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Rewriting the Merger Laws: Global Versus Incremental Approaches

The Proposed "Merger Modernization Act of 1986" and "Antitrust Improvement Act of 1986"

Testimony Before the Senate Judiciary Committee

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by
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Introduction

The antitrust laws speak in words of constitutional generality, enunciating their basic standards in terms of restraint of trade and injury to competition. To give content to these broad concepts, courts formulate legal rules rooted in specific adjudications, informed by detailed factual records and expert testimony. In addition, in the merger field and certain other areas the Department of Justice has issued detailed guidelines to inform business even more precisely about current enforcement policies. Over time judicial interpretations and enforcement guidelines have evolved in the light of accumulated enforcement experience and increased economic knowledge. But until now the legislative foundations of substantive antitrust law and of merger law have responded to changing economic circumstances by incremental adjustment.

Recently, however, the Justice Department proposed a radical deviation from the policy of incremental adjustment and change. In 1986 on behalf of the Administration the Justice Department presented several major amendments to the antitrust laws. These included a revision of the merger law, called "The Merger Modernization Act of

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1986,"[1] that would have altered the key substantive language of section 7 of the Clayton Act,[2] substituting in place of the historic test, "substantially to lessen competition . . . or . . . tend to create a monopoly," a quite different and more particularized test of illegality. Indeed, had it been adopted, the proposal would have codified substantial portions of the Department's Merger Guidelines, revised most recently in 1984.[3] The legislative proposal was all the more surprising since the attempt to codify the recent Merger Guidelines was not informed by judicial interpretation of the Guidelines. In fact, since 1981 the Department has not presented substantive issues of merger policy to the courts. When private litigants have brought merger cases that might evoke substantive rulings, the Justice Department has attacked their standing to litigate.

Introduced contemporaneously with the Administration Bill was a counterproposal by Senator Metzenbaum, presently Chairman of the Senate Antitrust Subcommittee, called "The Antitrust Improvement Act of 1986."[4] Less sweeping than the Administration proposal, the Metzenbaum Bill would nevertheless have made several important changes in antitrust law.

These recent legislative proposals are of more than passing interest. While neither was enacted, extensive hearings were held, and typically proposals for antitrust revision germinate for several years before they are accepted. Thus, the issue these proposals raise concerning global versus incremental change in merger policy may recur. What follows is essentially the testimony I delivered as a committee witness before the Senate Judiciary Committee on the two proposed merger enactments.[5]

I. Substantial Changes in Existing Law

The proposed Merger Modernization Act would change the basic language of section 7 of the Clayton Act by eliminating the central substantive test, which for seventy-two years has been framed in terms of upholding competition and preventing monopoly, and substituting in its place an entirely new statutory term, "increased market power." There can be no clearer signal of a fundamental policy change than the radical alteration of the core language of a statute. The proposal is all the more

1. S. 2160, 99th Cong., 2d Sess., 132 CONG. REC. S2280 (daily ed. Mar. 7, 1986) [hereinafter S. 2160].

2. 15 U.S.C. § 18 (1982) (original version at ch. 323, § 7, 38 Stat. 730, 731-32 (1914)).

3. 2 Trade Reg. Rep. (CCH) ¶¶ 4490-4495, 4500-4505 (1984) [hereinafter Guidelines].

4. S. 2022, 99th Cong., 2d Sess., 132 CONG. REC. S335 (daily ed. Jan. 27, 1986) [hereinafter S. 2022].

5. The original text of my testimony can be found in *Hearings on S. 2022 and S. 2160 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 92-105 (1986).

striking in view of the fact that no previous antitrust statute has used any term other than "lessening of competition," "monopolization," or "restraints of trade" to indicate the object of prohibition. In Europe, antitrust is even called "competition policy."

Substitution of the words "increased market power" for "lessening of competition" would narrow the enforcement goals of the Clayton Act as well as those of the Sherman Act[6] and other antitrust statutes.[7] The term "increased market power," which is defined as the ability to charge higher than competitive prices and still make a profit,[8] is narrower than the lessening of competition concept that it replaces because it describes only a single, immediate consequence of reduced competition—the ability to raise prices. But competition as it has been conceived in antitrust law, both in the United States and in Europe, also means rivalry in innovation, and in the quality and variety of products, equality of access to scarce resources, preservation of alternative centers of decision-making, and a general preference for the competitive process as the social instrument for achieving material well being. Thus, the present statute is aimed not only at preventing immediate and near-term monopolistic price increases, but also at maintaining a competitive environment favorable for long-term economic welfare.

In addition to narrowing the goals of the antitrust statutes, the new legal standard contained in the Merger Modernization Act would drastically alter both the substantive content of merger law as enunciated by the courts and the method of proof in antitrust cases. In describing these changes, I am not suggesting that existing merger doctrine is desirable in all respects. My point is to demonstrate how extensive the changes would be and how sharply this legislative approach contrasts with the incremental common-law method by which antitrust doctrine has in the past gradually evolved.[9]

6. 15 U.S.C. §§ 1-7 (1982).

7. Although S. 2160 redefines competition only under § 7 of the Clayton Act, it would also immediately raise the issue of similar redefinition of established norms under the Sherman Act and other antitrust statutes, due to the well-known doctrine of United States v. Hutcheson, 312 U.S. 219 (1941). Under the *Hutcheson* case, which also involved an amendment to the Clayton Act, a later statutory redefinition can be read to modify earlier statutes containing the same term.

8. S. 2160, *supra* note 1, 132 CONG. REC. at S2281 ("For purposes of this section, the ability to exercise market power is defined as the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time.").

9. The failure of the government to prosecute merger cases in recent years has prevented some adjustments in merger law that courts would otherwise no doubt have made. Moreover, private litigation can make only a limited contribution to the evolution of merger policy in view of the difficult hurdle private litigants face in merger cases in establishing antitrust standing. *See* Cargill, Inc. v. Montfort of Colo., 107 S. Ct. 484 (1986).

A. Narrowing of Substantive Law

The most vital effect of the proposed change in the core language of the Clayton Act would be to call into doubt almost every prior merger decision. This unsettling result would occur because the substantive heart of the statute under which all of the prior cases were decided would be removed. In place of the existing statutory language "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly," the proposed amendment substitutes the entirely different language "significant probability that the acquisition will substantially increase the ability to exercise market power." This new language is undefined in existing merger decisions of the courts. The only reliable source to which a court could turn to learn what this language means in terms of merger analysis is the source from which it was taken—the Justice Department's current Merger Guidelines.[10] Thus, with a single stroke of the pen, the precedential value of all prior merger case law would be called into question.

The authority of the case law would be further weakened by the proposed change in the statistical measure used to assess market concentration. The proposed Act mandates consideration of several specific factors in assessing the competitive effects of a merger, including "the number and size distribution of firms."[11] This would replace the four-firm concentration ratio that courts have almost universally used to measure market concentration. The new formulation would arguably require use of the Herfindahl-Hirschman Index, a mathematically complex index which measures both number and size distribution of firms and which is contained in the current Merger Guidelines.[12] Since the Herfindahl-Hirschman Index has no direct analogue in the case law, it would be difficult to use the prior cases to determine what degree of concentration as measured by the Herfindahl-Hirschman Index would be excessive under the Clayton Act. Instead, courts would inevitably look to the standards in the Merger Guidelines, which are framed in terms of the Herfindahl-Hirschman Index. Under these standards, almost half of the horizontal mergers the Supreme Court has held to be unlawful would raise no market concentration problems.[13]

The proposed amendment further provides that a merger will be unlawful only if the particular acquisition under scrutiny substantially increases the ability to exercise market power. That would appear to mean

10. *See supra* note 3.

11. S. 2160, § 2, *supra* note 1, 132 CONG. REC. at S2281.

12. Guidelines, *supra* note 3, ¶¶ 4493.10, 4493.101-.102.

13. *See* Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519 (1982).

that a court could not declare a merger unlawful merely because it is part of an accelerating merger wave that threatens to overwhelm competition. Instead, the government would also have to prove that the particular merger was at the tipping point, and would by itself move the market from competitive to monopolistic conditions. This requirement would reverse the result in *Brown Shoe Co. v. United States,*[14] which held that under the Clayton Act courts could bar a merger that was part of an accelerating trend toward excessive concentration even though monopolistic conditions had not yet been achieved.

Another change in existing law would be the immunization of mergers in monopolistic or oligopolistic markets where the merging firms are already charging monopolistic prices. This immunity would occur because the proposed Act condemns mergers only when they *increase* a firm's ability to charge a monopolistic price and not when they merely perpetuate and entrench this ability. This effect would perpetuate a gap presently contained in the Merger Guidelines, which condemn mergers that increase market power but not mergers that entrench market power already achieved.[15]

Neither would the proposed amendment be likely to reach mergers that create monopolistic buying power—the power to force prices below competitive levels—as distinct from monopolistic selling power. So long as a merger did not lead to any clear and immediate ability to increase resale prices, the formation of abusive buying power would presumably be freely tolerated under the new law.

For all practical purposes the proposed amendment would also terminate enforcement against mergers injuring potential competition. A merger injures potential competition when it forecloses the probability that an outside firm will enter a monopolistic or oligopolistic market. It would seldom, if ever, be possible to protect potential competition under a legal test that requires a showing that a merger would directly enhance a firm's ability to raise prices. This change would reverse the result in such cases as *Ford Motor Co. v. United States,*[16] *United States v. Continental Can Co.,*[17] and *FTC v. Proctor & Gamble Co.,*[18] which barred mergers that removed one of the few most probable entrants into an oligopolistic market. It would also reject some or all of the legal doctrine

14. 370 U.S. 294 (1962).

15. *See* Note, *The* Cellophane *Fallacy and the Justice Department's Guidelines for Horizontal Mergers,* 94 YALE L.J. 670 (1985).

16. 405 U.S. 562 (1972).

17. 378 U.S. 441 (1964).

18. 386 U.S. 568 (1967).

enunciated in *United States v. Penn-Olin Chemical Co.*,[19] and *United States v. Falstaff Brewing Corp.*,[20] which attempted to define potential competition in tractable, legally objective terms. Indeed, the proposed amendment is less hospitable to the concept of potential competition than the Justice Department's 1984 Merger Guidelines themselves.[21]

Moreover, the proposed amendment would virtually eliminate enforcement against vertical and conglomerate mergers because, except in the most exceptional of cases, a nonhorizontal merger will produce no immediate ability to raise prices however anticompetitive its longer term effects might be. The proposed amendment would therefore reverse the results in such vertical or partially vertical merger cases as *Brown Shoe Co. v. United States, Ford Motor Co. v. United States,* and numerous lower court decisions, as well as the result in *FTC v. Proctor & Gamble Co.*,[22] which prohibited a conglomerate merger on the theory of entrenchment of market dominance, and *FTC v. Consolidated Foods,*[23] which declared a conglomerate merger unlawful due to its reciprocity effect. None of this is to say that antitrust enforcement against vertical and conglomerate mergers should return to what it was in the 1960s, but modifications should be made incrementally, informed by a full factual record, interpreted in the light of current economic learning.

B. Increased Difficulties of Proof

The proposed amendment would severely increase the government's burden of proof in merger cases. This effect by itself would preclude effective merger enforcement even if there were no change in the substantive law. Mandating the use of an open-ended rule of reason analysis in every merger case, the proposed bill enumerates six specific factors, ranging from market structure and conduct to expected efficiencies, that must be considered in addition to "any other evidence" that bears on the ultimate issue of market power effects.[24] This statutorily mandated, unbounded approach reverses the entire course of development of Supreme

19. 378 U.S. 158 (1964).

20. 410 U.S. 526 (1973).

21. *See* Brodley, *Potential Competition Under the Merger Guidelines*, 71 CALIF. L. REV. 376 (1983).

22. 386 U.S. 568 (1967).

23. 380 U.S. 592 (1965).

24. S. 2160, § 2(d), *supra* note 1, 132 CONG. REC. at S2281. The proposed factors are:

> (i) the number and size distribution of firms and the effect of the acquisition thereon; (ii) ease or difficulty of entry by foreign or domestic firms; (iii) the ability of smaller firms in the market to increase production in response to an attempt to exercise market power; (iv) the nature of the product and terms of sale; (v) conduct of firms in the market; (vi) efficiencies deriving from the acquisition; and (vii) any other evidence

Court analysis which began in 1963 with *United States v. Philadelphia National Bank.*[25] In *Philadelphia Bank* the Court squarely confronted the fact that an open-ended judicial consideration of all conceivably relevant economic facts would make the legal consequences of a merger uncertain and thereby subvert the congressional intent that the law be effectively enforced. To avoid such a result the Court declared that whenever it was possible to do so, courts should, in the interest of sound judicial administration, simplify the test of illegality, and accordingly the Court adopted a presumption of illegality for horizontal mergers based on the degree of market concentration.[26]

In the light of enforcement experience, the Supreme Court in 1974 modified the legal test for horizontal mergers to allow consideration of additional economic evidence in *United States v. General Dynamics Corp.,*[27] but still maintained the framework of an initial presumption of illegality drawn from a limited set of accessible facts. Subsequent lower court cases have expanded and developed the *General Dynamics* approach, considering economic factors that appear reasonably tractable such as entry barriers and product characteristics.[28]

The Merger Modernization Act appears to propose an entirely different approach. It would place the burden on the government to prove, on the basis of all pertinent economic facts, that a merger creates a significant probability of substantially increased market power. The changed burden of proof alone will in all probability prevent effective merger enforcement.

Merger enforcement differs fundamentally from other types of antitrust enforcement in that the legality of a merger is usually tried before it occurs. Under the present enforcement system, which involves prenotification of mergers, suits are filed before the merger takes place. Thus, the assessment of competitive consequences occurs in advance. Without the aid of a simplifying presumption of illegality, however rebuttable, and with no evidentiary limitation on the type of proof that can be offered, it appears unlikely that the government could ever prevail, particularly on an issue requiring proof of the future behavior of prices. Instead, courts

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indicating whether the acquisition will or will not substantially increase the ability, unilaterally or collectively, to exercise market power.

25. 374 U.S. 321 (1963).

26. *Id.* at 362, 365-66.

27. 415 U.S. 486 (1974).

28. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 171-73 (2d ed. 1984).

would confront "the complex statistical and theoretical jungle"[29] that vexed merger litigation prior to *Philadelphia Bank*, and would tend naturally to decide the case against the party who has the burden of proof—here the government.

It is perfectly clear, therefore, why the existing merger statute was drafted in terms of incipient effects—that is, a merger is unlawful if it may lessen competition—and why it was necessary for the courts to adopt simplified rules of presumption in order to implement the statutory purpose. Without such an approach there can be no adequate enforcement against complex transactions, the effects of which must be assessed in advance. If this enforcement scheme is to be abandoned, it would be much simpler to repeal section 7 than to weigh it down with evidentiary burdens that preclude its effectiveness.

II. Promotion of International Competitiveness

It is difficult to think that the unprecedented package of major antitrust legislation, of which the Merger Modernization Act is a part, would be before Congress were it not for the claim that antitrust enforcement in some way impedes industrial competitiveness. Seemingly lending credence to the claim, the President's Commission on Industrial Competitiveness last year recommended certain modifications of the antitrust laws.[30] But the Commission's recommendations were far more confined than the legislation now being sought, and even the need for the Commission's more limited recommendations has not been established.

As one of its thirty-two separate recommendations, the President's Commission urged certain antitrust changes, including (1) modification of the Clayton Act and other antitrust statutes to recognize efficiency gains from business combinations, (2) definition of antitrust markets to encompass global competition where it exists, and (3) the granting of antitrust exemptions for mergers and other business relationships which promote national objectives such as rationalization of production and, more generally, "the public good."[31] The proposed Antitrust Improvement Act introduced by Senator Metzenbaum responds directly to two of these objectives, but the Merger Modernization Act goes far beyond anything recommended by the Commission.

Congress has in recent years been responsive to well-documented,

29. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 291 (1960).

30. PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION: THE NEW REALITY 192-93 (1985) [hereinafter PRESIDENT'S COMMISSION].

31. *Id.* at 271.

narrowly targeted proposals to modify the antitrust laws to promote industrial competitiveness. In 1982 Congress passed the Export Trading Company Act,[32] which provided substantial antitrust immunity for properly qualified export trading companies. In 1984 Congress passed the National Cooperative Research Act,[33] which extended a similar substantial immunity to research and development joint ventures. Both statutes were adopted after specific showings that antitrust protection was needed to induce firms to jointly undertake activities that would directly and immediately promote United States competitiveness in critical areas—in the one case exports and in the other innovation.

By contrast, the Merger Modernization Act—as well as most of the other antitrust legislation the Administration now proposes—reflects an entirely different attitude. The proposed legislation does not address a particular problem of international competitiveness, as did the 1982 and 1984 Acts, but would weaken antitrust enforcement across all economic sectors, whether or not they are subject to the impact of foreign competition.

Certainly nothing in the Commission's report establishes the need for drastic change in merger standards. Indeed, the few facts cited in the Commission's very short discussion of its antitrust proposals (six pages within a 391 page report)[34] are quite unpersuasive. For example, in arguing that United States firms need to be larger than they now are to compete effectively in world markets the report presents the following data:[35]

Herfindahl-Hirschman Index of Concentration

Country	Chemicals	Steel
United States	682	937
Japan	946	1,734
West Germany	2,226	1,442
United Kingdom	6,566	6,187
World [U.S. share]	272	393

This table is intended to show that other industrial nations allow their firms to grow much larger in national markets, presumably to the disadvantage of United States firms in world competition. But only a few pages earlier the report states that chemicals are one of the United States's most successful exports, while steel is one of its least successful.[36]

32. 96 Stat. 1233-35 (1982) (codified at 15 U.S.C. §§ 4001-4003 (1982)).
33. 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301-4305 (1982 & Supp. II 1984)).
34. 2 PRESIDENT'S COMMISSION, *supra* note 30, at 188-93.
35. *Id.* at 189.
36. *Id.* at 181.

Thus, it is no more reasonable to conclude that merger constraints explain our lack of success in steel manufacturing than it is to conclude that they are responsible for our success in chemicals. Similarly, the near monopoly position allowed British Steel within the United Kingdom, albeit a relatively small market, does not appear to be linked to any unusual success by that firm in export markets.

Effective competition in world markets *does* require improved competitive strategies, but the Commission's report fails to demonstrate that market-concentrating mergers are the answer. Indeed, a principal author of the report has recently suggested that successful strategies are much more likely to involve joint ventures and other coalitions short of merger.[37] The recent report of the European Economic Community[38] reaches a similar conclusion, and in noting the need for "fundamental structural changes" to make European industry more competitive, speaks of "facilitating cooperation between firms" not by mergers, but by joint ventures. Clearly, amendment of the Clayton Act is not required in order to ensure permissive treatment of joint ventures or recognition of efficiency benefits in joint venture cases, for the law is already permissive.[39]

The President's Commission also called for realistic definition of economic markets so as to recognize global competition where it exists.[40] One can agree entirely with this recommendation without conceding that any amendment of the antitrust laws is necessary. The report certainly presents no evidence suggesting that modern courts are unwilling to recognize international competition where it exists. Indeed, as long ago as the *Alcoa* case Judge Learned Hand defined the relevant market to include the shipments of aluminum imports that competed with domestic production.[41] Moreover, Judge Hand was perfectly clear in his statement that he would have included not only current imports but all foreign capacity as well had he not concluded that tariff and other trade barriers imposed an effective ceiling on imports.[42]

The Antitrust Improvement Act contains a specific provision that would direct courts to consider foreign competition in merger or joint venture cases when any reduction in competition between United States

37. *See* Porter, *Changing Patterns of International Competition,* 27 CAL. MGMT. REV. 9 (1986).

38. *15th Report on Competition Policy of the EEC* (1986).

39. *See generally* Brodley, *Joint Ventures and Antitrust Policy,* 95 HARV. L. REV. 1521 (1982).

40. PRESIDENT'S COMMISSION, *supra* note 30, at 192.

41. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

42. *Id.* at 426.

firms would be offset by increased foreign sales in the United States.[43] While this provision is declarative of present law, it would make clear that foreign sales are to be considered when it is economically realistic to do so. On the other hand, a specific provision of this kind applicable only to mergers and joint ventures creates the possibility of a negative inference that foreign sales are to be treated differently under the Sherman Act or other antitrust statutes. Problems of technical construction of the specific statutory language in relation to present law might also arise. If all that is intended is a restatement of existing law, the provision might instead simply declare that foreign competition, realistically assessed, should be taken into account in defining markets for antitrust purposes.

III. Recognition of an Efficiencies Defense

The proposed Merger Modernization Act and the Antitrust Improvement Act both require antitrust courts to take economic efficiencies into account in ruling on mergers.[44] Consideration of efficiencies in merger cases poses extreme difficulties, however, and if undertaken at all should be done under tight constraints.

The problem with considering efficiencies in merger cases is that it would require courts to assess the outcome of a highly complex transaction before it has occurred. A merger involves a meshing of diverse and often scattered physical facilities, financial assets, and personnel that were never designed to be part of a single organization. Will the union be a success, or will it be a disaster, or will it produce indifferent results in terms of efficiencies? A mandatory efficiencies defense would require a court to make this exceedingly difficult assessment on a purely hypothetical basis, informed only by the claims and counterclaims of interested litigants. Under such circumstances it is difficult to think that courts could be any more successful in picking out the efficient mergers from among the inefficient than are financial analysts and managers, whose batting average is, to say the least, remarkably uneven. Moreover, the courts would not only have to identify whether a merger will produce efficiencies, but also whether such efficiencies will then outweigh anticompetitive effects, which must also be assessed in advance.

In determining whether an efficiencies defense should be introduced it is important to bear in mind that efficiencies considerations already shape merger and other antitrust rules. The basic substantive standards

43. S. 2022, *supra* note 4, 132 CONG. REC. at S338.

44. S. 2022, § 5, *supra* note 4, 132 CONG. REC. at S338; S. 2160, § 2(d), *supra* note 1, 132 CONG. REC. at S2281; *see supra* note 24.

for mergers are drawn with a view to permitting most mergers to go through, thereby allowing any efficiencies to be realized. Indeed, the present Merger Guidelines relaxed the standards for merger enforcement precisely to allow greater latitude for potentially efficient mergers,[45] and recent merger cases reflect a similar viewpoint, thus further reducing the chance that substantial efficiencies are being lost through overly stringent merger policy. In addition, joint ventures and similar limited cooperative undertakings between firms are treated even more permissively than mergers.[46] Since these transactions are frequently alternatives to merger, a blocked merger may simply be rechannelled into a joint venture or another less restrictive contractual undertaking, rather than be prohibited altogether.

Nevertheless, some believe that current antitrust rules bar a non-trivial number of mergers in which significant efficiencies could be achieved. I know of no way to test the truth of that proposition, but even if one accepts it, it does not necessarily follow that courts should be asked to assess efficiencies in advance. Instead, we must face up to the fact that if direct assessment of efficiencies is to be undertaken in merger proceedings, an after-the-fact procedure is needed to audit whether the claimed efficiencies actually resulted. That is, at some point following a merger approved on efficiency grounds, say after five years, the proceeding should be reopened and the parties required to prove that efficiencies were actually achieved. When a subsequent audit determines that the promised efficiencies were not realized, additional relief can then be administered to restore competitive conditions. It is only by such a procedure that before-the-fact efficiency claims can be kept honest. In West Germany, the Federal Cartel Office presently follows a procedure for after-the-fact audits of efficiency claims, particularly in cases involving joint ventures.

Turning to the specific legislation proposed, the Merger Modernization Act would require courts to consider efficiencies as a factor of analysis in every merger case.[47] This places an undue burden on the courts and complicates the decision beyond any benefit that appears likely. The bill fails to state explicitly who has the burden of proof on the issue, yet clearly the burden should be placed on the defendants since, as the actual participants, they are in the best position to demonstrate the facts.

45. Guidelines, *supra* note 3, at 4490.

46. *See* General Motors Corp. and Toyota Motor Corp., 49 Fed. Reg. 18,289, 18,291 (FTC 1984) (consent order) (statement of James C. Miller III, Chairman, FTC) ("important to separate reality from rhetoric" in analyzing joint venture as opposed to merger).

47. S. 2160, *supra* note 1, 132 CONG. REC. at S2281-82.

The proposed Antitrust Improvement Act adopts a much better approach to the problem, which, although not entirely free of difficulties, would regularize the present procedure by which efficiencies are taken into account by the Antitrust Division and the FTC in the exercise of their enforcement discretion.[48] Senator Metzenbaum's bill would establish a common filing procedure and specifies the kinds of cost savings that would qualify as recognizable efficiencies, properly excluding merely pecuniary savings and speculative gains, such as "learning effect" benefits. The burden is correctly on the defendants both to demonstrate the presence of efficiencies by clear and convincing evidence and to show that the cost saving could not be achieved by a less restrictive alternative.

In addition, the bill provides for a certification procedure whereby the FTC may certify that a merger is likely to reduce costs and will promote competition.[49] This certification can then be introduced in any future antitrust proceeding involving the merger. The difficulty with this proposal is that the certification does not arise out of a contested proceeding, or indeed one in which anyone but the interested parties is likely to be involved. Unless provision is made for the participation of adverse litigants, it seems undesirable to allow the introduction of the certification in a subsequent proceeding except as against the government. Furthermore, if the FTC is to effectively monitor complex efficiency claims, it should be provided with funds to engage management consultants as independent experts in appropriate cases.

A more limited approach to efficiencies consideration in merger cases would be to limit the FTC certification procedure to joint ventures, and then to provide specifically for subsequent audit by the FTC to determine if efficiencies were in fact realized or if the efficiency benefit achieved outweighed any restraints on competition. If the results of either inquiry are negative, the unwinding of the joint venture or administration of other curative relief would present less difficulty than in a merger case because the joint venture participants would have retained their separate institutional identities. After the results of this more limited efficiencies procedure are observed, it would be possible to determine whether it is feasible to extend the procedure to mergers in general.

IV. Merger Enforcement Procedures

The Antitrust Improvement Act proposes to strengthen merger enforcement procedures in several ways. Changes in these procedures do

48. S. 2022, *supra* note 4, 132 CONG. REC. at S338-39.
49. *Id.* § 5(b), 132 CONG. REC. at S338.

not raise the same problem of undermining common-law judicial development as does revision of substantive standards, and in fact there have been several procedural modifications of the antitrust statutes over the years. Two proposals of particular interest are those relating to divestiture standards and access to investigatory files by state attorneys general.

With increasing frequency the relief in merger cases involves divestiture of some portion of the acquired assets. But such divestitures often raise severe problems of viability. This is not difficult to understand since the assets being divested were never designed to stand on their own or even to be part of another firm, but were intended to function within the firm from which they are now being separated. In the past many such divestitures have failed to restore competition,[50] and it is unclear whether recent divestitures have been more successful. The provisions of the Antitrust Improvement Act that would require strict standards of competitive viability for divested assets appear highly desirable, at least in the light of past experience. Congress should also require periodic reports from the enforcement agencies on the effectiveness of curative relief in merger cases. These reports would both provide needed information on the efficacy of merger remedies and serve as a source of discipline to enforcement agencies in administering such remedies.

State attorneys general provide a vital source of independent enforcement for the antitrust laws. Unlike private litigants they directly reflect the public interest, yet at the same time they present a viewpoint distinct from that of federal enforcement authorities. Under the Hart-Scott-Rodino Act, documents and information obtained in premerger notification procedures are confidential,[51] however, and state attorneys general have been unable to obtain access to such information even for the purpose of providing federal enforcement authorities with useful comments and recommendations.

From personal experience I know how difficult it is to make informed comments on a pending merger or joint venture investigation if one lacks access to the facts being evaluated by the enforcement agency. Recently in attempting to comment to the FTC on the antitrust implications of the General Motors-Toyota joint venture, I was limited to the information published in the newspapers, although the actual joint venture agreement was no doubt on file with the FTC. As a result my comments were less informed and helpful than they might otherwise have

50. *See* Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. LAW & ECON. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act*, 17 ANTITRUST BULL. 19 (1972).

51. 90 Stat. 1383 (1976) (codified at 15 U.S.C. § 18a(h) (1982)).

been. It is perhaps impractical to make investigatory information available to those who represent private parties opposing a merger or joint venture, but clearly state attorneys general could be allowed access on a confidential basis. Federal enforcement can only be improved if it receives the benefit of informed comments from a sister enforcement agency.

Conclusion

The constitution-like generality of the statutory tests of antitrust have made it possible for courts and enforcement agencies to adjust by incremental change to shifting economic circumstances. From time to time Congress has intervened in the development of antitrust law by statutory amendment, but with rare exception this intervention has been in response to a narrowly articulated and specific need, as in the recently enacted Export Trading Company Act and National Cooperative Research Act.

The Administration's proposed Merger Modification Act represents a sharp break from these previous policies of incremental and focused change. The Administration seeks to codify its current enforcement policy, enunciated in the 1984 Merger Guidelines, by changing the foundational language of the Clayton Act. In fact, the proposed bill would delete from the statutory test the word "competition" itself, substituting for all of the values encompassed in that historic term a single index of power over price. Such an alteration is defended on the basis of current economic learning. But that very defense supplies the decisive reason why the statute should not be so amended.

Economics and business science are not static fields. Today the Justice Department castigates the antitrust views of an earlier period, but a future generation may look back on their views with less than full acclamation. Suppose, for example, that the antitrust decisions of the Warren Court or the 1968 Merger Guidelines had been codified. Had that happened we should now be faced with the problem of rewriting statutory law in order to adjust antitrust to modern economic conditions. We should no more attempt to bind the future enforcers of antitrust law than our predecessors sought to bind us. We ought not to freeze a specialized interpretation of competition into the Clayton Act. Instead, we should recognize that our knowledge, like the knowledge of those who preceded us, is finite and our vision limited. Thus, rejecting efforts to enact global wisdom, we should adhere to the common-law approach in antitrust of incremental change and gradual evolution.