accomplished fact. The notification requirement would enable the enforcement agencies to keep currently informed of such transactions and would allow them a reasonable period of time in which to study the competitive implications before deciding whether to seek preventive action.[82]

This bill contained a provision authorizing the FTC, wherever it had reason to believe such action to be in the public interest, to petition a Federal District Court for an order to enjoin stock or asset acquisitions in advance of consummation, or to maintain the status quo after such acquisitions had been wholly or partially consummated.

The Senate Staff Report went further, and recommended that formal legal determination be *required* in advance of consummation of those proposed mergers or acquisitions which are deemed sufficiently *important* under criteria set forth by Congress to warrant such advance adjudication. It stated:

> The selection of those merger or acquisition proposals for which advance legal proceedings would be mandatory would be made on the basis of criteria to be contained in legislation. The purpose of requiring advance legal determination in certain cases would be essentially the same as that of the premerger injunction. It would preserve the status quo while the legality of the transaction was being tested. The mandatory procedure would be reserved for those proposed mergers or acquisitions which were deemed to involve economic considerations of such importance that the public interest would be better served by a determination of their legality before the "scrambling of the eggs" than after.

81. 84th Cong., 2d Sess. (1956).
82. S. REP. No. 132, *supra* note 4, at 47.

> The criteria for determining which proposed mergers or acquisitions warranted a requirement of advance legal review . . . might appropriately relate to the following factors:
>
> (a) Absolute or relative size of the companies involved, regardless of how such size was attained, where such size is already manifested in a high degree of power in one or more markets.
>
> (b) History of merger record of the companies involved, where the possibility of excessive resort to this form of expansion is indicated.
>
> (c) Competitive structure of the industries affected, where markets are already characterized by a high degree of concentration, or where the companies involved, either singly or together, have already attained a position of dominance and account for a substantial share of such markets.[83]

Both the Department of Justice and the FTC now employ advance clearance procedures under which a company, seeking voluntarily to determine in advance the legality of a proposed merger or acquisition to which it is a party, may obtain an affirmative or negative "clearance letter" from the agency to which it applies. It is not clear whether such clearances are more accurately described as a form of advisory legal opinion of merely an indication of the enforcement agency's intention with regard to proceeding on the facts presented.

The Senate Staff Report stated:

> In either case the present program has serious weaknesses from the standpoint of overall effectiveness, and the legal authority and the procedures employed for the actions taken under this program are highly questionable. . . .[84]

Since the legality of some mergers may be a relatively easy matter to determine, while a legal judgment concerning others may be extremely difficult, depending upon the circumstances in each case, the Senate Staff Report recommended that companies involved in mergers or acquisitions, whether or not of such importance as to make advance determination mandatory, be given the option of obtaining a formal adjudication of the proposed transaction if they so desire. It stated:

> Concepts of fair play require that a businessman whose past or proposed conduct is in question should have a full opportunity to justify the legal propriety of such conduct.[85]

H.R. Res. 9424,[86] as amended and reported by the Senate Judiciary Committee gave recognition to the need for providing business with a procedure for ascertaining legality in advance of a merger, by

83. *Id.* at 72-73.
84. *Id.* at 71.
85. *Id.* at 70.
86. See note 81 *supra*.

authorizing a corporation to bring a suit for a declaratory judgment.

The proposals for advance notification of mergers bring into sharp focus the overlapping jurisdiction of the FTC and the Department of Justice. The proposed bills do not consider the basic question of why there should be two government agencies doing the same thing at the same time. The result is that the proposed bills would authorize both agencies to require notification. This could mean that each agency would have a different set of rules as to the type of information which had to be submitted, and all businesses subject to the new act would be required to file information with two agencies. Both agencies would be authorized to bring proceedings in court, so that a business might be subject to two proceedings at the same time by the government although the objective of each was exactly the same. Furthermore, one agency might give clearance and the other proceed to bring suit. It would seem that Congress has the responsibility of setting up a single agency to do a single job and not two which may cause considerable conflict and uncertainty. The merger statute is now enforced by two agencies with different procedures which can bring about different results. The standards of proof before the Commission are different from those applied in the federal courts. The remedies are different. It would seem that Congress should not permit a situation to exist where orderly enforcement depends entirely upon the ability of the Assistant Attorney General in charge of the Antitrust Division and the Chairman of the FTC to divide the work between them amicably.

In 1914, when the FTC was created, it was envisioned as a supplement to the work of the Attorney General. However, forty-three years of experience have resulted in a duplication of activity and not simply supplementary activities. The example of the undesirability of over-lapping jurisdiction demonstrated by the present discussion of appropriate legislation for advance notification of mergers, extends to every other aspect of antitrust enforcement. Accordingly, the issue should be faced squarely now and the decision made as to whether this unsatisfactory dual enforcement system is to be continued or a single enforcement system instituted.

Conclusion

As Professor Handler stated,[87] attempting to interpret or apply section 7 of the Clayton Act is nothing but a "guessing game."

Mr. Bicks raised the very interesting question whether the *du Pont-General Motors* decision might encourage the Department of Justice to cease proceeding against alleged monopolization under section 2 of the Sherman Act, with its required proof of purpose, existing market

87. Handler, *supra* note 9, at 381.

effects and potential substitute products issues, and instead to proceed under section 7 and secure much the same divestiture by proving simply that, as a result of some prior acquisition competition may—in the future—be lessened in some narrowly defined relevant market.[88]

Although Mr. Bicks stated that the Department of Justice does not have sufficient staff to examine many pre-1950 mergers, the "time of suit" rule offers a further temptation to resort to the merger statute instead of the Sherman Act.

Have the Department of Justice and the FTC been handed a new weapon with which to break up *any* large corporation which has a history of stock acquisitions since 1914, or asset acquisitions after 1950?

Whether section 7 will turn out to be the "sleeping giant"[89] described by Mr. Justice Burton, only time will tell.

88. Bicks, *supra* note 14.
89. 353 U.S. at 611 (dissenting opinion).