

Economic Issues in the Regulation Of Acquisitions and Mergers

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THE MERGER PROBLEM IN 1914.

Acquisitions and mergers were historically the nation's first monopoly problem. The first wave of mergers in the 1880's, many of which were conspicuously monopolistic in character, led in 1890 to the enactment of the Sherman Antitrust Act. And the first anti-trust case to reach the Supreme Court, *United States v. E. C. Knight Co.*,¹ involved a series of mergers by which the American Sugar Refining Co. achieved a virtual monopoly. Despite failure in this case because of the Court's narrow interpretation of the scope of congressional power under the Sherman Act, the government was more successful in subsequent antitrust suits, and the enforcement of the Sherman Act early established the key role of acquisitions and mergers when the result was a restraint of trade or the achievement of monopoly.²

However, the Sherman Act, as applied by the courts, has been inadequate to prevent or to correct mergers which have gone far to change the competitive characteristics of many of our major industries.³ The ineffectiveness of the Sherman Act test in dealing with the problem of mergers is underscored by the conclusions reached by Professor Handler in 1932:⁴

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¹ 156 U.S. 1 (1895).

² *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Union Pacific R. R. Co.*, 226 U.S. 61 (1912), and *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922); *Temple Iron Co. v. United States*, 226 U. S. 324 (1912), and *United States v. Lehigh Valley R. R. Co.*, 254 U.S. 255 (1920).

³ *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).

⁴ Handler, *Industrial Mergers and the Anti-trust Laws*, 32 *Col. L. Rev.* 179, 271 (1932).

"No one can read the cases or study the recent mergers without feeling that the chief effect of the federal anti-trust laws in this field has been the prevention of complete combination—the consolidation movement has not been otherwise repressed. The Sherman Law under the latest pronouncement of the Court has imposed no serious fetters upon the merger processes and an area large enough to satisfy the most optimistic of promoters—64% according to the Harvester decision—has been left free of governmental restraint. The virtual disappearance or dilution of competition in a number of important industries has not been prevented."

The committee reports and congressional debates that preceded the enactment of the original Section 7, (originally designated Section 8) of the Clayton Act were focused principally upon the evil of the holding company as a monopoly device.⁵ The holding of stock in one corporation by another corporation was said to be a device by which the "trust" was given corporate form.⁶

"Section 7 deals with what is commonly known as the 'holding company,' which is a common and favorite method of promoting monopoly. 'Holding company' is a term, generally understood to mean a company that holds the stock of another company or companies, but as we understand the term a 'holding company' is a company whose primary purpose is to hold stocks of other companies. It has usually issued its own shares in exchange for these stocks, and is a means of holding under one control the competing companies whose stocks it has thus acquired. As thus defined a 'holding company' is an abomination and in our judgment is a mere incorporated form of the old-fashioned trust."

In the light of subsequent interpretations of Section 7 of the Clayton Act, it is significant that in the congressional debates reference was made to the possibility that a corporation might sell all of its assets to another corporation or that the corporation might go out of business or that its property might be acquired by another corporation. In addressing himself to this possibility, Senator Reed remarked that:⁷

"When that is done, it means an increase of capital stock. It means that there is given to the world knowledge of the fact that the property and the business are thus controlled; whereas, under the method of stock ownership, there has been exercised in this country for years a secret control, and frequently monopoly is almost completely worked out through it."

⁵ See Report of the House Committee on the Judiciary, H. R. REP. NO. 627, 63d Cong., 2d Sess. Pt. I, at 17; Pt. II, at 6; Pt. III at 7-8.

⁶ Report of the Senate Committee on the Judiciary SEN. REP. NO. 698, 63d Cong., 2d Sess., p. 13, (1914); see also at 47.

⁷ 51 CONG. REC. 14457 (1914).

In continuing the debate, Senator Cummins pointed out⁸ that holding companies were also objectionable because the device permitted a small investment to control very large corporate enterprises:

"There are many objections to holding companies, but the chief one has not yet been suggested. The chief one is that it permits a small amount of capital to control a very large business. Ten percent, 15 percent, of the capital of a corporation in a single hand, if the stock is widely distributed, will control it; and if that corporation be permitted to buy another with equal capital it will control the additional capital, and so on and on, until you have put in a single hand with a trifling amount of capital, as compared with all that is involved, the power to control the whole business, and that is what is going on in this country every day. We all know it. It has been testified here over and over again that 10 percent of the capital of a great corporation will control its management and its policy."

The prohibition against the acquisition of the securities of one corporation by another corporation engaged in commerce, as contained in Section 7, as the Clayton Act was originally enacted, was not intended simply to incorporate the Sherman Act prohibitions against restraints of trade and attempts at monopoly. The Clayton Act sought to establish a lesser and more immediate standard, prohibiting acquisitions where the effect "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce."⁹

The principal evil foreseen was the elimination of competition between two companies engaged in the same line of commerce. Conceivably, if a more active enforcement of the original Section 7 had not been foreclosed, the commission and the courts might ultimately have been brought to deal with acquisitions of a vertical character, where the evil was not the absorption of one competitor by another but the monopolization of a source of supply or the monopolistic control of market outlets.

In Section 7, as in other provisions of the Clayton Act, the underlying purpose was to forestall the development of restraints and monopolistic tendencies. Whereas the Sherman Act had proved its competence to deal with combinations which accomplished a restraint of trade or a monopoly, the Clayton Act sought to prevent acquisitions and mergers which may have the effect of substantially lessening competition or of tending toward monopoly.

THE DEMISE OF THE ANTIMERGER LAW OF 1914.

As enacted in 1914, Section 7 of the Clayton Act provided "that

⁸ *Id.* at 14474.

⁹ 38 STAT. 731 (1914).

no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create monopoly in any line of commerce."¹⁰ And the provision went on to inhibit the acquisition by a corporation (a holding company) of the stock of two or more corporations with the effect of lessening competition between them in interstate commerce. (The section exempted acquisitions of stock solely for investment purposes and specifically permitted the formation of subsidiary corporations to carry on the immediate lawful business of the parent company.)

As applied to the realities of corporate acquisitions, the Supreme Court in two lines of decision nullified the prohibitions of Section 7. Although concluding that the Federal Trade Commission might prevent a corporation which was holding stock in a competing corporation in violation of Section 7 from using its illegally held stock to accomplish the acquisition of the plant and property of its competitor,¹¹ the Court at the same time ruled that the commission was without authority to require a corporation to divest itself of a competitor's assets, even though acquired by means of the illegal holding of the securities of that competitor, if the acquisition of assets had preceded the commission's complaint.¹² Eight years later the Supreme Court was willing to permit a merger of two competing electrical equipment manufacturers, accomplished through a complex of holding company maneuvers, to be consummated after the commencement of a commission preceeding to compel the holding company to divest itself of the voting stock of one of two competing companies.¹³

A second line of decisions resulted in a significant weakening in the concept of what constituted competition between the acquiring and acquired company. A single set of facts led Mr. Justice Sutherland, who delivered the opinion of the Court, and the majority of the justices to conclude that the International Shoe Co.

¹⁰ *Ibid.*

¹¹ *F.T.C. v. Western Meat Co.*, 272 U.S. 554 (1926).

¹² *Thatcher Mfg. Co. v. F.T.C.*; *Swift & Co. v. F.T.C.*, 272 U.S. 554 (1926). These interpretations brought a dissent from Justice Brandeis, in which Chief Justice Taft and Justice Holmes and Stone joined. Even the single victory proved an empty one when the *Western Meat Co.*, having failed in its attempts to divest itself of the stock, was permitted to buy the plant and property of its competitor to satisfy a debt contracted prior to the original action seeking divestiture. 33 F.2d 824; 280 U.S. 235, *dismissed* 281 U.S. 771 (1930).

¹³ *Arrow-Hart & Hegeman Electric Co. v. F.T.C.*, 291 U.S. 587 (1934).

and the W. H. McElwain Co. were not significantly competitive, whereas Justices Stone, Holmes and Brandeis found that they were.¹⁴ Both companies manufactured men's dress shoes and sold them in the same communities in the same States. That International sold largely through dealers in small communities while McElwain sold principally through wholesalers and larger retailers in the larger cities was held to establish that the two products were not substantially competitive.

The ultimate effect of these decisions was to encourage acquiring corporations to purchase the assets rather than the securities of other companies. In practice, corporations were left free to acquire either securities or assets, knowing that, if challenged, it would be possible to use any stockholdings to accomplish a full merger and transfer of assets from the acquired company. Thus, Section 7 of the Clayton Act became an unenforceable law, wholly ineffective in coping with successive merger movements, particularly in the 1920's and again after 1945. Beginning in 1927, the Federal Trade Commission included among its recommendations for legislation proposals for the amendment of Section 7. In 1945 and in every Congress thereafter, amendatory legislation was introduced. Finally, the 81st Congress passed and on December 29, 1950, the President signed the Celler Act, amending Section 7.

THE AMENDED SECTION 7

As amended,¹⁵ Section 7 provides "That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital" or "the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 7 is thus modified in two essential respects; it applies to acquisitions of assets as well as to acquisitions of securities, and it seeks to deal with all acquisitions of whatever description that have the unwanted effect of substantially lessening competition.

Congressional committees had for many years expressed concern over the level of economic concentration, particularly as accomplished through corporate mergers and acquisitions, and had been concerned with the ineffectiveness of both the Sherman Act and the Clayton Act to halt the trend. In its report accompanying the Act, the Senate Judiciary Committee stated explicitly that "The purpose of the proposed bill, . . . is to limit future increases in the level of economic concentration resulting from corporate

¹⁴ *International Shoe Co. v. F.T.C.*, 280 U.S. 291 (1930).

¹⁵ 64 STAT. 1125 (1950), 15 U.S.C. § 18.

mergers and acquisitions" and "thereby aid in preserving small business as an important competitive factor in the American economy."¹⁶

The Senate Judiciary Committee was specific in announcing its purpose "to make this legislation extend to acquisitions which are not forbidden by the Sherman Act,"¹⁷ and the House Judiciary Committee affirmed the same point:¹⁸

"Acquisitions of stock or assets have a cumulative effect and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

"Under H.R. 2734, a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition or (b) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices."

Thus, the Congress sought to conform Section 7 to the underlying preventive purpose of the Clayton Act.

The test of illegality under the amended Section 7 is no longer the lessening of competition between the corporate parties to the merger or acquisition. The new Section 7 applies to all acquisitions

¹⁶ Report of the Senate Committee on the Judiciary, SEN. REP. NO. 1775, 81st Cong., 2d. Sess. 3 (1950).

¹⁷ *Id.* at 4.

¹⁸ Report of the House Committee on the Judiciary, H. R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1950).

which may have the effect of substantially lessening competition. The test of a substantial lessening of competition or of a tendency toward monopoly is not limited to those situations which are of nation-wide or industry-wide significance. The act forbids acquisitions which, "in any line of commerce in any section of the country," may effect a lessening of competition or set in motion a tendency toward monopoly. The Senate Judiciary Committee elaborated on the new significance of "in any line of commerce in any section of the country —"

"To make clearer the intent to give the bill broad application . . . its wording has been broadened in certain respects. Thus, the phrase 'in any section of the country' was made applicable to both the lessening of competition and the tendency to create a monopoly. As the bill originally stood, it applied only to the former. Hence, an acquisition is not to be interpreted merely in terms of either its effect upon competition or its tendency to create a monopoly 'in the Nation as a whole.' The act is to be violated if, as the result of an acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly in any section of the country."¹⁹

In supplying a similar explanation with respect to the phrase "in any line of commerce," the Senate Judiciary Committee added that "It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition."²⁰

This change in language was also believed by the Judiciary Committee to serve the further purpose of emphasizing that the Clayton Act tests were different from and lesser than those applicable under the Sherman Act. In explaining this position, the committee stated:²¹

"The Committee believes that the excessive sweep that has been given to Section 7 of the present Clayton Act [original act] by these two features of that section has been largely responsible for the tendency of the courts in cases under that Section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts

¹⁹ Report of the Senate Committee on the Judiciary, SEN. REP. NO. 1775, 81st Cong., 2d Sess. 5 (1950).

²⁰ *Ibid.*

²¹ *Id.* at 4-5.

of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."

And the Senate Report added:²²

"These various additions and deletions — some strengthening and others weakening the bill — are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act."

The remainder of this paper is concerned with the problems arising in the economic analysis of acquisitions and mergers. It is not concerned with the legal adequacy of evidence or with the legality or illegality of specific acquisitions or categories of acquisitions. The examples selected are not facsimiles of actual acquisitions under study but are fabricated solely to illustrate the discussion.

ADMINISTRATIVE RESPONSIBILITIES UNDER SECTION 7

The Federal Trade Commission, with the amendment of Section 7, is newly charged with responsibility for dissolving acquisitions or mergers which threaten a substantial lessening of competition or exhibit a tendency toward monopoly, in regional as well as national markets, in specific lines of commerce as well as in larger industries.

A first step in the administration of Section 7 has been the establishment of a system of monitoring acquisitions and mergers. On the basis of announcements in the financial press and trade papers, the commission has listed mergers and acquisitions, both those contemplated and those accomplished. The monitoring operation has resulted in the listing of from 50 to 90 transactions a month, a total of some 703 in 1951 and some 822 in 1952.

The number of acquisitions recorded has raised the question whether a new wave of mergers has been stimulated by the enactment of the amendment to the Clayton Act, whether trade and industry have been seeking to accomplish acquisitions before enforcement machinery gets into high gear. No data are available that would indicate that this is so. A simple explanation appears to be that a more inclusive survey has resulted in identifying more acquisitions and that many acquisitions are now potentially subject to the Clayton Act which would not have come within the scope of the former statutory provisions.

A second step involves a preliminary examination or screening of the recorded acquisitions. Those acquisitions which appear, on the basis of what is known of the industry, to involve no signifi-

²² *Id.* at 5.

cant lessening of competition are eliminated from further consideration. The remaining acquisitions are segregated into two groups: those which appear to be of primary importance are immediately assigned for further investigation; the remainder are necessarily put aside for investigation as resources permit.

The investigation begins with the preparation of letters of inquiry to the parties to the merger or acquisition. This is preceded by a sufficient examination of the companies and of the industry to permit an identification of the areas where competition may be significantly affected. The letters of inquiry seek to develop what information the companies can supply relative to their positions in the industry and in the markets that appear to be competitively significant.

Only rarely can the corporation's reply reveal all the economic consequences of the transaction. Additional information on the structure and behavior of the industry, the extent and character of the markets affected, and the relation of the merging companies to these markets and to other competitors in the industry are essential to any final judgment.

If office investigation indicates that the acquisition may produce a substantial lessening of competition, a field investigation is recommended. An investigation focuses particularly on economic facts relating to a determination by the commission of the extent and character of the competitive consequences of the acquisition or merger; it is concerned more with industries and markets than with the parties to the acquisition and their conduct. If a complaint is issued, the Section 7 proceedings follow the usual course of cases before the commission.

The Clayton Act makes no provision for advisory opinions respecting the legality of proposed acquisitions in advance of the consummation of a transaction. Nevertheless, counsel for corporations contemplating mergers have on numerous occasions submitted their plans to the commission's staff with a request for an informal expression of opinion. Such voluntary submissions are usually supplemented by replies to a letter of inquiry which the commission's staff prepares in order to develop what additional information appears to be necessary.

The commission's staff is unable to give final answers to those who submit proposals for acquisitions. The staff can only say that on the basis of the available facts it would, or would not, recommend that an investigation be undertaken if the merger should be consummated.

The informal opinion of the commission's staff has no binding effect upon the proponents of the proposed merger. In some instances a negative opinion by the commission's staff results in a

dropping of the merger plan. In others the merger is consummated. Thus, when counsel for Pillsbury Mills, Inc., submitted its plan to acquire Ballard & Ballard Co., the commission's staff advised that such an acquisition would raise serious questions regarding competitive consequences which would necessarily require a thorough investigation. Nevertheless, Pillsbury Mills acquired Ballard & Ballard Co.; after further investigation, the commission, on June 16, 1952, issued its complaint charging that the acquisition of Ballard & Ballard Co., and also of the Duff Division of American Foods, Inc., constituted a violation of Section 7 of the Clayton Act. This became the first formal proceeding under the new law.

EXAMINING THE COMPETITIVE CONSEQUENCES OF MERGERS

1. *The Orientation of the Statute.*

In its revision of Section 7 of the Clayton Act, the Congress recognized the connection which has historically existed between acquisitions and mergers and the changing character of competition in our national economy. Through the years, the growth of industry by acquisition had produced a twofold effect: there had been a loss of important competitors, both on an industry-wide basis and in terms of specific markets; and there had been a change in the character of competition as a larger percentage of production in industry after industry had come under the control of a few companies.

The broadly stated objectives of Section 7 recognize that competition is not static and that rigid rules cannot be established to define illegal acquisitions. The Act gives the commission two tests by which to judge illegal acquisitions and mergers: An acquisition or merger which may result in (1) a substantial lessening of competition or (2) in a tendency toward monopoly. These tests are distinct, and an affirmative finding respecting one suffices to condemn the acquisition. A substantial lessening of competition may appear as the immediate consequence of the merger or it may result from a series of developments the character of which cannot be precisely blueprinted in advance. However, a tendency toward monopoly would normally be expected to appear only as a long-run consequence, since few mergers would be attempted if monopoly were the immediate and obvious outcome.

2. *The Prospective Character of Section 7 Judgments.*

The commission is directed to proceed against acquisitions where the effect *may be* to substantially lessen competition.

The test is prospective. The commission is not required to prove the actual consequences of the acquisition but only the reasonable probability that a lessening of competition will result. In its discussion of the amendment, the Senate Judiciary Committee emphasized that reasonable probability rather than "mere possi-

bility" was intended to govern: "The words 'may be' appear in the bill in defining the effect on competition of the forbidden acquisition. Acquisitions are forbidden only where in any line of commerce in any section of the country the effect 'may be' substantially to lessen competition or to tend to create a monopoly.

"The words 'may be' have been in Section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."²³

The longer action is delayed in identifying and terminating acquisitions which violate the Clayton Act, the greater is the possibility of irreparable damage to competition. The commission may not await an examination of the actual consequences of a merger, which might involve years of waiting and investigation, for that course would remove all possibility of restoring competitive conditions comparable to those which prevailed before the merger. The statute, therefore, places upon the commission the necessity of adopting procedures which facilitate prompt findings respecting the prospective effects of an acquisition.

3. *Selection of Cases.*

In reviewing the acquisitions which have been recorded from the financial press, it is obvious that many, perhaps even most of them, have no critical economic consequences. As it first comes up for consideration, an acquisition record is accompanied by such information as is available in the financial manuals, supplemented by any additional facts recently reported in the financial press. General background information about the industry and markets, together with the conventional and skeletal facts which are known about the two companies, constitute the basis upon which an initial determination must be made whether the acquisition warrants preliminary investigation.

Two years' experience in examining recorded mergers have resulted in the development of certain rule-of-thumb questions, the answers to which may convince the analyst that he knows enough about the industry and the probable consequences of the merger to say that further investigation is unnecessary, or the questions may focus on particular unknowns that must be clarified before concluding that the matter warrants serious study or that it may safely be dismissed without further attention.

²³ SEN. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950).

The law itself, with its stated exemptions and exclusions, provides the first grounds upon which some acquisitions may be dismissed. Unincorporated businesses and corporations not engaged in interstate commerce are by definition excluded from the Act. The Act also provides exemption for acquisitions, presumably partial stock acquisitions, solely for investment, and it permits corporations engaged in commerce to form subsidiaries and to acquire their stock for the purpose of carrying on "their immediate lawful business, or the natural or legitimate branches or extensions thereof, . . . when the effect of such formation is not to substantially lessen competition." The Act also exempts from the prohibitions of Section 7 those transactions which are consummated pursuant to the authority of other regulatory agents — the Civil Aeronautics Board, Federal Communications Commission, Interstate Commerce Commission, Securities and Exchange Commission exercising jurisdiction under Section 10 of the Public Utility Holding Company Act, the United States Maritime Administration or the Secretary of Agriculture.

In examining other acquisitions, no one fact places a transaction beyond the need for scrutiny and similarly no one fact suffices to mark out a merger for study. In each instance the competitive structure and behavior of the industry are significant, as well as the characteristics of the companies which are being merged. Moreover, it matters little whether the merger takes the form of an acquisition of assets or of a purchase of securities; the same competitive problems arise and similar competitive consequences are to be expected. With these qualifications in mind, the questions which are presented by certain types of acquisitions may be considered briefly.

Plant acquisitions are an every-day occurrence. When one is reported, the first question concerns the use which has been made of the plant and what effect the disposal of the plant will have upon the future business of the selling corporation. Many small plant disposals involving facilities which are either unused or which are being sold as a consequence of a consolidation of operations or a relocation of the business can be dismissed as having no competitive significance. At the other extreme are the large transactions which in effect mean the acquisition of a going business or of a product-line or division of a business. In these instances the problem presented is not properly speaking the acquisition of space but rather the acquisition of a business.

Similarly varied situations are encountered when equipment acquisitions are examined. Many represent a chance to buy at bargain prices equipment which is going out of production, and a number of these have been followed shortly by a second sale of the

same assets as the bargain proved to be less attractive. When an equipment acquisition assumes large proportions and becomes, in fact, the acquisition of an entire operation, it is no longer a routine transaction.

Patent acquisitions reflect a varied industrial picture. Patent acquisitions or the acquisitions of rights under a patent frequently occur when a new product moves from the development to the production stage, particularly where the product is one whose marketing calls for large financing. In the past patent acquisitions have sometimes been used to effect a concentration in the control of an industry's technology in the hands of a single interest. Consequently, any purchase of a conspicuous number of important patents requires that consideration be given to the possibility that the patent transfers may result in a regimentation of the industry, in a system of private controls which would be detrimental to the continuance of competition.

In recent years there have been many purchases and sales of loosely held assets, that is, production facilities which have been employed in a secondary business. A number of such transactions involve the disposal of side-lines or new productive operations developed by large corporations, perhaps the outcome of research in areas of their primary interest. Such divestments, particularly to newly established corporations, may accomplish a healthy increase in the corporate population. Other transactions have involved a withdrawal of corporations from wartime activities. Where the demand for the product has declined and the industry is adequately competitive, the transaction raises no public interest questions. On the other hand, where the disposal of the facility is to a leading corporation in an already highly concentrated industry, an inquiry into the competitive consequences appears to be required.

Many of the acquisitions recorded are small, both in dollar amount and in relation to the number of companies or the average size of a company in the industry in question. The merger of two small companies causes no concern when many companies serve the market. Similarly, where the optimum size for efficient operation is larger than the merging firms, the transaction may be promotive of healthy competition. On the other hand, where the industry is dominated by a few large companies, even small acquisitions may have to be examined to determine whether the cumulative effect of such acquisitions will lead to a substantial lessening of competition.

Where the acquired and acquiring companies are directly competitive, where they are of substantial size and where they are selling the same or similar products in the same markets, further inquiry is obviously indicated. How much of the common mar-

kets will the merged company occupy? Will the loss of one competitor mean a decline in the scope and vigor of competition? Will the hazards of competition be so increased for small firms and new competitors that the latter will be eliminated, even though they are capable of meeting competitive standards of efficiency in production and marketing?

Where a substantial company is acquired by one of the larger firms in the industry, even though neither company ranks as a leader in its market, the competitive consequences of the loss of a significant competitor must be evaluated. What has happened to competition in this and similar industries as large companies have come to account for an increasing portion of production and sales? What has been the mortality experience of small firms, and how many new firms have successfully established themselves in the industry? What evidence is there of the ability of the medium and small firms to compete with the larger firms in the introduction of new products, in the adoption of new technologies, and in reducing prices?

Vertical acquisitions give rise to difficult and perplexing problems even when the acquiring and acquired companies are in no way competitive. These acquisitions take many forms: a manufacturer may act to assure a continuous supply of raw materials; a producer of basic materials may integrate forward to undertake further manufacturing or processing; a manufacturer of final products may acquire distributors and seek to control the marketing of its own product.

The economic questions that arise in analyzing the consequences of vertical acquisitions cannot be precisely delineated in advance. The critical questions normally relate to more than one market level. How significantly will the open-market supplies of the relevant products be reduced? How many users are dependent upon the market supply, and what alternatives are available to them if this market shrinks? What opportunities exist for the establishment of new firms and an expansion in production to replace the market supply which has been absorbed by the acquisition? Will the integration create a market situation where nonintegrated producers are dependent upon competitors for raw materials or for the sale of their production? And if this last situation prevails, how important is the product in the costs of the nonintegrated competitors?

In the preliminary examination of acquisitions and mergers, the importance of the competitive characteristics of the markets deserves emphasis. It is in changes in the structure and functioning of markets that the best evidence of competitive consequences must be sought. It may be many years before clinical studies will

lay the foundation for confident use of complex economic evidence—the number and size of the competing companies, the alternative choices available to buyers and sellers, the share of the market occupied by the acquiring company and its competitors, the opportunities for new firms to enter the industry, the competitive mores of industries and markets, et cetera—in forecasting the competitive consequences of mergers. New tools of economic analysis can be forged only on the basis of case-by-case studies.

4. *Injuries to Competition.*

Three broad categories of injury to competition can be described. It is quite another matter to identify in particular situations the precise injury to competition which is most important. Enough work has been done in a preliminary way to demonstrate that injury to competition may take novel forms, and from time to time field investigations focus attention on new and unfamiliar forms of injury.

A lessening of competition or an injury to competition may be found on three levels in the economy. First, there is the possibility that an acquisition or merger will work injury to individual firms, either competitors or actual or potential suppliers or buyers. Evidence of such injury normally depends upon the testimony of individual complainants. This is technically the easiest type of competitive injury to find if witnesses are available. It is also a type of injury as to which conclusions must be drawn with great care, since what injures one competitor may appear as more effective competition by another competitor.

The second order of injury to competition relates to a deterioration in competitive markets through some such development as reduction in the number of sellers or buyers, a diversion of supplies from competitive markets, the erection of barriers against the entry of new firms, or the removal of a crucial competitor. A demonstration of this type of injury requires a careful analysis of present and prospective markets. It requires that the tribunal, commission or court, be presented with fully developed facts and carefully wrought reasoning to understand the nature of the injury to the competitive market. It is a costly and time-consuming case to develop, but it presents a significant appraisal of competitive conditions.

A third type of injury to competition arises from a deterioration in the competitive tone of the economy. This results from a change in the character of the incentives which guide corporate managements, and may be the consequence of one company becoming a dominant power in the industry or of control being concentrated in the hands of a small number of leaders. This type of weakening in the competitive economy has long been recognized

and much debated, involving such familiar problems as the reluctance of new capital to enter these fields, difficulties in promoting industrial research, undue caution in introducing new technologies, a disposition to follow live-and-let-live policies in relations with strong competitors. The problem is extremely complex because these are matters which properly lie within the discretion of corporate management. As has been observed, one cannot compel competition; one can only endeavor to create or sustain an environment in which competition becomes the normal code of business behavior. Acquisitions and mergers which do not work immediate injury to competitors or to market structures may nevertheless by a process of geological erosion change the basic attitudes of corporate management and weaken the competitive tone of the economy.

RECURRING PROBLEMS IN THE EXAMINATION OF MERGERS

Competition is the foundation of the free enterprise economy, yet its anatomy is little understood either by business men who practice it or by administrators who seek to enforce it. Competition is fundamentally a complex of production and marketing practices which arises and is self-sustaining in industries and markets which are so organized as to compel independent decisions by individual business units. Business rivalry survives but effective competition is gone in industries or markets where decisions on production, price and sales are made collectively or with a foreknowledge of the conduct which other business rivals will pursue.

Competition is the keystone of government policy toward business and industry because competition is believed to promote an efficient and impersonal direction of economic activity which is responsive both to the opportunities to produce and to the needs of consumers for products. Competition has the high public office of assuring efficiency and economy in industry. Efficient competitors are presumably rewarded with enlarged opportunities, while inefficient competitors are eliminated and the resources which they have employed are released for more competent producers. At each stage from raw material to finished product, free markets test the efficiency of competing producers or distributors, rewarding the competent with larger profits and expanding their opportunities while penalizing the inefficient with losses.

The incidence of competition varies from industry to industry and from one phase of the business cycle to another. Whether competition focuses on price, on product improvement or differentiation, on greater efficiencies, on sales efforts, on combinations and illegal agreements, is in significant degree a function of the organization of the industry. Consumers, workers, and investors all benefit when competition impels producers to seek reductions

in costs, improvements in products, a better organization of production, and the development of improved technologies, for in such progress lies the basis for sustaining and improving the standard of living.

Analysis of probable competitive effects of an acquisition begins with the competitive pattern of the industry as a whole and of its markets, particularly in the period preceding the acquisition. From such facts and from information about the specific merger or acquisition, an estimate must be made of what changes in the character of competition in the industry and markets will follow from the transaction.

The underlying purpose of Section 7 to prevent acquisitions from producing a substantial lessening of competition requires that the question — what is a competitive industry? — be asked. No easy answer may be expected, for no simple calculus of easily calculated magnitudes will yield a definitive solution. The answer must come as a result of a fully informed judgment which will command assent only if the economic facts and their analysis are explicitly set forth. In the world of business, decision can never await a marshalling of all the facts, and when government operates on the affairs of business, it cannot be asked to do the impossible. In the regulation of corporate acquisitions and mergers, governmental decisions must come promptly and explicitly. Decision must be preceded by asking the relevant questions and weighing the obtainable facts, but when this has been done, justice to business and the public requires that judgment be prompt, that it not be postponed in striving for perfection in the collection of data.

1. *The Identification and Evaluation of the Competitive Consequences of Mergers.*

The most perplexing problems in the administration of Section 7 relate to the economic evidence on the basis of which to establish whether a substantial lessening of competition or a tendency toward monopoly must be anticipated as a result of an acquisition or merger.

Competition cannot be measured directly, and hence, no single standard suffices to weigh the economic effects of all acquisitions or even of a single acquisition. Competitive practices differ in different industries, and moreover, the significance of the same competitive activities varies from one industry to another and even from one competitor to another within an industry. Consequently, what an informed judgment requires in one case may carry little persuasion in another.

a. *Industries and Markets*

The basic economic facts respecting an acquisition relate to the definition and competitive character of the market or markets in

which the companies operate. Information secured from the parties to the acquisition will identify these markets. The companies may also supply facts which are relevant with respect to changes in their positions in the several markets in which they buy and sell, but they will seldom be able to supply all of the essential facts about these markets. Yet the particular significance of these changes must be judged in terms of the overall characteristics of the appropriate markets.

In some cases even the identification of the relevant markets may present difficulties. If a paper manufacturer acquires a pulp company, will the competitive effects be confined to the market for pulp, or will they also appear in the market for paper products? And if competition in the manufacture of paper is affected, what will be the range of paper products which must be studied to determine the economic consequences? Even the identification of geographic markets may be difficult, for changes in production in one market area may lead to shortages or surpluses in other market areas.

What market areas are affected when two regional companies, meeting only on the periphery of their territories, or perhaps not selling in direct competition at all, are brought under common management? If a bakery operating along the Atlantic seaboard combines with one operating throughout the Middle West, are there no competitive effects, or are the competitive effects to be sought in the whole area served by the new company? If a dairy company which is strong north of the Mason-Dixon Line combines with one which is a leader in the Southeast, is there a substantial lessening of competition, and if so, is it confined to the loss of potential competition that might come from one invading the other's territory, or is there a change in competition identified with bringing a larger portion of the industry under the management of regional or national companies?

What markets are influenced when a company which has been manufacturing one line of chemicals or pharmaceuticals acquires another company that has been manufacturing a different line? May the conclusion be that there are no competitive effects or shall an examination be made of the consequences for short-line companies of additional competition from long-line companies? And how do long-line companies conduct competition with other long-line companies, as contrasted with the way in which they behave toward short-line companies? In the process of lengthening their line, companies may choose to establish new subsidiaries or they may seek to acquire operating units; are the competitive effects the same?

b. Immediate and Long-Term Consequences.

Every substantial acquisition produces not one but several competitive consequences. Every acquisition, save the one that eliminates the last competitor from the market, may increase competitive pressures for some firms, even though the ultimate effect is to move the industry along the road toward a limitation of competition. Virtually every acquiring company can point to some way in which competition will be increased. Acquiring its own source of raw materials may enable it to maintain production and sales in a period of shortage. The addition of a new product-line may enable the large distributor to infuse more competitive vigor into the marketing of the acquired product-line. Diversification, by supporting the firm during seasonal loss, may make it a stronger competitor with both the old and the new product-lines. As long as there is one larger firm in the industry, the acquisition of new capacity by other firms may be alleged to create stronger competition for the dominant company. If a company is the largest in its industry, it may argue that acquiring a regional company will enable it to enhance competition in markets which have not heretofore known its products. If the two companies are directly competitive, it may be argued that the larger firm will be able to operate and sell with greater economy and that it will have to do so because of competition from the remaining firms in the industry.

Similarly, any firm which is unable to meet the competition of a larger rival, which finds its markets invaded, its sources of raw materials cut off, its sales diminishing, may argue that the acquisition has resulted, or will result, in a substantial lessening of competition.

Any appraisal of competitive consequences must look beyond the effects upon individual firms of the changes in competitive markets. Very often the acquisitions which carry the greatest menace to the survival of healthful competition may initially produce a flare-up of competitive activity which may be interpreted as enhancing competition. And conversely, the large acquisition which arouses no apprehension among competitors or customers or suppliers may seal the doom of a competition which is already so atrophied that no one sees any hope of its being preserved.

To predict the immediate results of an acquisition calls for a measure of prophecy. To arrive at a final evaluation of ultimate consequences requires an informed judgment that, with the aid of past experience and present facts, sees beyond the years.

c. Tests of Competitive Consequences.

The economic effects of mergers and acquisitions on competitive markets must be examined qualitatively and quantitatively. The qualitative question is whether, and in what respects, the ac-

quisition or merger results in a lessening of competition. The quantitative question relates to the substantiality of the competitive effects and their measurement.

No two acquisitions raise precisely the same competitive questions. Indeed, it is unsafe to use the same economic analysis for the same industry in examining successive mergers, for acquisitions, like time, bring changes to industries and markets.

Much of the public discussion with respect to mergers has been addressed consciously or unconsciously to mergers between direct competitors. At one extreme there would be little difficulty in concluding that the merger of two local gas stations could have little continuing effect upon competitive markets. The buyer of gasoline enjoys a choice of sources by reason of his own mobility. But even if this were not so, the merger would not cause great concern, since it is easy for new gas stations to enter the field.

Similarly, one would have little difficulty in concluding that a merger of two large petroleum companies competing for the same markets could have serious competitive consequences, not only for consumers of gasoline but also for operators of filling stations. Between these two extremes lies a variety of market situations where the number of competitors, their relative size, the facility with which consumers shift from one seller to another, and the ease with which new competitors may enter the market are all material factors in interpreting the competitive consequences.

Where competing firms merge, one of the questions is what share of the market did each occupy and what share of the market will the new firm possess. The question is, of course, unanswerable in that form, unless it is possible to measure the total market, which cannot always be done. The absence of specific data does not relieve the commission of responsibility to arrive at a judgment regarding the competitive consequences of a merger. Nor does the impracticability of securing the best measures of competitive effects render legal a merger which results in a substantial lessening of competition.

Assuming, however, that it is possible to arrive at satisfactory measures of market shares, what significance attaches to these figures? What is more important, that two merging companies each account for X percent of a common market, or that these two are the smallest among twelve, or conversely, the largest among twenty-five competitors? If one of the largest in the market acquires one among the second group, what is more significant—the increase in the size of the larger firm or the disappearance from the market of an effective competitor?

The answer to these questions lies in the competitive structure of the market and in the nature of the competitive practices which

prevail. No mechanical application of yardsticks can conceivably yield a solution. Yet with an analysis of the salient market characteristics and of the relation of the merging companies to that market, an informed judgment, resting on experience with competitive practices in many industries, becomes possible.

What are the significant market shares when the acquisition is not of a competing firm? Where the acquisition takes the form of vertical integration, the inquiry must be addressed to the adequacy of the remaining market supply in relation to the market demand. Where the vertical integration carries forward into fabrication, the analysis must focus on the probabilities of squeezes with respect to nonintegrated fabricators who are dependent upon the integrated company, of denial of supply, of inducing other large producers to integrate forward until ultimately the nonintegrated fabricators are eliminated. Similar considerations arise when the integration is carried another step to the control of the outlets through which the products reach their ultimate markets. In any analysis of vertical acquisitions it may not be assumed that the competitive effects are confined to the market in which the acquired company has sold.

Acquisitions that involve diversification, a lengthening of the product-line or an entry into new markets will hardly be illuminated, and will certainly not be resolved, in terms of any simple statistical approach. Although such an acquisition normally leads to no reduction in the number of sellers, it does involve a reorientation in market strategy which may increase or diminish the inducements to vigorous competition.

The competitive effects of an acquisition may mature slowly, and these delayed effects may be of more moment than those which appear early. Whether competitors will have an opportunity to continue to do business profitably, whether small firms will find the way to growth and expansion foreclosed, whether new firms will be able to enter the industry without undue handicaps, whether new capital will find the industry an attractive investment, whether open-market supplies of raw materials and semi-finished products will remain adequate to the demand—these matters may be of greater significance than the immediate consequences of the expanded business to the acquiring firm.

No one theory will fit all acquisition cases. Both in terms of economic analysis and in terms of final judgments, each case must be approached individually and the available evidence must be assayed in the light of the economic characteristics of the markets affected. Moreover, the nature of the product, whether a necessity or a convenience item, and the availability of substitutes may require a more circumscribed, or a broader, definition of the mar-

ket. One merger may confront one group of industrial users with the problem of adapting their process to changes in the availability of materials; another merger may confront other industrial users having no alternate source of supply with an insoluble dilemma. The number of buyers, their relative strength, and the alternatives open to them must all be scrutinized.

Just as proponents of a merger may seek to define the market in terms which are most favorable to their view of the case, so it may be expected that they will show a preference for the economic tests which minimize the competitive consequences of their action. Any temptation to accept a single test of competitive consequences should be resisted, at least until fuller experience with a large array of cases has provided some clear indications as to their significance. The appealing argument that a single test would provide greater certainty in judging which mergers are legal is basically misleading, for each industry and each market situation will give differing economic significance to the same test.

During the developmental stage of the new merger law, there will be a tendency to multiply evidence by developing additional tests of competitive consequences. This experimental, case-by-case approach to measures of competitive consequences affords the best hope of determining the usefulness of economic data in assaying the competitive results of mergers. As the several tests are placed on trial before the commission and courts, experience will demonstrate that some have greater reliability than others, and that in particular circumstances, tests which closely duplicate one another may safely be omitted.

In summary, every substantial acquisition has some competitive effects, even though present methods of economic analysis may be inadequate to identify and measure them. Every such acquisition and merger may, indeed almost inevitably will, adversely affect some competitors, and where these competitors have been sheltered from vigorous competition, the disturbance created may appear to be serious. It is always necessary to distinguish between a substantial lessening of competition which weakens the competitive structure or behavior of markets and industries and an invigorated competition which may worsen the market position of particular competitors.

The structure of the markets affected is the beginning of any analysis of competitive consequences. It involves such considerations as the number of competitors, their relative equality or inequality in economic strength, the degree to which different competitors are self-sufficient with respect to sources of supply and outlets. The competitive characteristics of markets may be examined in terms of the realities of price competition, the flexibility

or rigidity of producers' dependence upon particular resources, the responsiveness of production to changes in demand, the continuity of technological progress, the ease with which new competitors may enter the industry, the availability of new capital for expansion, the extent to which companies purchase supplies and dispose of products in free and open markets, or contrariwise, the extent to which they depend upon companies which are also their competitors for either raw materials or outlets. On the basis of such analyses, with explicit evaluations of the different categories of evidence, the final judgment of the competitive consequences of mergers must rest.

2 *Categories of Evidence*

There are many different categories of evidence in terms of which the competitive consequences of an acquisition may be examined: the opinions of those familiar with the conduct of the industry, the characteristics of competition in the past or a forecast of competition to be expected, the prospective changes induced by the acquisition or the actual competitive characteristics of the market following the acquisition, the types of competitive behavior characteristic of the industry, and statistical evidence with respect to production, sales, prices and the like — all may be advanced as evidence on the basis of which a decision should rest.

Opinion evidence as to the ultimate competitive effects furnishes a weak basis for judging the consequences of an acquisition or merger. The disabilities of opinion evidence arise partly from the limited competence of witnesses, partly from unconscious elements of bias arising from their relationship to the market, and partly from the unavailability of basic factual data.

Few witnesses may be expected to have the breadth of competence which would enable them to recognize and weigh the complex factors which determine the trend of competitive development in an industry. Equally experienced observers differ in their judgments of the competitive nature of the industry and of the competitive effects of changes therein. Witnesses identified with individual companies will not, as a rule, have access to sufficient information concerning other companies to give validity to their analyses. And too often witnesses identified with the industry will have their appraisals colored by their own experience, and perhaps even by their estimates of the commission's success in dealing with the problem under investigation. Finally, industry witnesses are likely to associate injury to individual companies with injury to markets, losing sight of the commission's responsibility to preserve vigorous competition and of the inevitable problems which competition creates for individual companies.

Opinion evidence, however, has its uses. It may be sought respecting specific decisions by individual business firms on such matters as expansion in capacity, changes in the character of the product or in the volume of production, entry into new markets or withdrawal from old markets, and changes in technology, to mention a few specific examples. Competent opinions with respect to specific conduct by identified business units, when supported by an explanation of the facts supporting the opinions and the considerations directing the decision, may provide significant evidence respecting competitive changes in markets or industries.

Facts respecting the organization and the conduct of an industry are to be preferred to predictions as to broad competitive developments. A factual analysis of the organization and conduct of an industry, of the structure and behavior of competitive markets, provides a basis for evaluating changes in the industry's organization and market structure. The objective of economic analysis should be to present the salient characteristics of industries and markets explicitly, in terms of identifiable elements which remain unchanged or which may be subjected to specific changes in consequence of the merger.

Evidence of actual consequences arising from an acquisition or merger may be offered either to support the complaint or to rebut the allegation of competitive injury. If evidence of actual injury to competition becomes available, this evidence may appropriately be cited. But the absence of evidence of actual injury to competition may not be taken as indicative that the merger is without injurious results. Counsel for acquiring companies have shown sharp concern to learn whether the commission has received complaints arising from such transactions and there has been evidence of special care to preserve existing sources of supply, to create favorable markets for those selling raw materials, to supply jobbers and dealers, to avoid price increases, and the like, in connection with mergers being investigated. Finally, the commission cannot be required to await evidence of actual competitive consequences, since this might delay a decision until all possibility of restoring competitive conditions has disappeared.

The character of the available statistical evidence deserves particular attention. It has been argued, for example, that evidence respecting market shares is an indispensable test of the legality or illegality of the acquisition. Undue deference to statistical evidence, and specifically to evidence of market shares, could undermine the enforcement of Section 7. Much of the factual evidence respecting the organization of industry and markets takes the form of statistics of production, shipments, sales and the like, but these figures,

divorced from an analysis of the industry and market to which they apply, have little meaning.

Two problems always arise in considering the availability of evidence. First, many companies regard statistics of operations as confidential and are opposed to furnishing them lest their competitive position be prejudiced. A second difficulty relates to the degree of reliability or certainty which attaches to economic evidence. If full returns from all units are not available, there is inevitably a lower degree of certainty than customarily attaches to other types of evidence, as for example, the documentary evidence often introduced in conspiracy and monopoly cases. But these shortcomings do not preclude the use of such data when properly supported by other economic analyses.

The most difficult problem in preparing Section 7 cases is the transition from general economic considerations to specific evidentiary facts. Two distinct steps are involved: first, the general questions must be translated into specific questions with respect to which economic facts may be collected, and secondly, the economic facts to answer the specific questions must be available.

The first step, the transition from general to specific questions, may be illustrated with an example. A number of writers have urged that the behavior of the industry should be an important element in judging whether an industry is competitive. The progressiveness of the industry, the introduction of new products, the improvement of old products, the development of new technologies and other similar factors have been cited as indicative of active competition in an industry. However, specific objective tests have not been developed to evaluate these factors and perhaps cannot be devised. It may be possible to point to new products which have been introduced, to improvements in old products, to new technologies that have been adopted by the industry; this is quite different from establishing that there might not have been a greater rate of progress had the industry been more competitive than it in fact was. Moreover, these behavior elements are matters for managerial judgment and the fact that one management may judge the time inappropriate for the introduction of new technology is not proof that another management under greater competitive pressure might not have risked the introduction and developed it effectively. Even such seemingly objective economic facts as the relationship between prices and costs are hardly reliable evidence, considered alone, for the proposition that an industry is competitive; American industry abounds with examples of the expansion in markets that has occurred with price reductions, demonstrating that cost-price relationships are not static in a competitive industry.

The second step relates to the compilation of economic facts by which specific questions may be answered. In many instances the essential facts respecting the operations of the acquiring and acquired companies are available to the commission's staff; in some instances even the commission's subpoena power may be ineffective to secure facts which are alleged not to be in existence. In yet other cases the raw facts from which market analyses must be derived may be available in the form of undifferentiated invoice data, but the processing of such raw data may involve such an extensive operation as to make reliance thereon unduly costly. Where the necessary facts relate to other companies in the industry, the problem of access to information becomes more difficult, involving possible questions of confidentiality as well as the reasonableness of the burden which may be thrown upon companies which are not parties to the merger.

3. *Company Data and Industry and Market Figures*

There may be some cases where a determination of the percentage of the market occupied by a particular seller or by a group of sellers may appear to supply an obvious answer to questions of competitive effect. Some discussions of mergers and their competitive consequences have proceeded almost wholly in terms of such statistics, perhaps even to the extent of implying that from these statistics may be derived valid conclusions with respect to a whole range of industry and market characteristics. An examination of the availability and the validity of this class of statistical evidence is therefore appropriate.

The key to this use of specific company data lies in the availability of universe figures for the markets or industries which are being studied. Yet such universe figures are available only in special circumstances and only for certain markets. Where such over-all figures are not readily available, an attempt to develop them for the specific purposes of a Section 7 case might mean accepting a delay in the final decision which would foreclose any possibility of remedial action before the competitive markets sustained irreparable damage. One must start therefore with a realization that there are many instances where one may not speak with certitude respecting the total size of an industry and even more where certitude cannot be attained with respect to the total size of a market.

The census reports offer only limited help in arriving at universe figures. Census reports are available only for specific years and only on a basis of geographic units which do not normally coincide with economic markets. Moreover, the products and industries with respect to which census presents its data are frequently

more inclusive than the product or industry category which is relevant for a particular case, or conversely the product may be scattered through several census categories. And if there are fewer than four companies reporting, the non-disclosure rule will cause census to suppress the figure, and these are the cases where our need is most urgent.

Similar, though lesser, difficulties are encountered with respect to industries and products for which information is gathered by the Bureau of Mines and the Tariff Commission. It is only for a few products which are subject to regulation or taxation that statistics are available in significant detail. It is possible for such products as beverage alcohol, cigarettes, automobiles, and a few more, to secure quantitatively accurate universes.

Some trade associations have sought to develop information with respect to capacity, production and sales and where their membership includes all, or a substantial proportion, of the industry, they may have fairly reliable figures. Yet figures from trade association sources are seldom subject to verification by examining the sources from which the data are compiled, and hence, even if available, would be subject to some infirmities.

There are also industry and market surveys conducted by commercial organizations to guide manufacturers and sellers in planning advertising budgets and production schedules. These figures are used as a basis for managerial decisions, often involving large expenditures, both for sales promotion and for capital investment. But again these figures are seldom verifiable by examination of the sources from which the figures are derived.

Various other measures have been proposed for evaluating the size or the market position of companies — sales, assets, profits, shipments, purchases, receipts, capacity, payroll, or raw material consumption. Such figures are, however, subject to all of the basic difficulties inherent in measurements of market shares as well as some additional individual defects. While a statistic of this kind may, where uniformly available for a wide range of companies, give some indication of certain characteristics of the company, it can rarely, if ever, be sufficient to determine competitive consequences.

Precise figures with respect to the percentage share of the market held by the acquiring and the acquired companies are neither essential in all cases to a judgment as to the competitive effects of a merger, nor when available, are they likely to be sufficient alone to support a conclusion as to competitive consequences.

The percentage share of the market which is held by an individual company, considered without other evidence, could be conclusive only when the percentage is so high as to be indicative of monopoly. In other circumstances to rely solely on figures which

are indicative of the share of the market is to assume that there is a direct correlation between size and competitive behavior, between size and a substantial lessening of competition. Within the range of magnitudes encountered in most industries, this one-to-one relationship has not been established.

In the early and experimental stage in the regulation of mergers and acquisitions, the basic economic problems are beginning to come into focus. As yet, no case has been adjudicated on the merits, and only one private suit involving the amended Section 7 has reached the courts. Not only are the tests of illegality so far unaffirmed by legal authority but even the questions in terms of which the basic issues are to be framed are still being formulated. Section 7 has introduced a new dimension into management's planning for corporate expansion, but many of the questions as to what that dimension means in practice must await the test of enforcement and adjudication.