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What Does Expanding Horizontal Control Mean for Antitrust Enforcement? A Look at Mergers, Partial Ownership, and Joint Ventures

Diana L. Moss*

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I. Introduction

The many mechanisms for expanding horizontal ownership and control of economic resources pose ongoing challenges for merger enforcement. This is readily apparent in markets that have undergone profound structural change from horizontal consolidation and rising concentration over the last several decades, including wireless telecommunications, airlines, hospitals, health insurance, meat processing, and others. Horizontal control is a central concept in industrial organization and frequently encountered concern in antitrust enforcement. For example, the vast majority of all merger transactions challenged by the U.S. Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) involve some form of horizontal control.[1] Horizontal mergers that completely and permanently eliminate an independent competitor receive the most attention. But other forms of horizontal control that do not completely eliminate a rival—including acquisitions of partial ownership stakes and some joint venture agreements—have no less important implications for competition and consumers.

For example, production, marketing, and R&D joint ventures (or "competitor collaborations") can weaken incentives for parties to the agreement to compete independently. Such arrangements have become more common, as we have seen, for example, in the agricultural biotechnology and pharmaceutical sectors.[2] Rivals' partial ownership stakes in each other, and private equity and institutional investors that acquire stakes in multiple rivals competing in the same product markets, can also weaken competitive incentives. Private equity buyouts raise broader concerns about the damage left behind in the wake of rapid exits and in raising prices to consumers.[3] Yet there remains

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* President, American Antitrust Institute (AAI). AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, please see www.antitrustinstitute.org.

[1] Fed. Trade Comm'n, Cases and Proceedings, https://www.ftc.gov/enforcement/cases-proceedings/advanced-search, U.S. Dep't. Just. Antitrust Div., Antitrust Case Filings, https://www.justice.gov/atr/antitrust-case-filings.

[2] *See, e.g., Novartis (NVS): Some Examples of Joint Ventures, Partnerships, and Alliances*, Aug. 29, 2007, KNOW. ECOLOGY INT'L., https://www.keionline.org/book/novartis-nvs-some-examples-of-joint-ventures-partnerships-and-alliances **and** Murray Fulton, Konstantinos Giannakas, *Agricultural biotechnology and industry structure*, 4 AGBIOFORUM, 137 (2001), https://www.agbioforum.org/v4n2/v4n2a08-fulton.htm.

[3] Lovisa Gustafsson, Shanoor Seervai, and David Blumenthal, *The Role of Private Equity in Driving Up Health Care Prices*, HARV. BUS. REV., Oct. 29, 2019, https://hbr.org/2019/10/the-role-of-private-equity-in-driving-up-health-care-prices.

little transparency around the role of private equity in the broader landscape of horizontal control. Moreover, research indicates that partial ownership can lessen incentives to compete more than under a monopoly.[4] Meanwhile, there is ongoing debate over whether antitrust can reach to competitive issues raised by institutional investor ownership of stock in rivals in sectors such as airlines and banking.

As antitrust enforcers try to keep pace with the many forms of horizontal control and their competitive implications, we see indications of weakening merger enforcement under Section 7 of the Clayton Act.[5] For example, the scales have tipped sharply toward merging parties in merely *predicting* the pro-competitive effects of their deals, while the government bears a nearly insurmountable burden of *proving* that a merger will harm competition.[6] Research shows that the benefits of mergers are often speculative and never materialize, leaving consumers with higher prices, lower quality, less innovation. Moreover, data on merger enforcement reveals that the antitrust agencies increasingly seek remedies for problematic mergers, rather than moving to block them or to force their abandonment. Yet we see a growing list of failed merger remedies, leaving consumers with higher prices, lower quality, and less innovation.

Given its many faces, ubiquity, and indubitable link to market concentration, it is time to take a fresh look at horizontal control. Analysis in this White Paper reveals troubling issues for antitrust enforcement in light of rising concentration, weakening enforcement, evidence of failed mergers and merger remedies, and growth of the partial ownership model. These takeaways should inform potential antitrust reform proposals and approaches to invigorating merger enforcement and competition policy. The first part of the paper examines the competitive dynamics of different forms of horizontal control. The second part examines major enforcement and policy issues raised by expanding horizontal control and highlights areas of much needed analysis. This includes analyses of failed merger remedies, whether litigated mergers have produced claimed benefits, and how partial ownership acquisitions by private equity firms have affected market concentration. The paper also recommends that the agencies withdraw the "safe harbor" provision for some partial ownership acquisitions in their proposed revisions to the Hart Scott Rodino (HSR) Act filing requirements.

II. Taking Stock of Horizontal Control

A. The Ubiquity of Horizontal Control

More antitrust agency guidance has been issued on the concept of horizontal control than any other antitrust concern. For example, the Horizontal Merger Guidelines (2010 Guidelines), which address both horizontal mergers and partial ownership acquisitions, have been revised six times between 1968 and 2010. The DOJ has provided guidance on merger remedies in policy statements and

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[4] *See, e.g.,* Øystein Foros, Hans Jarle Kind, and Greg Shaffer, *Mergers and Partial Ownership*, 176 ECON. LETTERS 90 (Mar. 2019) and Duarte Brito, Ricardo Ribeiro, and Helder Vasconcelos, *Can Partial Horizontal Ownership Lessen Competition More Than a Monopoly?,* 176 ECON. LETTERS 90 (2019).

[5] 15 U.S.C. § 18.

[6] See, e.g., Jonathan B. Baker, *Market Concentration in the Antitrust Analysis of Horizontal Mergers,* in ANTITRUST LAW AND ECONOMICS (Keith N. Hylton ed., 2010) and Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. OF ECON. PERSPECTIVES (Summer 2019).

manuals in three revisions between 2004 and 2020.[7] And the Antitrust Guidelines for Collaborations Among Competitors (Collaboration Guidelines) were issued in 2000.

Agency guidance is designed to address the core concern raised by enhanced horizontal control—problematic increases in market concentration and high market concentration. Regardless of whether rivals expand their market positions through organic growth or horizontal integration, higher concentration can pose a threat to competition and consumers. Highly concentrative mergers result directly in higher prices and lower levels of quality and innovation. But horizontal control is foundational to vertical and other types of non-horizontal mergers. While it does not eliminate a rival and increase market concentration, non-horizontal integration can enhance the incentive for a firm to exercise market power in one, or multiple, highly concentrated markets affected by a vertical merger. Moreover, anticompetitive, exclusionary strategies such as predation, tying, and leveraging, and collusive agreements to fix prices or allocate markets, are predicated on high market concentration—often amassed by defendants through previous horizontal integration.

For example, monopolization cases such as Standard Oil, AT&T, and Microsoft were based on alleged competitive harm from conduct in markets that each company came to dominate, early on, through horizontal consolidation.[8] Vertical integration into complementary markets such as petroleum refining and marketing (Standard Oil) and personal computing applications (Microsoft) came later in the evolution of each company. This model remains in force today. For example, pharmacy benefit managers, CVS-Caremark and Express Scripts, which administer prescription drug benefit plans for health insurers, expanded through horizontal acquisitions of retail and specialty pharmacies to now control 50% of the national market.[9] Only recently did these companies integrate vertically into the health insurance market—CVS with Aetna (2019), and Express Scripts with Cigna (2019).

Similarly, internet service provider (ISP) behemoths Comcast and AT&T established their market positions through a series of mergers and asset swaps.[10] These dominant positions fueled concerns over Comcast's vertical acquisition of content provider NBC Universal (2009) and AT&T's acquisition of Time-Warner (2017). Likewise, agricultural biotechnology companies such as Monsanto and Dow, which established dominance in germplasm and crop-seed through dozens of horizontal acquisitions, are now fully integrated into multi-level, proprietary systems of genetic traits, transgenic seed, agrochemicals, and digital farming.[11] These examples of horizontal integration,

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[7] U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 GUIDELINES], available at http://www.ftc.gov/os/2010/08/100819hmg.pdf; U.S. Dep't of Justice & Fed. Trade Comm'n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000) [hereinafter COLLABORATIONS GUIDELINES], https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf and U.S. Dep't of Justice, MERGER REMEDIES MANUAL (Sept. 2020) [hereinafter 2020 MERGER REMEDIES MANUAL], https://www.justice.gov/atr/page/file/1312416/download.

[8] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1983), and United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).

[9] Am. Antitrust Inst., *Letter to Assistant Attorney General Makan Delrahim, Re: Competitive and Consumer Concerns Raised by the CVS-Aetna Merger*, Mar. 26, 2018, https://www.antitrustinstitute.org/wp-content/uploads/2018/09/CVS-Aetna_AAI-Letter_3.26.18.pdf.

[10] Sumit K. Majumdar, *Horizontal Ownership Concentration and Communications Infrastructure Adoption: Historical Data Evaluation* (Sept. 29, 2019), https://ssrn.com/abstract=3483602.

[11] COLLABORATIONS GUIDELINES, supra note 7.

followed by vertical integration, have resulted in the emergence of a only a few, large integrated systems and very little competition within them—or between them.[12]

The evolution of the digital technology "ecosystems," where there has been largely unchecked consolidation, raises similar issues.[13] Ecosystem-based markets do not fall neatly into the category of horizontal, vertical, or even conglomerate integration. Rather, they comprise myriad sets of markets that facilitate the provision of interconnected services, fueled by enhanced user data. Only recently have the digital technology players integrated non-horizontally through acquisition of assets such as cloud computing, data analytics, artificial intelligence, and machine learning.[14] But without amassing horizontal control over core markets such as search and advertising (Google), social media (Facebook), and mobile operating systems (Apple), competitive concerns surrounding the digital ecosystems would be far more temperate.

B. Unpacking Different Forms of Horizontal Control

Horizontal control can be enhanced through organic growth and economic phenomena, such as scale economies, network effects, and winner-take-all markets. But it also results from increased ownership or coordination, through three major mechanisms: horizontal mergers, competitor collaborations, and acquisitions of partial ownership shares in rivals. The unifying theme of the 2010 Guidelines is that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[15] How this occurs, however, differs significantly across various types of transactions that increase horizontal control.

For example, the 2010 Guidelines explain that "…in *most* horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them."[16] Because the incentive for the merging parties to compete post-merger is extinguished in a horizontal merger, analysis begins with how eliminating a rival can lead to harmful effects. Competitive assessments of horizontal mergers are increasingly shaped by economic theory and tools that have both expanded the scope of empirical evidence and pose challenges for courts in grappling with complex technical issues.[17]

In contrast to horizontal mergers, partial ownership acquisitions and some joint ventures do not completely eliminate competition and, therefore, incentives to compete. The threshold question for these transactions is how they can reduce incentives to compete through mechanisms such as a change in corporate control or degree of financial interest, leading to adverse price and non-price outcomes through unilateral or coordinated effects. For example, the Collaborations Guidelines state that for competitor collaborations that are not evaluated as *per se* illegal (that result, *e.g.,* in price

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[12] *See, e.g.,* Am. Antitrust Inst., Nat'l Farmers Union, and Food & Water Watch, *Letter to Acting Assistant Attorney General Andrew Finch Re: Monsanto-Bayer Merger: Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data*, Oct. 3, 2017, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU_MON-BAY-addendum.pdf.
[13] *See* Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST., Jul. 8, 2019, https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.
[14] *Id.*
[15] 2010 GUIDELINES, *supra* note 7, at 2.
[16] *Id.,* at 33.
[17] Diana L. Moss, *The Antitrust Revolution: A Microcosm of the Antitrust Enterprise*, ANTITRUST BULL. (forthcoming) (Aug.18, 2020).

fixing or market allocation), most "…preserve some form of competition among the participants…"[18] and that "…agreements may limit independent decision making or combine the control of or financial interests…or may otherwise reduce the participants' ability or incentive to compete independently."[19]

Several high-profile cases illustrate the foregoing concerns. For example, the DOJ's challenge of the 2014 Ardent Mills flour milling joint venture between ConAgra Foods, Cargill, and CHS, alleged that the collaboration would, among other things "permit information exchanges between CHS, Cargill, and the joint venture that would facilitate coordination in the relevant markets."[20] In another example, the FTC 2014 challenged the joint venture that combined the consumer healthcare businesses of GlaxoSmithKline (GSK) and Novartis. The FTC's action focused on the fact that both companies were the only rivals in the market for one consumer healthcare product—nicotine replacement therapy (NRT) patch products. And even through the Novartis NRT business was excluded from the joint venture, the FTC alleged that if Novartis' raised prices on its NRT products, the lost sales would be diverted to GSK, and the proceeds shared by both rivals through the broader joint venture.[21] Finally, a recent retrospective of the MillerCoors beer joint venture, formed in 2008, finds that prices after the joint venture were 6-8% higher and markups 17-18% higher than they would have been under non-cooperative oligopoly competition.[22]

The 2010 Guidelines note, for the first time, that the statutory provisions of Section 7 apply also to partial ownership acquisitions, even if minority positions "….do not necessarily or completely eliminate competition between the parties to the transaction."[23] They further note that partial acquisitions "…may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control."[24] Antitrust concerns around partial ownership transactions cover three major scenarios. One is an acquirer's stake in a firm against which it competes directly with in a product market. A second is an acquirer's stake in multiple firms that compete with each other in a product market, where the acquirer is an investor such as a private equity firm. Other private equity firms can often be investors in those very same rivals.

The agencies look to three major factors for how incentives to compete may change as a result of a partial ownership transaction: incentives, influence, and information.[25] One concern is that the acquisition can change the unilateral incentives of rivals to compete. Any losses imposed on a rival would be shared by the acquirer, thus blunting the acquirer's incentive to compete, even if it cannot influence the conduct of the acquired firm. Second, a partial ownership acquisition can enhance the acquirer's ability to influence decision making to compete less aggressively or coordinate conduct, through voting interests or governance rights acquired through the transaction. Finally, partial

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[18] COLLABORATIONS GUIDELINES*, supra* note 7, at 5.
[19] *Id.*, at 6.
[20] United States v. ConAgra Foods, Inc., Horizon Milling, Cargill, and CHS Inc., Complaint, Case No. 1:14-cv-00823 (D.D.C. May 20, 2014).
[21] Mike Moiseyev, *What's the interest in partial interests?* FED. TRADE COMM'N, BUREAU OF COMPETITION, May 9, 2016, https://www.ftc.gov/news-events/blogs/competition-matters/2016/05/whats-interest-partial-interests.
[22] Nathan H. Miller and Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 ECONOMETRICA 1763 (2017).
[23] 2010 GUIDELINES, *supra* note 7.
[24] *Id.*
[25] *See* Laura A. Wilkinson and Jeff L. White, *Private Equity: Antitrust Concerns With Partial Acquisitions*, 29 ANTITRUST 28, at 29-20 (2007).

acquisitions can facilitate the sharing of non-public, competitively sensitive information between rivals, leading to traditional coordination or even unilateral competitive concerns.

The DOJ's 2003 challenge of Dairy Farmers of America, Inc.'s (DFA's) acquisition of a 50% ownership interest in Southern Belle Dairy Co. was a watershed case in highlighting competitive concerns surrounding partial ownership.[26] Just one year prior, DFA acquired a 50% interest in National Dairy Holding, owner of the Flav-O-Rich brand, and rival to Southern Belle. In reversing the district court's finding that DFA did not exert control over Southern Belle's decision making, the appellate court held that even with no control or influence, a partial-ownership acquisition can violate Section 7.[27] In 2007, the FTC also challenged the combined interest in energy firm Kinder Morgan by private equity firms Carlyle and Riverstone (TC Group).[28] Their combined share of 22% in Kinder Morgan, coupled with an existing, combined 50% interest in Kinder Morgan's rival, Magellan, would have given both private equity firms board seats at each energy company, the right to veto decisions at Magellan, and access to competitively sensitive information.

A third partial acquisition scenario that has garnered more recent attention is an acquirer's stake in multiple firms that compete with each other in a product market, where the acquirer is an institutional investor that transacts on behalf of individual investors (e.g., mutual funds, insurance companies, hedge funds, etc.). This is referred to as "horizontal shareholding." Scholars offer empirical support for the notion that horizontal shareholding in concentrated markets can have anticompetitive effects.[29] Critics, however, note that the mechanism for translating anticompetitive incentives into adverse outcomes in product markets would require managers to violate their fiduciary obligations.[30] This argument ignores the role of common owners in strategic decision making, enabled through corporate governance rights, and executive compensation packages that reward industry performance, in addition to individual firm performance.[31]

The foregoing analysis highlights the ubiquity of horizontal control in industrial organization and in antitrust enforcement. While horizontal mergers receive the lion's share of attention, it is important to consider other mechanisms, such as partial ownership acquisitions and some joint ventures, that also enhance horizontal control. As such, there are myriad mechanisms for eliminating or weakening incentives to compete. The magnitude of this issue—and the associated importance of a coherent approach to the invigoration and constructive reform of antitrust—becomes clearer when considered against the backdrop of four major developments, discussed in the next section.

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[26] United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 852–55 (6th Cir. 2005).
[27] Wilkinson and White, *supra* note 25.
[28] TC Group L.L.C., et al., FTC File No. 061-1097, Docket No. C-4183, Complaint at 6 (Jan. 24, 2007), http://www.ftc.gov/os/caselist/0610197/complaint.pdf.
[29] *See e.g.,* Elhauge, Einer R., *How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It*, HARV. BUS. L. REV. (FORTHCOMING); Fiona M. Scott Morton and Herbert Hovenkamp *Horizontal Shareholding and Antitrust Policy*, 127 YALE L. J. (2018); and José Azar, Martin C. Schmalz, & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. OF FIN. (2018).
[30] José Azar, Martin C. Schmalz, & Isabel Tecu, *Why Common Ownership Creates Antitrust Risks*, CPI ANTITRUST CHRONICLE, Jun. 2017.
[31] *Id.*

III. Major Policy Issues Surrounding Horizontal Control

A. Concerns Over Rising Concentration

The many mechanisms through which it can be enhanced, and its indubitable link to market concentration should feature prominently in the debate over antitrust reform. Antitrust enforcers look to specific relevant markets, fact patterns, and the likely competitive effects raised by individual horizontal transactions. However, gradual increases in market concentration resulting from the consummation of horizontal transactions does not make its way into case-specific competitive assessments. Enforcement in the later Obama-era illustrates how enforcers accounted, albeit briefly, for these concerns in blocking or forcing the abandonment of highly concentrative mergers such as Comcast-Time Warner Cable (2015), Sysco-US Foods (2015), Anthem-Cigna (2017), and Baker Hughes-Halliburton (2016). As the more subtle effects of partial ownership acquisitions and some joint ventures on market concentration unfold, it is vital for enforcers to take better stock of these trends.

Beginning in 2015, reporting on increasing concentration in major sectors surfaced in the popular press.[32] One source reported that concentration in food and staples retailing increased from 1,000-3,000 HHI from 1996-2013, and in airlines from 1,000-2,000 HHI over the same period. In mid-2016, another source reported 4-firm concentration ratios for numerous U.S. sectors, including third-party administration of insurance and pension funds, which increased from 10-75% from 1997-2012, and from 50-90% in wireless telecommunications over the same period.[33]

Economic studies confirm concerns over rising concentration.[34] White and Yang find that aggregate concentration in the U.S. economy, as measured by employment, payroll, and profits, appears to have risen moderately but steadily since the mid-1990s.[35] Peltzman finds that concentration in U.S. manufacturing industries has been increasing since around 1980, a trend that was a "decisive break with a long history of stability dating back to the beginning of the twentieth century."[36] Brock examines merger activity from 1985-2008 across 14 major sectors and industries ranging from raw materials to finished products. He finds significant increases in concentration over time.[37] Numerous

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[32] Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL ST. J., Oct. 18, 2015, http://www.wsj.com/articles/wave-ofmegadeals-tests-antitrust-limits-in-u-s-1445213306 (citing Gerard Hoberg & Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 REV. FIN. STUD. 3773 (2010)).

[33] *Too Much of a Good Thing*, ECONOMIST, Mar. 26, 2016, http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needsgiant-dose-competition-too-much-good-thing. Concentration is represented by the 4-firm ratio.

[34] *See, e.g.,* COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER, May 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue brief_updated_cea.pdf. *See also,* Gregory J. Werden and Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018.

[35] Lawrence J. White & Jasper Yang, *What Has Been Happening to Aggregate Concentration in the U.S. Economy in the 21st Century?* Mar. 30, 2017(unpublished manuscript, on file with New York University), https://www.ssrn.com/abstract=2953984.

[36] Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration*, Apr. 25, 2018, (unpublished manuscript), https://ssrn.com/abstract=3168877.

[37] James W. Brock, *Economic Concentration and Economic Power: John Flynn and a Quarter-Century of Mergers*, 56 ANTITRUST BULL. 681 (2011).

other studies of sector-specific concentration, including hospitals, telecommunications, and agricultural biotechnology, also show upward trends in concentration.[38]

A growing body of empirical work reveals adverse effects from highly concentrative mergers. Merger retrospectives are an important tool for evaluating how consummated mergers affect consumers through price and non-price effects such as quality, choice, and innovation. Leading in this area is Kwoka, who examines FTC data on merger enforcement over four discrete time periods between 1996-2011.[39] Using meta-analysis of merger retrospectives, he examines consummated transactions that were subject to enforcement action. These include cases where the agencies challenged mergers by seeking preliminary injunctions, settled cases with remedies in consent decrees, or forced the abandonment or restructuring of anticompetitive deals.

Kwoka's analysis reveals troubling patterns. For example, results show that there is a higher level of enforcement consistency over time for transactions with post-merger concentration of 5,000 HHI or greater.[40] Much of this is apparent in the frequency with which enforcers bring actions against mergers that leave only two or three rivals in the market. But at low to moderate levels of post-merger concentration, enforcement has been markedly weak. In cases with post-merger concentration levels of 3,000-5,000 HHI, enforcement dipped markedly between the periods 1996-2003 and 2004-2007. Enforcement rebounded for this class of mergers from 2008–2011, but only after almost a decade of underenforcement. For cases with post-merger concentration of less than 3,000 HHI, enforcement trended downward for the entire period (1996-2011).[41]

A major takeaway is that lax merger enforcement has resulted in the ratcheting-up of concentration in key markets in which successive, less concentrative, mergers have occurred. Other evidence supports this concern. For example, the FTC's long-standing policy in the pharmaceutical sector has been to settle virtually all challenged horizontal mergers. Macro-analysis of deals from 1994-2020 reveals that many drug makers engaged in serial mergers and acquisitions (M&A) and/or made repeated purchases of divestiture assets in other challenged deals. This has led to the swapping of assets within a relatively small group of increasingly large firms.[42] Indeed, just under 20% of all firms that engaged in repeated M&A and/or purchases of divestiture assets account for almost 45% of the disposition of pharmaceutical assets in the data set from 1994-2020.[43] Many of the very firms that were the most active in M&A and as purchasers of divestiture assets now appear as defendants in private, state, and federal price fixing litigations and in federal criminal indictments.

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[38] *See, e.g.,* Martin Gaynor, Kate Ho & Robert J. Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LIT. 235 (2015); Federal Commc'ns Comm'n, EIGHTEENTH MOBILE WIRELESS COMPETITION REPORT (2015), https://docs.fcc.gov/public/attachments/da-15-1487A1.Pdf and U.S. Dep't Agric., RESEARCH INVESTMENTS AND MARKET STRUCTURE IN THE FOOD PROCESSING, AGRICULTURAL INPUT, AND BIOFUEL INDUSTRIES WORLDWIDE, ECON. RESEARCH REPORT NO. 130, 15 (2011), https://Www.Ers.Usda.Gov/Webdocs/publications/44951/11777_err130_1_.pdf?v=41499.
[39] John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 860–61 (2017).
[40] *Id.*
[41] *Id.*
[42] Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector*, AM. ANTITRUST INST., Sept. 3, 2020, https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.
[43] *Id.,* at 3.

B. Indicators of Weakening Merger Enforcement

The pervasiveness and complexity of horizontal control raises the question of whether merger enforcement is keeping up. As noted earlier, horizontal mergers account for the vast proportion of all transactions challenged by the DOJ and FTC. But only a small proportion of horizontal consolidation ever comes into the view of antitrust enforcers. Public agencies are subject to significant resource constraints, not only in screening transactions for those that potentially violate Section 7, but in litigating merger cases in federal court. And, it is also well known that enforcers apply error-cost analysis, under which they weigh the risk of challenging what would be a pro-competitive merger with that of not challenging an ultimately harmful one. However, the flawed assumptions made by antitrust conservatives about the competition policy environment have "inappropriately tilted" the scales toward weak enforcement.[44] In light of these factors, an important question is thus whether, under the current reporting and enforcement regime, enforcers are flagging potentially harmful transactions.

Reporting statistics under the HSR Act shed light on this question.[45] Merger activity is cyclical in nature, which affects the year-to-year volume of transactions that are reportable to the federal antitrust agencies. Not all mergers are reportable, and of those that are "cleared" to the DOJ or FTC for a closer look, the majority receive early termination because they raise no competitive issues. A small proportion of merger transactions receive a "second request" for further information that will aid an agency in making a competitive assessment. This rate has averaged, as a proportion of total clearances, about 20% from 1996-2019.[46] Even fewer transactions (15%) are challenged by the agencies under Section 7.[47]

A closer look at longer-term trends in enforcement reveals more. For example, the rate of second requests has trended *downward* from 1993-2019, signaling that the agencies are scrutinizing fewer deals. More important, the agencies rely more heavily on remedying harmful, challenged mergers than they do on seeking to force their abandonment, or to block them. To understand the implications of this trend, it is important to note that merger challenges fall into two major categories: (1) those settled by consent decree containing remedies, filed simultaneously with a complaint, and (2) those deals that are abandoned or restructured in response to an agencies' signal that it intends to seek a preliminary injunction, or that are actually litigated. Very few mergers are litigated in federal court.

As shown in the figure below, over the period 1993-2019, the number of challenges (as a percentage of total clearances) that resulted in a consent decree was almost 20% higher than deals that were abandoned, restructured, or litigated in response to government opposition.[48] Moreover, as shown by the trend lines for both categories of challenged mergers, it is clear that those settled with consent

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[44] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTIRUST L. J. 1, 2 (2015).

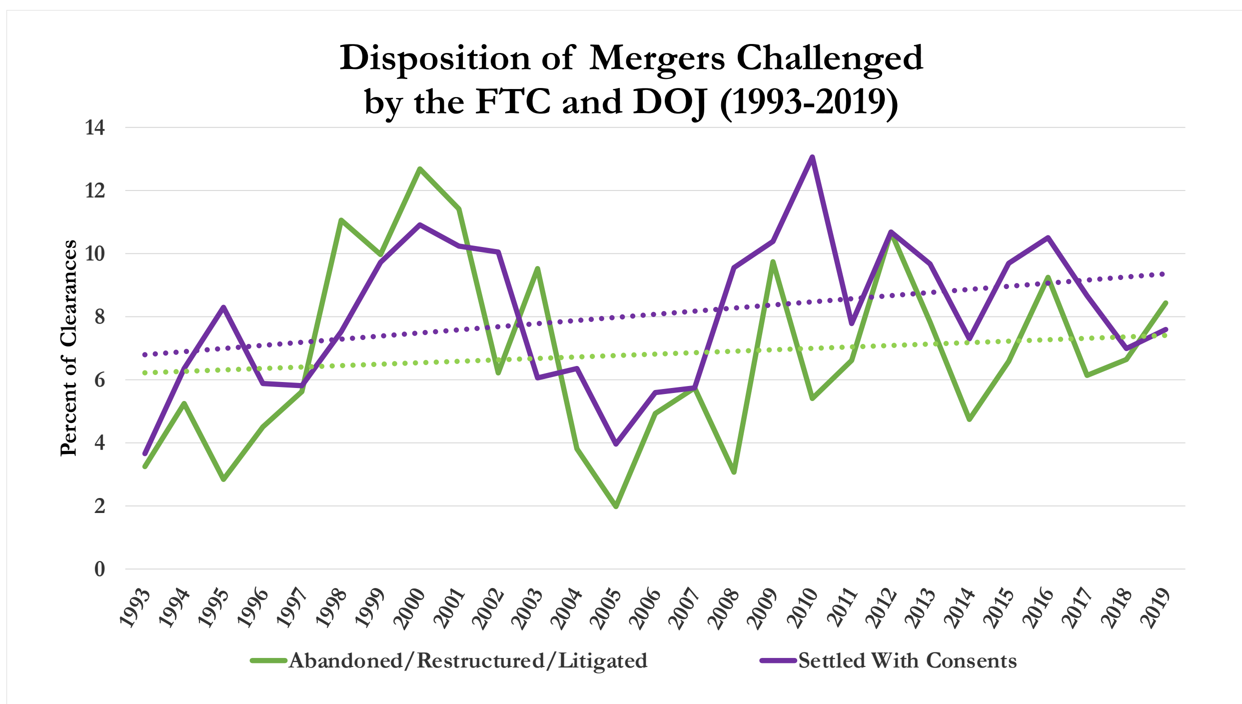
[45] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[46] Am. Antitrust Inst., THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S., Apr. 14, 2020, https://www.antitrustinstitute.org/work-product/antitrust-enforcement-report/. The report relies on data from U.S. Dep't of Justice & Fed. Trade Comm'n, ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 1993-2019 [hereinafter HSR REPORTS], https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

[47] *Id.*

[48] *Id.*

decrees from 1993-2019 increased at a *higher* rate than challenges that the agencies did not settle. In addition to settling more challenged mergers, therefore, the agencies are increasingly resolving them with remedies, rather than moving to block them. As discussed in the next section, this has significant implications for merger remedies. The declining rate of merger second requests, coupled with the antitrust agencies' clear preference for settling challenged mergers, supports the notion that merger enforcement has weakened over time.



A final issue is reporting thresholds under HSR. Experience in the digital technology sector illustrates that the current thresholds may be too high to flag acquisitions of small or potential rivals. For example, Amazon, Apple, Facebook, Google, and Microsoft make over 700 acquisitions from 1987-2018, only a fraction of which were reportable under HSR.[49] Competitive concerns in digital technology have put many of these acquisitions under the microscope, leading to calls for lower HSR thresholds, so that they do not evade antitrust scrutiny. This is currently the subject of an FTC 6(b) study, under which the agency has asked the five companies for information on the "terms, scope, structure, and purpose" of non-reported transactions consummated between 2010-2019.[50] Pressures associated with acquisitions in the wake of the COVID-19 pandemic have also put renewed focus on acquisitions of smaller, struggling firms and filing requirements under HSR.[51]

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[49] Moss, *supra* note 13.

[50] Fed. Trade Comm'n, Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp., Feb. 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[51] *Prepare For Antitrust Scrutiny Of PIPEs, Partial Acquisitions*, LAW360, Jun. 29, 2020, https://www.kirkland.com/publications/article/2020/06/prepare-for-antitrust-scrutiny-of-pipe.

C. The Growth of Partial Ownership

Concerns over rising concentration and weakening merger enforcement raise fundamental questions about the explosive growth in partial ownership acquisitions. Sources estimate that the share of S&P firms holding at least 3% ownership stakes in firms that compete in the same product markets increased 20-90% from 2000-2010.[52] The initial wave of private equity buyouts in the mid-2000s corresponded to a significant upswing in activity. Private equity buyouts have continued on a steady expansion path since then. Deal value increased by over 350% between 2009-2018, while deal counts increased by 400% over the same period.[53] Indeed, a former DOJ Antitrust Division enforcer characterized private equity in 2012 as a "complex web of interrelated relationships."[54] This has resulted in more acquisitions of minority shares in companies, which should sharpen the focus on expanded horizontal control.

The growth of partial ownership raises a number of important policy issues. First, scholarship reveals that increases in market concentration resulting from partial ownership acquisitions can be even higher than a horizontal merger, depending on the degree of corporate control and financial interest.[55] This has important implications for vigorous antitrust enforcement. Less attention, however, has been given to how other horizontal merger activity in product markets that are home to myriad forms of partial ownership change the strategic competitive incentives of partial owners. Horizontal mergers permanently change the structure of the product markets—enhancing the probability of unilateral and/or coordinated effects. With fewer rivals in product markets, investors with partial ownership shares face stronger anticompetitive incentives. This includes engaging in conduct that limits head-to-head competition (unilateral effects) and coordinated effects, through the exchange of competitively sensitive information on product market rivals.

Second, the volume of comments filed in the FTC's 2018 hearing on horizontal shareholding, as part of the agency's Competition and Consumer Protection in the 21st Century initiative, highlights the controversy over the reach of antitrust.[56] The antitrust agencies have emphasized that enforcement action involving horizontal shareholding will be motivated by evidence of actual or potential effects, rather than "general relationships suggested by academic papers."[57] And while they

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[52] Jose Azar, *Portfolio Diversification, Market Power, and the Theory of the Firm*, Aug. 23, 2017, https://ssrn.com/abstract=2811221.
[53] PRIVATE MARKETS COME OF AGE: MCKINSEY GLOBAL PRIVATE MARKETS 2019, MCKINSEY&COMPANY (2019), https://www.mckinsey.com/~/media/McKinsey/Industries/Private%20Equity%20and%20Principal%20Investors/Our%20Insights/Private%20markets%20come%20of%20age/Private-markets-come-of-age-McKinsey-Global-Private-Markets-Review-2019-vF.ashx. *See also* Press Release, *Private Equity-Backed Buyout Deal Flow in North America Reaches Post-Lehman High in 2012*, PREQIN, 2013, https://www.preqin.com/docs/press/Buyout_Q4_2012.pdf.
[54] *Id.*
[55] *See* Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest & Corporate Control*, 67 ANTITRUST L.J. 598 (2000) and Timothy Bresnahan and Steven C. Salop, *Quantifying the Competitive Effects of Production Joint Ventures*, 4 INT'L J. OF INDUS. ORG. 155, 161(1986).
[56] Fed. Trade Comm'n, *FTC Announces Agenda for the Eighth Session of its Hearings on Competition and Consumer Protection in the 21st Century; Session at New York University to Focus on "Common Ownership*, Nov. 20, 2018, https://www.ftc.gov/news-events/press-releases/2018/11/ftc-announces-agenda-eighth-session-its-hearings-competition.
[57] *Hearing on Common Ownership by Institutional Investors and Its Impact on Competition - Note by the United States*, OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE (DAF/COMP/WD(2017)8), Nov. 28, 2017, https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf.

acknowledge a potential role for antitrust, neither agency has brought an antitrust case involving horizontal shareholding.[58]

A final, major development that could have potentially dramatic effects on how enforcers view partial ownership acquisitions is the recent notice of proposed rulemaking issued (NPRM) on proposed revisions to the HSR filing requirements. The NPRM would, among other things, create a safe harbor for partial ownership acquisitions. The exemption would apply to partial ownership acquisitions of not more than 10%, where the acquirer is not a "competitor" of the acquiree, and where the acquirer owns no more than 1% of the outstanding voting securities of any entity that is a competitor of the acquiree.[59] This proposition should be carefully scrutinized, for two major reasons.

First, acquirers are responsible for making key, subjective determinations as to whether their transaction falls within the safe harbor. This includes ascertaining who is a "competitor." The agencies propose that this assessment be based on (1) a comparison of the 6-digit industry classification codes reported by the acquirer and the acquiree and (2) the filing parties' "good faith" assessment of whether an acquirer "…competes with or holds interests in entities that compete with the issuer, in any line of commerce."[60] As a general matter, regulatory constructions that rely on applicants' good faith reporting, and provide significant latitude in defining critical terminology, create incentives and opportunities for gaming.

For example, acquirers have strong incentives to narrowly define a line of commerce or report industry classification code overlaps to support their showing that they do not compete with an acquiree or the acquiree's rivals. It would be difficult for the FTC to police this type of reporting and subjective interpretation. The proposed *de minimis* thresholds also create incentives for investors to amass multiple partial ownership stakes. Such stakes can, when aggregated, lead to the control of important markets by only a few private equity investors, as we have seen in the retail grocery industry.[61] Moreover, gaming of the proposed safe harbor conditions can result in partial ownership stakes in rivals that compete in "closely" related markets. But private equity investors have strong incentives to encourage the post-acquisition "repositioning" of rivals in which they own stakes into the same market. This has significant competitive implications. Namely, investors with partial ownership stakes in multiple rivals have strong incentives to maximize profits, which are far higher under monopoly or collusion than under competition.

Second, the proposed HSR revisions are at odds with new DOJ guidance on merger remedies. For example, the 2020 Merger Remedies Manual states that purchases of divestiture assets by private equity firms may be "preferred" because past FTC divestiture studies show that "…the purchaser had flexibility in investment strategy, was committed to the divestiture, and was willing to invest more when necessary."[62] Encouraging divestitures to private equity purchasers—at the same time

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[58] *Id.*
[59] Fed. Trade Comm'n, NOTICE OF PROPOSED RULEMAKING, 16 CFR PARTS 801, 802 AND 803, PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS, RIN 3084-AB46, Sept. 21, 2020, https://www.ftc.gov/system/files/documents/federal_register_notices/2020/09/p110014hsractamendnprm09182020_0.pdf.
[60] *Id.,* at 31-32.
[61] Eileen Appelbaum and Rosemary Batt, *Private Equity Pillage: Grocery Stores and Workers At Risk*, THE AMERICAN PROSPECT, Oct. 26, 2018, https://prospect.org/power/private-equity-pillage-grocery-stores-workers-risk/.

[62] 2020 MERGER REMEDIES MANUAL, *supra* note 7, at 24.

the proposed revisions to the HSR filing requirements create a *de minimis* exemption for partial ownership stakes—signals undue, preferable treatment of private equity. The proposed HSR revisions will significantly decrease transparency around partial ownership acquisitions, at a time when it should be increasing.

D. Failed Mergers and Merger Remedies

Burgeoning issues around horizontal control draw attention to the key question of whether mergers, acquisitions of partial ownership stakes, and some joint ventures are delivering benefits to consumers. Indeed, strategic management research has estimated that the success rate for mergers is only about 10-30%. This high rate has been attributed to transactions that fail to deliver shareholder value, an inability to leverage the strengths of the merging parties, and technology integration problems.[63] Limitations on the ability of managers to successfully integrate organizations, often while executing required divestitures and implementing conduct rules required in consent decrees, pose significant hurdles for post-integration operations. For example, research on airline merger efficiencies reveals exceptionally long post-merger integration periods and cuts in service.[64]

The cost savings and consumer benefits that merging parties put before antitrust enforcers in justifying their deals are integral to the success of a merger. Efficiencies defenses have come to play an outsized, pivotal role in enforcement actions. Because few mergers are ever litigated, there is a sparse judicial record to inform whether defendants have carried what should be a significant burden under the structural presumption.[65] Namely, once the government has shown the likelihood of anticompetitive effects, the burden shifts to defendants to show that the merger is not harmful. That should not be an easy showing, especially in highly concentrative mergers where harm to competition and consumers is imminent. Indeed, the merging parties must show that the deal is pro-competitive, *i.e.,* that merger-specific and cognizable efficiencies will actually lower prices, increase quality, or spur innovation, despite the parties' enhanced market power.

The structural presumption was arguably abandoned in the states' recent loss in the merger of wireless telecommunications carriers, Sprint and T-Mobile (2020). Despite a highly concentrative 4-3 merger that raised concerns about both unilateral and coordinated effects, the court agreed with the defendants' expansive efficiencies claims.[66] Cases like Anthem and Cigna (2017), where the court *did* reject defendants' specious claim that monopsony prices were a merger-specific efficiency, are rare. These examples emphasize the relationships between the failure to realize claimed efficiencies, the low success rate on mergers more generally, and the inability of enforcers to hold merging parties "feet to the fire" in proving up claimed efficiencies. Together, these factors strongly highlight the negative impact of a weakened structural presumption on horizontal merger law.

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[63] Robert L. Martin, *M&A: The One Thing You Need to Get Right*, HARV. BUS. REV. (JUNE 2016), https://hbr.org/2016/06/ma-the-one-thing-you-need-to-get-right.
[64] Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, Nov. 21, 2013, https://www.antitrustinstitute.org/wp-content/uploads/2013/12/AAI_USAir-AA_Efficiencies.pdf.
[65] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).
[66] Decision and Order, *State of New York, et al. v. Deutsche Telecom AG et al.*, 1:19-cv-05434-VM-RWL (S.D.N.Y., Feb. 11, 2020), https://cdn.vox-cdn.com/uploads/chorus_asset/file/19712093/show_temp__6_.pdf, and Memorandum Opinion, *U.S. v. Anthem Inc., et al.*, 1:16-cv-01493-ABJ (D.D.C. Feb. 21, 2017) http://media.mcguirewoods.com/publications/2017/Anthem-Cigna-Memorandum-Opinion.pdf.

A second troubling development is the agencies' increasing reliance on remedies to resolve competitive concerns in challenged merger cases. Given the increased deployment of remedies, it makes sense to ask if they have been successful in fully restoring the competition lost in past mergers. For example, to the extent that a buyer of a divested line of business or targeted asset cannot reinject the competitive discipline of pre-merger rivalry, the remedy is more likely to fail. The more concentrative a merger, the commensurately higher is the risk of failure. Taking remedies in these cases stands in stark contrast to what is arguably the most effective route in deterring future anticompetitive conduct—a full stop injunction.[67]

Remedies raise substantive and procedural issues. For example, enforcers often consider whether a proposed remedy will have a significant effect on the outcome of a litigated case. An agency may extract stronger remedies up front if its strategy is to litigate the case without considering a fix. In contrast, perceived higher litigation risk may motivate the agency to settle with weaker remedies if it does litigate a restructured merger in court. This "litigating the fix" dynamic undoubtedly affects incentives to abandon harmful mergers, as well as the effectiveness of remedies in settled cases.

While the relationship between litigation risk and remedies is real, it remains that evidence on the failure of past merger remedies is mounting. For example, the FTC's 2017 study of its divestiture remedies between 1999-2012 reveals only 25% of purchasers of divestiture assets in pharmaceutical mergers actually sold the product post-acquisition.[68] In the merger of retail grocers Safeway and Albertsons, the FTC-approved the sale of almost 150 stores to regional west coast grocer Haggen. Within months, Haggen had shuttered the divested stores.[69] Similarly, in *Hertz-Dollar Thrifty*, the buyer of the divested assets, Advantage Rent-a-Car, filed for bankruptcy soon after the sale.[70]

The foregoing provides important context for evaluating the DOJ's recent issuance of its 2020 Merger Remedies Manual.[71] The new guidance states a strong preference for structural remedies and a more limited role for conduct remedies. This is a significant change from the 2011 Merger Remedies Guide that, in the wake of vertical mergers such as Live Nation-Ticketmaster (2010), Comcast-NBC Universal (2011), and Google-ITA (2011), sought to codify the use of conduct remedies. Despite expressing strong skepticism about conduct remedies, the Trump DOJ recently cobbled together a conduct-heavy remedy in the merger of Sprint and T-Mobile.[72] It is too early to tell if and how the 2020 guidance on remedies will pattern into stronger enforcement, particularly in regard to horizontal transactions.

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[67] *See, e.g.,* Diana L. Moss, *Realigning Merger Remedies with the Goals of Antitrust*, in GCR GUIDE TO MERGER REMEDIES 32 (2019).
[68] Fed. Trade Comm'n, Bureaus of Competition and Econ., FTC'S MERGER REMEDIES 2006-2012 (2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.
[69] Fed. Trade Comm'n, *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger*, Jan. 27, 2015, http://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J., Oct. 9, 2015, www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.
[70] *Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC*, FSNA-INC.COM, Nov. 4, 2013, www.fsna-inc.com/newspdfs/115201391920.PDF.
[71] 2020 MERGER REMEDIES MANUAL, *supra* note 7.
[72] *See, e.g.,* John E. Kwoka, *Masquerading As Merger Control: The U.S. Department Of Justice Settlement With Sprint and T-Mobile,* AM. ANTITRUST. INST., Aug. 21, 2019, https://www.antitrustinstitute.org/wp-content/uploads/2019/08/Kwoka_Sprint-TMobile-Settlenent_8.21.19_F.pdf.

IV. Policy Recommendations

This White Paper assesses the state of play in antitrust on horizontal control. The paper makes the case for more attention to all areas of horizontal control, against the backdrop of rising concentration and weakening merger enforcement. Moreover, evidence on failed mergers and failed merger remedies, and the growth of partial ownership transactions raises additional questions about the need for a more coherent enforcement and policy response involving horizontal control. Proposals for reforming the antitrust laws and invigorating antitrust should reflect the important policy issues raised in this White Paper. But there is a significant amount of work yet to be done. The following recommendations highlight key areas of needed analysis.

- **Undertake a comprehensive study to determine why remedies taken in past horizontal mergers have failed to fully restore competition. Such a study would focus on case-specific factors, but also draw out common observations across cases.**

- **Open an inquiry into the partial ownership acquisitions that have been subject to enforcement action to determine how the transactions have affected ownership concentration in product markets.**

- **Withdraw the proposed provisions of the NPRM to revise the HSR filing requirements that pertain to the 10% safe harbor for partial ownership acquisitions. The DOJ should also withdraw the language in the 2020 Merger Remedies Manual suggesting that private equity firms are favored as potential purchasers of divestiture assets.**

- **Open an inquiry into whether challenged mergers that were either litigated in federal court or settled with remedies in consent decrees produced claimed efficiencies.**