DOES MERGER ENFORCEMENT PROTECT CONSUMERS FROM THE LONG-TERM COSTS OF CONSOLIDATION?

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This article suggests that U.S. merger enforcement, while more effective at preventing harmful mergers in the short term, does not work as well to avoid scenarios that pose significant costs on consumers over the long-term. These scenarios involve markets that are affected by successive mergers, large mergers, and strategically motived serial acquisitions that can, variously, fortify barriers to entry, create market power bottlenecks, and accelerate the loss of independent competitors. The analysis unpacks key aspects of merger enforcement that heighten these risks. A major takeaway is that vigorous merger enforcement in the short term plays a key role in minimizing long-term costs of consolidation but because it cannot completely tackle the problem, other policy tools may be needed to protect consumers.

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I. INTRODUCTION

By any number of measures, merger enforcement is the most active area of U.S. antitrust enforcement. In 2024, for example, 64 percent of total civil investigations initiated by the U.S. Department of Justice ("DOJ") Antitrust Division were for potential violations of Section 7 of the Clayton Act.[2] This percentage remained relatively stable over the last two decades. Among other things, it supports the idea that the incipiency standard in merger control is the first line of defense to higher market concentration that gives rise to anticompetitive coordination and practices designed to exclude rivals.[3]

Not all mergers are harmful, as demonstrated by mergers where cost reductions are passed on to consumers through lower prices, and that expand demand by improving product quality, diversify product lines, and spur product innovation. These transactions, however, are likely the exception, not the rule. Mergers that are strategically motivated by amassing market power spell trouble for consumers. The "surplus" consumers would otherwise enjoy in a competitive market is transferred to sellers and they bear the brunt of inefficiency from output restrictions that are necessary to raise prices above competitive levels.

Harmful mergers and acquisitions that are likely to "substantially lessen competition" competition have tangible, adverse effects on consumers.[4] The prevailing consumer welfare standard guides this "effects-based" analysis by flagging the likelihood of higher prices and non-price effects, such as lower quality and slower innovation.[5] It is becoming increasingly clear, however, that that despite rigorous merger review using an effects-based approach, consolidation can have systemic, long-term effects that impose nontrivial costs on consumers.

For example, as markets become more concentrated through successive mergers, large mergers, and strategically motived serial acquisitions, other consequences of consolidation begin to surface. These impose long-term costs on consumers that are less foreseeable under antitrust's case-by-case approach. This article explores a number of scenarios, including fortified barriers to entry, market power bottlenecks, and the loss of independent competitors. While this is not an exclusive list, the analysis unpacks key aspects of merger enforcement that heighten the risk of these scenarios emerging, with the major takeaway that vigorous merger enforcement plays a key role in avoiding long-term costs of consolidation. However, because merger enforcement cannot address completely prevent these outcomes, other policy tools may be needed to protect consumers.

II. THE LONG-TERM COSTS OF CONSOLIDATION: THREE SCENARIOS

Under the consumer welfare standard, higher prices are the most immediate adverse effect from a harmful merger. Lower quality and slower innovation are likely to manifest more slowly.[6] There are other costs of consolidation, however, that are revealed over an even longer period of time. Several of these problems are now visible in important consumer-facing markets in the U.S. These include multi-level vertical integration that fortifies barriers to market entry; market power bottlenecks that destabilize supply chains; and the loss of independent competitors that deprive consumers of important choice in the marketplace.

A. Fortifying Multilevel Barriers to Entry: Agricultural Biotech

Long-term consolidation has spurred the formation of vertically integrated "systems." These systems involve ownership of assets in multiple, adjacent markets that can span an entire supply chain. This integration works to fortify existing barriers to entry for smaller rivals that may operate at only one or two levels. Agricultural biotech is a leading example, where the rapid succession of mergers of Bayer-Monsanto, Dow-Dupont, and Syngenta-ChemChina produced multi-level vertically integrated systems across markets for genetic crop traits, traited seed technology, agrochemicals, and digital farming. This swath of mergers reduced the number of large competitors from six to three in the two-year period from 2017-2018.

2 U.S. Dep't. of Justice, Antitrust Division Workload Statistics, FY 2015-2024, https://www.justice.gov/atr/media/1385421/dl?inline.

3 See e.g. *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962); see also *United States v. AT&T,* Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

4 *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

5 Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard*, ProMarket.org, Feb. 16, 2022, https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

6 See e.g. Vivek Bhattacharya, Gaston Illanes & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods*, NBER Working Paper 31123, Apr. 2023, https://www.nber.org/papers/w31123.

For example, the Monsanto-Bayer merger, proposed in 2016, advanced the claim that "integrated solutions" strategy would generate numerous benefits for farmers, such as convenience, improved sourcing, improved yields, optimized inputs, and sustainable farming."[7] The potential anticompetitive effects of the merger, however, cast doubt on the strength, and even veracity, of these claims. That is, an agricultural biotech system engineered with minimal, if any, interoperability with rivals' technologies or products increases the risk of foreclosing non-integrated rivals by fortifying barriers to entry.

The impact on farmers and consumers is significant. Locking farmers into a single proprietary cropping system limits their flexibility and choice, raises prices on bundled packages of traits, seeds, and chemicals, and reduces diversity in the crop system. On the consumer side, food manufacturers, grocers, and end use consumers face potentially higher prices and little to no choice for crop and vegetable-based food products.

Moreover, the integration of traits, seeds, agrochemicals, and digital farming into vertically integrated systems represents a sea-change in the competition "paradigm" in agricultural biotech. Consolidation shifts the playing field from competition within various markets (i.e. "intra-system" competition), to competition between integrated systems.[8] This begs the question of how many systems are necessary to generate benefits to farmers and consumers from "inter-system" competition while preserving the safety and stability of the supply chain. These effects of systemic vertical integration and the fortification of entry barriers to smaller rivals support the idea that the long-term costs of consolidation for consumers can be substantial.

B. Market Power Bottlenecks: Beef Packing

Successive consolidation can create market power bottlenecks in supply chains. These are typically in intermediary markets, such as facilitation services, marketing, and processing. Petroleum refining, protein processing, and pharmacy benefit managers all feature highly concentrated markets with only a few sellers or buyers. Because of its location in the middle of a supply chain, a market power bottleneck limits access. For example, the potential exercise of buyer power against upstream input sellers depresses prices paid for commodities and services. The exercise of seller power against downstream consumers raises prices for final products.[9]

U.S. beef packing is a good example. In 2021, 77 percent of U.S. beef packing capacity was controlled by four major firms -- JBS, Tyson, Cargill, and National Beef.[10] This high level of concentration resulted, in large part, from consolidation in the packing industry over time, especially during the late 1970s through early 2000s.[11] The beef packing industry has a rich history of antitrust violations, including private antitrust consumer class actions and federal challenges involving buyer market power and seller market power.[12]

The collapse of the beef packing supply chain during the COVID-19 pandemic – resulting in empty meat cases and high beef prices -- brought this speckled history to a head.[13] It exposes the grim reality that market power bottlenecks also pose a threat to the stability of supply chains. Exogenous shocks such as weather, disease, or political disruption are magnified by a lack of competition at choke points.

High concentration in a bottleneck market increases the risk that – in the event one or two market participants are unable to supply in the wake of a shock -- there are few other sellers ready to step in. This lack of redundancy imperils the resiliency and stability of the entire supply chain. These effects highlight that consolidation that produces market power bottlenecks over time have both immediate effects on prices

7 Creating a Global Leader in Agriculture, Investor Conference Call, Sept. 14, 2016, http://www.investor.bayer.de/en/handouts/investor-handout/, at 10-12.

8 Am. Antitrust Inst., Food & Water Watch, and National Farmers Union, Letter to AAAG Andrew Finch Re: Proposed Merger of Monsanto and Bayer, Jul. 26, 2017, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf.

9 See e.g. Diana L. Moss, *Market Power in Supply Chains*, CPI Antitrust Chronicle, June 2022.

10 James M. MacDonald, *Concentration in U.S. Meatpacking Industry and How It Affects Competition and Cattle Prices,* Amber Waves, U.S. Department of Agriculture, Economic Research Service, Jan. 5, 2024, https://www.ers.usda.gov/amber-waves/2024/january/concentration-in-u-s-meatpacking-industry-and-how-it-affects-competition-and-cattle-prices.

11 Tina L. Saitone, K. Aleks Schaefer, Daniel Scheitrum, Shawn Arita, Vince Breneman, Rebecca Nemec Boehm & Josh G. Maples, *Consolidation and Concentration in U.S. Meat Processing: Updated Measures Using Plant-Level Data*, Rev. Industrial Org. https://doi.org/10.1007/s11151-023-09923-z.

12 U.S. Dep't. of Justice, Department of Justice Statement on the Abandonment of the JBS/National Beef Transaction, Feb. 20, 2009, U.S. Dep't. of Justice, https://www.justice.gov/archives/opa/pr/department-justice-statement-abandonment-jbsnational-beef-transaction; and Don Jenkins, *R-CALF, National Farmers Union reach settlement with meat-packer*, Capital Press, Feb. 4, 2025, https://capitalpress.com/2025/02/04/r-calf-national-farmers-union-reach-settlement-with-meat-packer/.

13 Sanya Mansoor, *'The Food Supply Chain Is Breaking.' Tyson Foods Warns of Meat Shortage as Plants Close Due to COVID-19,* Apr. 26, 2020, https://time.com/5827631/tyson-foods-meat-shortage/; and Taylor Telford, Kimberly Kindy and Jacob Bogage, *Trump orders meat plants to stay open in pandemic*, Apr. 29, 2020, https://www.washingtonpost.com/business/2020/04/28/trump-meat-plants-dpa/.

and output, but can destabilize supply chains that are essential for public health and safely over the long-term. This poses significant costs on consumers.

C. Eliminating Choice for Consumers: Independent Physician Practices

The loss of independent, standalone competitors from long-term consolidation has a significant impact on markets. The dwindling fringe of small "indies" players is most obvious in retail grocery, pharmacy, and physician practice markets. Independents find it increasingly harder to compete against entrenched incumbents that grow through large mergers, successive mergers, or serial acquisitions. The loss of the indie-physician also removes an important source of choice in the delivery of healthcare for consumers.

The dramatic loss of independently-owned physician practices in the U.S. over the last two decades is a leading example. There is a steady decline in standalone physician practices as a result of acquisitions by corporate entities, including hospitals and health systems, private equity firms, and commercial health insurers. In 2012, hospitals and health systems owned 14 percent of physician practices. Twelve years later, this had increased to 60 percent.[14] Regulatory asymmetries, such as Medicare payment differentials between physician services delivered in hospitals versus in independently-owned physician facilities, are a leading driver of acquisitions. This allows hospitals to tack on facility charges based on site-of-service differentials, driving up costs to insurers and prices to consumers.

Moreover, with increased ownership of physician practices by dominant hospitals and health systems, there are stronger incentives to steer patients to the owning hospital's services, even if a hospital is higher cost or delivers lower quality services. This self-preferencing potentially stifles competition from other inpatient facilities and independent practices. The adverse effects on physicians and consumers are significant.

For example, evidence shows that hospital and health system ownership of physician practices increases healthcare prices and produces mixed quality effects.[15] The restructuring of physician markets is also accompanied by a loss of decision-making autonomy, with stronger incentives or requirements for physicians to base decision-making on financial objectives and constraints dictated by the owning hospital.[16] The impact of successive acquisitions of physician practices has broader, long-term consequences for patient access, choice, and health care costs, as well as the independent physician model as an important alternative delivery channel.

III. MERGER ENFORCEMENT TRENDS WORK AGAINST CONTROLLING LONG-TERM COSTS OF CONSOLIDATION

Major merger enforcement metrics confirm that the DOJ and Federal Trade Commission have more aggressively flagged market power concerns over time. Yet other trends work against the objective of controlling the long-term costs of consolidation. On the positive side, key rates of enforcement signal more vigorous merger control. For example, the rate at which the DOJ and FTC challenged potentially illegal mergers (as a percentage of transactions cleared for further review) increased by about 7 percent per year from the beginning of the first Obama administration in 2009, to 2023.[17] The rate at which the agencies forced merging parties to abandon harmful mergers increased, on average, by about 25 percent per year over the same period, as did the rate at which they litigated challenged mergers, or about 14 percent per year.

Increasing rates of enforcement are generally good news for stopping harmful mergers that can contribute to long-term costs of consolidation. Other factors, however, tell a different story. First, since the late 2000s, the rate at which the agencies cleared deals for a closer look fell steadily. From 2009-2023, the clearance rate was in freefall, plunging from over 20 percent of total reportable merger filings in 2009, to a low of 8 percent in 2021. Overall, the average annual decline in clearances is about 5 percent. This may be explained, in part, by a rise in HSR filings, which puts more demand on agency resources. But arguably, minimizing the potential for long-term costs of consolidation warrants more, not less, scrutiny of mergers in the immediate term.

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14 Physicians Advocacy Institute (PAI), Response to U.S. Department of Justice, Antitrust Division, Request for Information on Consolidation in Health Care Markets, May 30, 2024, https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/Advocacy/PAI%20FTC%20Response%20-%20FINAL.pdf?ver=be0ivnOECwuNx-vDMHFwtQ%3D%3D.

15 Alexandra Harris, Sarah Philbin, Brady Posts, Neil Jordan, Molly Beestrum, Richard Epstein & Megan McHugh, *Cost, Quality, and Utilization After Hospital-Physician and Hospital-Post Acute Care Vertical Integration: A Systematic Review*, 82 Medical Care Research and Review (2025).

16 PAI, *supra* note 14.

17 Data sourced from the *Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976*, Fed. Trade Comm.'n and U.S. Dep't. of Justice, Table X, https://www.ftc.gov/policy/reports/annual-competition-reports. Statistics are calculated as a percentage of transactions that were cleared to either agency.

Second, the agencies systematically raised the merger reporting thresholds under the Hart Scott Rodino Act filing requirements. This occurred first in 2001, with a 2.5-fold increase in the minimum deal value reporting threshold.[18] The agencies continue to adjust the filing thresholds upward based on economic growth and inflation. While the agencies must find ways to manage the burden of reviewing merger filings, it remains that with higher thresholds, smaller transactions are increasingly exempt from merger reporting. This makes it harder, if not impossible, to detect serial acquisitions involving smaller unreportable transactions -- such as roll-ups by private equity firms – that contribute to the long-term costs of consolidation.

Finally, the increase in size of merger transactions over gave rise to the "billion dollar deal." The billion dollar merger emerged in force, both in terms of deal counts and real total value, since the early 2010s. These transactions include large horizontal mergers that eliminate head-to-head competition or facilitate coordination; large vertical mergers that can strengthen incentives to exclude rivals from access to key inputs or distribution; and complex ecosystem mergers that can enhance incentives for a dominant firm to leverage market power across a constellation of markets.

A recent study indicates that 80 percent of challenged mergers that were settled between 2015-202 are worth more than $1 billion.[19] These include three of the highest valued transactions, worth more than $100 billion each: *Dow-DuPont, United-Raytheon*, and *AB InBev-SAB Miller*. Settling complex, behemoth mergers poses serious challenges for the DOJ and FTC in identifying the full range of competitive concerns and the higher execution risk for remedies to fully restore competition. Together, the difficulty faced by the DOJ and FTC to keep up with merger activity, numerous small transactions that fly under the antitrust "radar," and large, harmful mergers that are often settled, as opposed to being enjoined, all contribute the higher probability of long-term costs for consumers.

IV. THE APPROACH TO MERGER EFFICIENCIES REINFORCES CONCERNS

Mergers that are motivated by the quest for market power have particularly important implications for the long-term costs of consolidation. U.S. merger law operates on a rebuttable presumption of illegality. Namely, once the government makes a *prima facie* case that a merger is likely to substantially lessen competition, the burden shifts to the merging parties to offer evidence that merger-specific, verifiable efficiencies reduce anticompetitive incentives to restrict output and raise price, or lower quality and innovation.

This case typically rests on demonstrating how cost reductions resulting from economies of scale in horizontal mergers. or eliminating double margins in vertical mergers, will suppress post-merger price increases. But merging parties also offer other claims, including more nebulous benefits from economies of coordination and new product innovation. The "efficiencies defense" is a notoriously heavy lift for merging parties in litigated merger proceedings. Indeed, the more anticompetitive a merger, the more presumptively harmful it is, and the greater efficiencies need to be to suppress powerful anticompetitive incentives.

For these reasons, competition advocates stress that evidence on merger efficiencies should play a more prominent role in merger enforcement and litigated merger proceedings. Efficiencies are well-known to often fail to materialize, exposing consumers to the harmful effects of market power, as illustrated as recently as 2016 with the failure of the *AT&T-Time Warner* merger. At the outset, the companies estimated significant cost synergies and incremental revenue opportunities.[20] But less than three years later, AT&T spun off WarnerMedia to re-focus on multi-video programming distribution. Indeed, the company's financials reveal declining margins for WarnerMedia and low operating margins, with little growth in subscriber base, for AT&T.[21]

The unwinding of the *AT&T-Time Warner* deal was no surprise to skeptics of merger efficiencies. Evidence from strategic planning and management consulting studies is substantial. For example, 2004 study found that almost 70 percent of mergers studied failed to achieve

18 Fed. Trade Comm'n., Major Changes to Hart-Scott-Rodino Premerger Notification Requirements to Take Effect February 1, 2001, Jan. 25, 2001, https://www.ftc.gov/news-events/news/press-releases/2001/01/major-changes-hart-scott-rodino-premerger-notification-requirements-take-effect-february-1-2001.

19 Diana L. Moss, *What Does the Billion-Dollar Deal Mean for Stronger Merger Enforcement?* Am. Antitrust Inst., Sept. 20, 2022, https://www.antitrustinstitute.org/wp-content/uploads/2022/09/AAI_Billion-Dollar-Mergers_9.20.22.pdf.

20 AT&T to Acquire Time Warner, Att.com, Oct. 22, 2016, https://about.att.com/story/att_to_acquire_time_warner.html.

21 AT&T 2018, 2019, and 2020 Annual Reports, https://investors.att.com/financial-reports/annual-reports/2024.

expected revenue synergies.[22] Ten years later, botched merger integrations and inflated merger synergies were still a major cause of failure.[23] More recent evidence, however, is credited with signaling a turnaround, with 70 percent of mergers now considered successful because of better post-merger integration of assets.[24]

Despite the learning curve effects from decades of merger failures, newer evidence on the success of mergers is not comforting. Indeed, merger integration has more to do with retaining key talent, integrating management teams, retaining customers, and realizing revenue synergies and far less to do with implementing cost reductions. But it is precisely cost reductions have the most direct and powerful impact on reducing incentives to raise post-merger prices. In light of the significant, long-term costs of consolidation that can accrue from successive consolidation, large mergers, and serial acquisitions, enforcers and courts should continue to be skeptical of the “efficiencies defense.”

V. SUMMING UP

The concept of long-term costs of consolidation is not entirely novel.[25] The 2023 U.S. Department of Justice Merger Guidelines included a new Guideline 7 on industries undergoing a “trend toward consolidation.”[26] It focuses on evaluating the effects of mergers in industries that feature a trend toward concentration, vertical integration, serial mergers, and an “arms race for bargaining power.” The new guidance, however, provides no specific examples of how Guideline 7 aligns with current analytical frameworks or how the agencies would, in practice, articulate a competitive concern in challenging a transaction.

The foregoing analysis brings to light a growing list of scenarios that pose concerns over the long-term consumer costs of consolidation. It steps back to examine how current enforcement issues may be exacerbating these trends through declining rates of merger clearances, reporting thresholds that exempt smaller transactions, and settling large mergers that are well known to pose serious execution risks for complex remedies. While there is no prescription for adjusting the antitrust framework to better account for the long-term costs of consolidation, attention to this issue is now more important than ever. This includes the possibility of deploying other policy tools to address those costs and protect consumers.

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22 Scott A. Christofferson, Robert S. McNish & Diane L. Sias, *Where mergers go wrong*, McKinsey Quarterly (May 1, 2004), https://www.mckinsey.com/businessfunctions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong.

23 *Bain: 70% firms overstate M&A business case benefits*, Consultancy.uk, Dec. 16, 2014, https://www.consultancy.uk/news/1191/bain-70-firms-overstate-ma-business-case-benefits.

24 Adam Haller & Scott Nancarrow, *The 10 Steps to Successful M&A Integration: Where winners focus to make a deal outperform*, Jun. 2024, https://www.bain.com/insights/10-steps-to-successful-ma-integration/. Studies show that the vast majority (83 percent) of practitioners involved in past failed deals citing poor integration as the primary cause of failure.

25 The Progressive Policy Institute raised a number of issues in its comments on the draft 2023 Merger Guidelines. See, Re: Comments of the Progressive Policy Institute on the Draft Merger Guidelines for Public Comment (Docket FTC-2023-0043), Progressive Policy Institute, Sept. 18, 2023, https://www.progressivepolicy.org/ppi-comments-on-the-ftcs-draft-merger-guidelines/.

26 U.S. Dep’t of Justice & Fed. Trade Comm’n., Merger Guidelines (2023).

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