In the Matter of Sycamore Partners, Staples, and Essendant
Commission File No. 181-0180
January 28, 2019

Right now, a great debate is taking place in Washington policy circles and even around

Notwithstanding the majority's apparent view that the resolution of a vertical merger investigation is an inappropriate occasion for a discussion of vertical merger enforcement generally, I would like to make some broad observations about vertical mergers and share my views on how the Commission should approach them before addressing the specific merits of the Staples-Essendant merger.

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. According to Thomson Reuters, companies announced mergers at record rates in 2018,[2] and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.[3] Moreover, some observers believe that recent high-profile vertical mergers, including the potential clearance of the AT&T-Time Warner merger by the courts, will spark further vertical merger activity.[4]

Given the enormous impact these mergers will have on the economy, markets, and consumers, the Commission should carefully examine all mergers, including vertical mergers, with a forward-looking perspective. As the Supreme Court explained, Section 7 of the Clayton Act enables the Commission to prevent anticompetitive mergers in their incipiency without having to wait until the merger's anticompetitive effects come to fruition.[5] I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement.[6]

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[2] See Thomson Reuters, Mergers & Acquisitions Review, Full Year 2018 and Nine Months of 2018, at 1

[3] See id; Thomson Reuters, Mergers & Acquisitions Review, Full Year 2017; Thomson Reuters, Mergers & Acquisitions Review, Full Year 2016; U.S. Dep't of Justice Press Release, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner." (Nov. 20, 2017) (discussing harm from vertical merger); U.S. Dep't of Justice Press Release, "Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of the Cigna-Express Scripts Merger." (Sept. 17, 2018) (discussing vertical merger analysis); U.S. Dep't of Justice Press Release, "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger." (Oct. 10, 2018) (citing vertical integration); see also U.S. Dep't of Justice Press Release, "Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans." (Oct. 5, 2016) (discussing potential harm from abandoned vertical merger); European Commission Press Release, "Commission Approves Acquisition of Rockwell Collins by UTC, Subject to Conditions." (May 4, 2018) (citing vertical component).

[4] Tony Romm & Brian Fung, AT&T-Time Warner Merger Approved, Setting Across Corporate America, WASH. POST, (June 12, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/12/att-time-warner-decision; Cecelia Kang, Brooks Barnes, & Michael J. de la Merced, AT&T-Time Warner Ruling Could Make It Easier for Future Deals, N.Y. TIMES, (June 10, 2018), https://www.nytimes.com/2018/06/10/technology/att-time-warner-ruling.html.

[5] See Brown Shoe Co. v. United States, 370 U.S. 294, 317–18 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."); Phila. Nat'l Bank v. United States, 374 U.S. 321, 362 (1963) (Section 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future").

[6] I am also concerned about under-enforcement of horizontal mergers, but for the purposes of this case I am confining my comments to vertical merger analysis. Cf. Steven C. Salop & Daniel P. Culley, Revising the Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners, 4 J. ANTITRUST ENFORCEMENT 1,

Concerns about vertical mergers are not new.[7] We know that vertical mergers, particularly those involving highly concentrated markets, can pose a variety of significant threats to competition.[8] Indeed, agency investigations have identified a range of competition concerns,[9] including limiting access to or raising the costs of key inputs,[10] restricting access to an important customer,[11] inhibiting entry by new competitors,[12] evading regulations,[13] facilitating coordination,[14] or, as the Commission also alleged in this case, allowing anticompetitive information sharing.[15] But, among the enforcement actions that the Commission brings, many are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright.[16]

3–5 (2016) (documenting a decline in the number of vertical merger enforcement actions by presidential administration after the period between 1994 and 2000, but also noting that the level of enforcement is impracticable to judge absent further information); Steven C. Salop & Daniel P. Culley, *Vertical Mer g er* 1 – 2018 (Georgetown Univ. Law Ctr., Aug. 23, 2018) (showing that, in the period between 2001 and 2018, the number of vertical merger enforcement actions remain lower than the six-year period between 1994 and 2000).

[7] Some have argued that vertical mergers are rarely, if ever, anticompetitive and in fact are almost always procompetitive. *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 225–45 [illegible]

words, have the parties met their burden of providing adequate evidence to show that the claimed benefits are verifiable, merger-specific, and sufficiently large to give the Commission enough comfort that the merger indeed will not be, on balance, anticompetitive?

In practice, the likely anticompetitive effects of some vertical mergers may be difficult to predict reliably enough at the time of the transaction to mount a successful challenge. This uncertainty does not excuse the Commission from its obligation to utilize all of our authority to ensure that parties never abuse their position.[22] As noted above, the Commission's authority under Section 7 is forward-looking, and we are charged with preventing the exercise or attainment of market power, not merely correcting its abuse. It is particularly important that enforcers are mindful of this point when evaluating mergers between vertical partners in a supply chain; it may be more difficult to predict whether vertical mergers will be anticompetitive, procompetitive, or competitively neutral, but such difficulty does not alter our fundamental obligation to preempt illegal vertical integration.

When faced with a close case—a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge,[23] or where we obtained a limited consent decree—the Commission would do well to adopt a general practice of planned retrospective investigations that could inform subsequent enforcement decisions, including a decision to challenge the consummated merger if necessary.[24] While the anticompetitive effects of consummated mergers are more difficult to remedy and involve significant interim competitive harms from delayed enforcement, the ability to bring such challenges is an important enforcement backstop.[25]

In such close cases, the Commission should commit publicly, at the time the investigation concludes, to a follow-up retrospective investigation a few years after the merger is consummated and should require the parties to provide whatever data might be necessary to complete it.[26] To the extent necessary, the Commission should also request and obtain

[22] Some have proposed additional legislative authoritye 5e3s, pde whd aos1ti (s1ti)-12.1 Tw 8.04 p-7.2n(nf)3 04 -0 0 8(S)0.u18.04

information from relevant third parties. This retrospective should compare the reality of the post-merger market with the predictions the Commission made at the time of the transaction about whether anticompetitive harms and benefits would be realized.

Where the Commission's predictions were incorrect and there is sufficient evidence of anticompetitive effects as a result of the transaction, this retrospective investigation would allow

role in that tradition.[30] The Commission has already identified one recent merger as a potential subject of a retrospective investigation, including on the effects of efficiencies.[31] Similarly, Bureau of Economics Director Bruce Kobayashi has urged stakeholders to identify vertical mergers that merit retrospective investigation.[32] I applaud and join these calls for retrospective review generally, and I emphasize their importance as part of our vertical merger enforcement program.

I acknowledge that these retrospective investigations will require significant resources, and I share the majority's concerns about how best to allocate our existing resources. I do not believe that a program of retrospective investigations in close cases would require unlimited resources, however, because these instances should arise relatively infrequently.[33] I understand that reasonable Commissioners can disagree on what constitutes a close case—this case appears to be one such example—but I would nevertheless propose that the Commission determine

evidence to conclude that cognizable efficiencies do in fact offset that estimate. I am not persuaded that there is such evidence.

As an initial matter, upon review of the record, I do not believe that efficiencies from the elimination of double