AAI Responds to Wall Street Journal Editorial on Whirlpool Acquisition of Maytag

by Diana Moss

Readers of recent Wall Street Journal issues might be surprised to learn that strong antitrust enforcement in the U.S. should be on the way out, with the American consumer cheering its demise. Last Friday, the Brookings Institution’s Crandall and Winston informed us in “The Breakdown of Breakup” that antitrust is irrelevant in telecommunications. The AT&T/Bell South merger therefore poses no threat. On Monday, the Journal’s editorial board opined in “Antitrust Spin Cycle” that the 21st century reality is that American manufacturers compete in a global marketplace with steadily falling prices. Hence, the Whirlpool/Maytag merger will inflict no harm. By these accounts, technology and globalization are an automatic pass for massive, sprawling mergers—they are the magic bullet that will put antitrust out of commission for good.

What could one want or need with antitrust in this world? The Journal seems to believe that shareholders do not want it because antitrust challenges inflict financial harm, depriving them of the value mergers are sure to deliver. Consumers—the argument continues—should not want antitrust because they are overwhelmed with competitive options and blocked deals will rob them of choice and lower prices. But, how can we be so sure that technology and globalization will save the day? The answer is that it cannot, and it would be dangerous to conclude on this basis that all mergers will be winners. To put this in perspective, we need to look at a few basic truths.

One truth is that the consumer should matter. It is the consumer who is the backbone of the American economy and who buys the products and services (like those produced by Whirlpool) that institutions and other investors will bet on. Unfortunately, some have it backwards—arguing that consumers are only there to serve stockholders. If businesses successfully serve consumers, stockholders will have opportunities to profit. From this perspective, competition is the engine that drives the economy. And any merger that unduly reduces competition is the enemy of the economy, even if it benefits a limited number of shareholders.

As most antitrust practitioners will tell you—a merger’s effect on the consumer is revealed only by a careful, forward-looking study of markets, likely incentives for post-merger conduct, entry, and efficiencies. The Whirlpool/Maytag “shareholder comes first” dicta, obfuscates these details. Studies of the merger (see, for example, www.antitrustinstitute.org/recent2/477.cfm) show that appliance prices have not fallen—they have risen, or remained stable at best. And foreign firms do not and are not likely to
compete in some key product markets that the merger would affect—like the all-American
top-loading washer. So contrary to the Journal’s editorial view, foreign entry is not likely
to protect consumers in these markets from a Whirlpool/Maytag with a combined market
share of nearly eighty percent.

Another truth is that not all mergers are good deals for the shareholder. For the
proof, we can look at Bruner’s *Deals from Hell* or Scherer and Ravenscraft’s more
academic—but equally compelling—*Life After Takeover*. Shareholders have taken some
impressive hits from bad deals—even during periods of market expansion and
technological advancement. If shareholder interests are paramount—as proponents of the
Whirlpool/Maytag *dicta* would attest—then the lessons of history recommend caution in
equal measure to the enthusiasm for eliminating antitrust oversight.

Both of these truths highlight the fact that when it comes to mergers, the devil is
in the details. These truths also recognize the symbiotic relationship between consumers
and shareholders. Together, they drive the need for antitrust policies that provide a
flexible framework for allowing pro-competitive deals to go through while stopping the
harmful ones. That is why one important component of merger analysis is figuring out
whether the cost savings a merger’s proponents claim it will produce are genuine. This
provision protects consumers, by ensuring that, on net, the merger will do them no harm.
But it also protects shareholders indirectly, by bringing to light artificial or inflated cost
savings that will ultimately erode the value of their investments. The Justice
Department’s Mr. Barnett has the tools to make sure this happens, and he should not be
swayed by broad and unsupported claims that technological advance and globalization
are a reason to rubber-stamp every merger that comes across his desk.

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**Antitrust Spin Cycle**


Antitrust regulators at the Justice Department will soon decide whether to give a green
light to a proposed $1.7 billion friendly merger between consumer appliance giants
Whirlpool and Maytag.

The decision will tell us whether the Bush Administration’s antitrust team is finally taking
into account the 21st-century reality that American manufacturers are competing in a
global marketplace characterized by falling, not rising, prices. The washer-dryer and
dishwasher market hardly fits the profile of a monopoly run by price-gouging robber
barons. The trend for decades has been for home appliances to become more affordable,
and what were once luxury items are now near-universal fixtures in American homes.
But Maytag's stock price has tumbled in recent weeks as Wall Street has raised the likelihood that the new head of the Antitrust Division, Tom Barnett, will reject the merger and fail his first major test case. If that happens, Whirlpool and Maytag shareholders -- including thousands of pension and retirement funds -- collectively figure to lose at least $400 million in profits from their rights as owners to sell to the highest bidder.

Whirlpool is offering to pay $21 a share for Maytag, or a $5-a-share premium for a firm that lost $82 million last year. That's one reason 98% of Maytag shareholders approved the sale. Blocking this marriage would clearly inflict financial harm on Maytag shareholders and fly in the face of President Bush's commitment to an "ownership society."

Also clear is that the main beneficiary of an antitrust injunction would be foreign companies. Whirlpool estimates that the merger would reduce its costs by up to $400 million a year, thus widening its efficiency-lead against up-and-coming rivals from China, Korea and Europe. Qingdao Haier Co., the ambitious Chinese appliance maker, attempted to buy Maytag itself, as have other foreign appliance makers trying to make inroads into the American market. They were outbid by Whirlpool. No doubt, if a classic U.S. brandname like Maytag were acquired by a foreign firm, we would hear shouts of protest about the selling of America.

The antitrust enforcers fear monopoly pricing from a Whirlpool-Maytag marriage. And it's true that combining the two firms would give Whirlpool control of about two-thirds of the current washer and dryer domestic market, and nearly half the dishwasher market. In the very short term that market power may even give Whirlpool a window of opportunity to raise prices.

But market concentration indexes, especially the laughably obsolete Herfindahl-Hirschmann Index, are notoriously backward looking. Maytag in recent years has closed at least two plants and is laying off workers. The two U.S. firms may control the majority of the appliance market today. But the lesson of virtually every consumer-electronics product over the past 25 years is that only by remaining hyper-efficient and continuously chopping costs and prices will Whirlpool retain that leadership. At one time fat and happy Magnavox and RCA controlled a sizable share of the U.S. TV market. Today, there are no domestic TV makers.

If this merger is blocked, it would mark the third major botched antitrust case in recent years. Justice opposed a merger between US Airways and United Airlines, only to see both go bankrupt. It also tried to stop the acquisition of PeopleSoft by software giant Oracle, only to get trounced in court. The American Shareholders Association estimates that the Oracle fiasco reduced merger activity by some $150 billion over the six months that Justice intervened, with shareholders the big losers.

One lesson here is that Mr. Bush can't afford to let merger decisions be dominated by the antitrust lawyers who have a career interest in seeing the world in static market-share
terms. To take one example, the lead attorney representing Whirlpool in this case wrote many of the baffling regulations on horizontal mergers at Justice that he is now being paid handsomely to untangle. A useful step would be to require that Treasury or the National Economic Council review all antitrust cases, so that the broad domestic economic consequences can be vetted. The Attorney General could also put a "shot clock" on investigations so mergers cannot be stalled for months on end.

Mr. Barnett assured Congress during his confirmation hearings that he appreciates the global scope of modern markets. He also said he understands that strategic horizontal mergers can increase the competitiveness of American industry and thus benefit shareholders and consumers. This will be the first test of his sincerity.