Statement of Commissioner Christine S. Wilson
In the Matter of Staples, Inc. / Essendant, Inc.
File No. 181-0180
January 28, 2019

Staff in this case conducted a thorough examination, sifted through the resulting evidence to identify legitimate antitrust concerns, and crafted a remedy to address them. I therefore support the action the Commission takes today. Given my dissenting colleagues' desire to abstract from the facts of this case to discuss vertical merger policy writ large, I write separately to express my views. To be clear, I base my vote upon the theories, evidence, and facts of this case, rather than upon any general view of what the Commission's vertical merger policy is or should be.

A. The Concerns Voiced About Vertical Mergers Are Part of a Broader Debate

It is fashionable today to argue that antitrust policy has long been too permissive. My two dissenting colleagues echo this claim,[1] citing left-leaning Washington think tanks and a few academics.[2] According to some proponents of this view, our alleged laxity in antitrust enforcement has led to historic levels of consolidation and concentration. This, in turn, is apparently the cause of all that ails us, from declining competitiveness to greater income inequality, stagnant wages, and reduced innovation.[3]

Yet there is scant evidence that markets are less competitive today than they were in some ill-defined golden age of yore. Commentators most often point to general upward trends in the number of mergers, their valuations, or the size of the largest businesses.[4] While I do not dispute the accuracy of these broad statistics, they simply do not support such a sweeping claim about

[1] Dissenting Statement of Commissioner Rebecca Kelly Slaughter at 2 & n.6, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement. . . . I am also concerned about under-enforcement of horizontal mergers."); Dissenting Statement of Commissioner Chopra at 2, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.").

[2] Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1 ("Right now, a great debate is taking place in

the failure of American antitrust policy. What I would find persuasive, but have not seen, is evidence that firms' market power has increased significantly in relevant *antitrust* markets throughout the American economy and that this change has meaningfully harmed American consumers.[5] My dissenting colleagues do not make this more probative claim, and for good reason; there is no such evidence today.

What we see instead are highly flawed analyses[6] that have been roundly criticized.[7] Perhaps the most common mistake assumes increased concentration, and consequently consumer harm, using *ad hoc* estimates of increased revenue shares in one industry or another.[8] As any practitioner knows, broadly defined "industries" are rarely coterminous with relevant antitrust markets,[9] which usually are defined around the demand substitutes available to customers. Nor are revenues always the best measure of competitive significance. Even if these industry revenue shares were calculated within a relevant antitrust market, and even if they contained all relevant competitors,[10] courts routinely recognize that such shares are merely the first step in a much deeper market power analysis.[11] They therefore tell us nothing about whether merger policy has

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[5] As in any case we bring, such an analysis typically requires one to define a relevant market, identify competitors, estimate each rival's competitive significance, evaluate entry, exit, repositioning, and other changes to these competitive dynamics, and estimate how consumer welfare is likely to change as a result of the proposed transaction.

[6] *See* OPEN MARKETS INSTITUTE, AMERICA'S CONCENTRATION CRISIS (2019), *available at* https://concentrationcrisis.openmarketsinstitute.org/; JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (updated May 2016), *available at* https://obamawhitehouse.archives..gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

[7] *See* Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies: *A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912 (critiquing the CEA analysis).

[8] *See, e.g.*, OPEN MARKETS INSTITUTE, *supra* note 6 [illegible]

allowed firms to amass the market power required to raise prices, restrict output, or reduce quality.

Despite the dearth of evidence that antitrust policy has failed to arrest the accumulation of market power,[12] many – including proponents of the so-called "Better Deal" – question essentially everything we have learned about sound antitrust enforcement. They ask: Should we continue to use the consumer welfare standard as our lodestar, or instead jettison it in favor of a

this perceived problem simply by being more aggressive. As the decision of the federal district court in the AT&T-Time Warner case makes clear,[17] the antitrust agencies do not have the last word, and aggressive agency enforcement may well backfire by creating binding precedents that constrain future challenges to problematic deals.

C. Substantive Concerns

Recognizing both our limited authority to alter antitrust law and the fact that we as government enforcers bear the ultimate burden of proof before a neutral decision-maker (*i.e.*, a federal court), let us finally turn to the crux of the issue raised by my dissenting colleagues: What do we know about the likely competitive effects of vertical mergers?

We know that vertical mergers by definition combine fi

of the Clayton Act – such harm is likely to “substantially lessen competition, or to tend to create a monopoly” in a relevant antitrust market.

Vertical mergers also generate other procompetitive benefits. For example, these mergers allow firms at successive levels to coordinate their production, design, or innovation activities, thereby reducing costs, increasing quality, and speeding the introduction of new products.[29] Vertical integration also incentivizes greater investment by harmonizing upstream and downstream incentives and by reducing transaction costs, "free-riding," and the risk of hold-up.[30] Although my colleague is correct to note that vertical agreements short of a merger can confer similar procompetitive benefits,[31] I have not seen any evidence – and she does not cite any – for the proposition that these contractual arrangements necessarily replicate the benefits of a full merger. To the contrary, economists have long known that there are many circumstances in which contractual arrangements may be inferior to mergers.[32]

We also know that economic models that attempt to predict the net competitive effect of a given vertical merger are often more art than science. Most models identify the possibility of both procompetitive and anticompetitive effects, and sometimes even their magnitude, but make no attempt to assign probabilities to any of them. Standing alone, these "highly stylized [and] largely game-theoretic models" do not provide clear guidance on how to separate the wheat from

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(arguing "[e]nforcement should be focused on oligopoly markets" because in these markets the risk of anticompetitive harm may be larger and the likelihood of procompetitive benefits may be smaller); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1972 (2018) ("While vertical mergers in oligopoly markets should not be subject to near-per se illegality, they also are not entitled to near-per se legality."); *see id.* at 1967 ("[F]oreclosure concerns cannot simply be dismissed in oligopoly markets."); *id.* at 1969 ("[I]n oligopoly markets with multiple competitors, vertical mergers can harm competition from input or customer foreclosure, even without coordination.").

[28] Cooper, Froeb, O'Brien, & Vita, *supra* note 20, at 658 ("Most models that predict (potential) harm from vertical restraints require pre-existing market power at multiple stages of production. This condition usually implies the existence of efficiencies from vertical control, and the magnitude of the efficiency often rises monotonically with the level of pre-existing market power.").

[29] *See, e.g.*, Salop, Revising the Vertical Merger Guidelines, *supra* note 20, at 13.

[30] *See, e.g.*, Lafontaine, Vertical Mergers*, supra* note 23, at 86.

[31] *See* Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 4 (asserting "claimed [efficiency] benefits should not be taken at face value" because, among other things, "[t]he claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements").

[32] *See, e.g.*, Paul L. Joskow, *Vertical Integration*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 321 (C. Menard & M. Shirley eds., 2008) (summarizing the literature on various forms of vertical integration, from contraa003 Tw 0.22 Tc 0.001 Tw Eclaimayer

whether we are employing sound enforcement policies.[36] But I am wary of clearing mergers with remedies, after extensive investigations, while simultaneously threatening to undo those mergers later, which is precisely what Commissioner Slaughter hopes to do.[37] Absent certainty, a merged entity will be reluctant to make capital and other investments that may be lost if a subsequent merger challenge forces it to unwind the transaction. This uncertainty is bad for both businesses and their consumers. If applied on anything like the scale Commissioner Slaughter envisions, it also risks returning the Commission to its earlier role as the "national nanny" with an ongoing mandate to monitor prices, output, entry, and other marketplace developments throughout the economy.[38]

Conclusion

For all of these reasons, I have grave concerns about my dissenting colleagues' enthusiasm for treating all vertical mergers with skepticism and conducting a fundamental reevaluation of our vertical merger policy. Policy should be dictated by applicable law and relevant facts. On that basis, there are very few vertical mergers that should be challenged. Two of my colleagues believe that this is one of those few vertical mergers that the Commission should challenge, based on nothing more than a hunch that Staples "may" or "might" be able to harm rivals by integrating vertically. I prefer to base my analysis on the evidence we have gathered and the law as it exists today, and therefore vote to accept the limited relief we order.

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[36] *See* "Dynamic Efficiencies in Merger Analysis," Submission of the Business and Industry Advisory Committee, Presented by Christine S. Wilson to the OECD Competition Committee (June 6, 2007) at para. 58 (asserting that "it would be instructive for enforcement agencies to perform retrospective studies of merger enforcement decisions . . . to assess the efficacy of merger policy generally, and would be particularly useful in assessing the impact of dynamic efficiencies, given that benefits from such efficiencies may accrue over extended periods of time").

[37] Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 9-10 ("With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.").

[38] *See, e.g.*, Daniel A. Crane & Thibault Schrepel, *The Democrats' 'Better Deal' Is Neither Better Nor a Deal*, N.Y.U. J. L. & BUS. 1, 4 (2017) ("Allowing the agencies to give conditional blessing to a merger and then hover over the merged company for years with the constant threat of divestiture would create a 'national nanny' culture in which the agencies became de facto regulators rather than competition enforcement agencies. The fear of post hoc divestiture orders would deter beneficial investments and tearing apart companies integrated for years would result in chaos and economic loss (for all of the reasons recognized by the D.C. Circuit in *Microsoft*). It's a bad idea.").