

Retrospectives at the FTC: Promoting an Antitrust Agenda

thoughts about the types of studies that might be most useful for enforcers and possible areas of future research for the Commission.

I. Merger Retrospectives at the FTC

The FTC has long been at the forefront of merger retrospective analysis. With a tradition of research and policy work that dates back to its founding, and the ability to access needed information, the agency is well-positioned to undertake these kinds of studies.

FTC retrospective efforts began in the early 1980s and accelerated over the last 20 years, as the appreciation for their value, the ability to process data, and the agency's understanding of how to perform them increased. Over that time, the scope and volume of FTC staff's retrospective work has far exceeded that of any other group of researchers and constitute much of the publicly-available evidence in this area. I want to focus on a few of these studies.

A. FTC Hospital Merger Retrospectives

Let me start with what is perhaps the most prominent of the FTC's retrospective efforts to date: the hospital retrospective project. As most of you know, the project played a crucial role in reinvigorating the agency's hospital merger enforcement efforts after a string of losses.

During the 1980s and early 1990s, the FTC and Department of Justice successfully challenged a number of hospital mergers,¹ with courts receptive to the agencies' arguments that these mergers were harmful to consumers. Later, relying on a number of questionable arguments by defendants, several courts ruled that mergers even in very highly concentrated hospital markets could go forward over the agencies' objections. A majority of these courts rejected the agencies' proposed geographic markets on the ground that a sufficient number of patients would respond to a price increase by traveling to other hospitals, sometimes over 100 miles away. This

¹ See, e.g., *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Mem'l*, 717 F.Supp. 1251, aff'd, 898 F.2d 1278 (7th Cir. 1990).

provided a basis for the conclusion that a price increase by the merged firms would be unprofitable.²

In these cases, parties generally relied on the Elzinga-Hogarty test to define the geographic market based on patient inflow and outflow data. Where there was a showing that some patients traveled long distances for care, the presumption was that many others would do the same in response to a SSNIP.³ But the model overlooked that many of the consumers who traveled outside the market did so for services that were not available locally. The model also ignored that patients generally do not pay directly for health care services and have little incentive to switch in the face of a price increase.⁴

Other courts credited the parties' arguments that their non-profit status and claimed commitment to the community meant that they were not going to exploit any market power resulting from the transactions.⁵

In 2002, the FTC decided to examine the hospital merger program and test whether its market assumptions were correct. The Bureau of Economics and Competition undertook a retrospective study of the effects on price and quality of care resulting from a handful of consummated hospital mergers. To supplement the publicly available data and ensure the most accurate results, the FTC used its Section 6(b) authority to collect data from both hospitals and insurance companies to help the agency better understand pricing and negotiations with managed

² See *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1052-54 (accepting a relevant geographic market comprising a 65-mile radius around the merging hospitals); *U.S. v. Mercy Health Servs.*, 902 F. Supp. 968, 981-85 (holding that hospitals over 100 miles away could draw away enough patients from the merging hospitals to make price increases unprofitable).

³ Orley Ashenfelter et al., *Retrospective Analysis of Hospital Mergers*, 18 INT'L J. ECON. BUS. 5, 9 (2011).

⁴ *Id.*

⁵ See *U.S. v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146 (E.D.N.Y. 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1222 (W.D. Mo. 1995).

Relying on a large number of interviews with buyers of divested assets as well as merged parties, the study evaluated the effectiveness of fifty Commission-ordered divestitures between 1990 and 1994. It also sought to determine why certain divestitures had “failed to achieve” their remedial objectives.¹⁷

Although the analysis found that three-quarters of FTC-ordered remedies produced the desired outcomes, it uncovered problems with the remainder.¹⁸ The agency learned that many buyers of divested assets lacked the information they needed to operate the acquired business; that sellers tended to look for weak buyers or sometimes tried to undermine the buyer’s success; and that divestitures limited to select assets rather than a standalone business unit often failed to produce the intended results.¹⁹

Drawing on this knowledge, the FTC adopted a number of changes to its divestiture policies. Identifying upfront buyers capable of restoring competition is now a central part of our assessment of a proposed divestiture package. When necessary, we also require the seller to facilitate the transfer of technology and knowledgeable staff to the buyer in addition to physical assets. We sometimes turn to interim trustees to oversee the process, especially when the order requires ongoing ties between the buyer and seller. And finally, where possible, we favor divestitures of full, freestanding business units.

Nowhere are these improvements more evident than in our pharmaceutical divestitures. Prior to the study, FTC pharmaceutical orders were bare bones, typically requiring only the divestiture of the relevant IP to a buyer of the seller’s choosing.²⁰ The FTC has replaced those modest orders with more robust requirements, including supply agreements and technical

¹⁷ Divestiture Study at iii, 7-8.

¹⁸ *Id.* at 8-10.

¹⁹ *Id.* at 10-13, 18-29.

²⁰ *See, e.g., In re Dow Chemical Co.*, Docket No. 3533 (Sept. 23, 1994).

assistance²¹—requirements that our informal follow-up studies have shown overwhelmingly achieved our intended results.

C. Other Retrospective Studies

Although the hospital merger and divestiture studies are probably the most well-known FTC retrospectives, agency staff has conducted many other studies that have also made important contributions to the FTC's competition mission. I will briefly mention three of them.

First, a recent BE study analyzed the price effects of horizontal mergers in the grocery industry.²² It looked at fourteen markets affected by mergers in 2007 and 2008: eight highly concentrated markets and six less concentrated ones. By comparing markets affected by mergers to a control group, the study found price increases in half of the highly concentrated markets, and price decreases in five markets, only one of which was highly concentrated. These results support a basic tenet of antitrust law—that mergers in unconcentrated markets are rarely problematic, but those in concentrated markets, even those with relatively low entry barriers, are often anticompetitive. It also showed a correlation between mergers and lower prices in less concentrated markets, but not in more concentrated ones. These conclusions support a commonly-used agency screen, market concentration, as an effective tool to quickly identify potentially problematic mergers and those that are likely to benefit consumers.

The next retrospective project I want to mention is a series of five studies examining the effect of seven consummated petroleum industry mergers on retail gas prices.²³ All show that

²¹ See, e.g., *In re Watson Pharm. Inc.*, Docket No. C-4372 (Dec. 14, 2012) (requiring merged party to provide divestiture buyer with technical assistance and other support).

²² Daniel S. Hosken et. al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Fed. Trade Comm'n Bureau of Economics, Working Paper No. 313, 2012), available at <http://www.ftc.gov/be/workpapers/wp313.pdf>.

²³ See Christopher T. Taylor & Daniel S. Hosken, *The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure* (Fed. Trade Comm'n Bureau of Economics, Working Paper No. 270, 2004), available at <http://www.ftc.gov/be/workpapers/wp270.pdf>; John Simpson & Christopher T. Taylor, *Michigan Gasoline Pricing and the Marathon - Ashland and Ultramar Diamond*

the FTC's decisions not to challenge those deals were on the mark.²⁴ Given the scrutiny accorded petroleum industry mergers, these studies give assurance that our analysis of the industry has been sound.

The last study I will discuss is an analysis of the predictive accuracy of a particular merger simulation model.²⁵ By looking at two consummated mergers that appeared to be well-suited for the model, the study compared the model'

with the weight of other evidence. At the FTC, this research has led to a greater appreciation for the proper role and limitations of merger simulations.

II. Lessons from Prior Studies

So what does this look back at the FTC's retrospectives teach us? I draw several lessons.

First, given resource constraints, it is crucial to focus on areas that are agency priorities or have broad applicability because they test frequently-used tools or modes of analysis. The FTC's hospital and petroleum retrospectives are good examples. Performing multiple studies centered on a single industry or market that is a key area of enforcement can help yield more robust results. It permits a deeper examination of the way mergers affect particular markets, controlling for cross-industry differences that might otherwise be lost in broader and more general retrospectives. It can also provide insights into how a specific market or industry is evolving that can be used to direct future areas of study or enforcement.

Second, it is also worthwhile to conduct more focused, discrete research like the divestiture and merger simulation studies to examine frequently-used tools that an agency uses. Such studies can provide important information that can help guide an agency's use of these tools going forward.

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that an agency takes full advantage of its unique capabilities and avoids duplicating the efforts of other researchers.

Fourth, retrospectives need not be heavily quantitative to produce useful results. As the Divestiture Study shows, qualitative research can also provide valuable information.

Finally, it is important that studies, where possible, also assess a merger's non-price effects, including its impact on quality, consumer choice, and innovation. The 2010 Merger Guidelines emphasize the important role of non-price effects,²⁶ and it is incumbent on us to refine the way we evaluate these potential impacts. But the typical retrospective analysis focuses exclusively on price and gives little consideration to non-price effects.²⁷ Where possible, we need to explore ways to capture these effects in order to assess the full impact of a transaction. Prior FTC research examining non-price effects have proven quite valuable.

In the hospital context, for example, parties often contend that improved quality will offset any harm from a transaction.²⁸ Although quality claims must be considered carefully, especially in the health care arena, the FTC's past research suggests that these kinds of claims should not necessarily be credited.²⁹ But it is clear that the agency could benefit from more work in this area.

III. Future Retrospective Efforts

With these lessons in mind, I want to lay out some ideas for possible areas of retrospective study at the FTC.

²⁶ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010), *available at* <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

²⁷ Graeme Hunter et al., *Merger Retrospective Studies: A Review*, 23 ANTITRUST 34, 34 (2008).

²⁸ *See, e.g., OSF Healthcare Sys.*, 852 F. Supp. 2d at 1093.

²⁹ *See Balan & Romano*3.

Another worthwhile project would be to look at whether some of the predictions about market structure we often rely on to close an investigation actually come to pass. For example, it would be beneficial to study investigations that have been closed based on likely or imminent entry. There is some evidence that, even in product markets with relatively easy entry, higher post-merger prices have not triggered entry or expansion.³¹ The results of an entry study could help us understand if we are relying too heavily on the threat or likelihood of price-induced entry to save the day.

It may also be time for a follow-up to the FTC's Divestiture Study. By looking at recent consents, a new divestiture study would provide insight into whether the reforms adopted following the prior study have adequately addressed the shortcomings that were identified and whether any new issues have arisen in the last 15 years. It would also allow us to ascertain whether divestitures have been effective in maintaining competition in the affected markets at premerger levels. If such an inquiry were to reveal that certain kinds of divestitures do not work in certain markets—and a recent survey of retrospectives suggests that might be the case³²—we would have to rethink our calculus in deciding whether to litigate and how to approach remedy negotiations.

Finally, in addition to our own research, I believe we need to do more to encourage retrospective scholarship outside of the agency. A number of scholars (some of whom are here today) have made very valuable contributions to merger policy.³³ But their efforts have sometimes been hampered by a lack of information about how we as enforcers make our

³¹ Hosken & Weinberg, *supra* note 25, at 29.

³² John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L. J. 619, 640 (2013) (finding that studies of mergers subject to divestitures show an average price increase of 7.68% in the relevant market post-merger).

³³ See, e.g., Hunter et al., *supra*

decisions.³⁴ We do our best to explain our reasoning in Commission statements, especially in difficult cases, but there is always room for improvement. I will look for ways to maximize the information offered in closing statements and elsewhere to help economists evaluate our predictions and determine whether they have been sound.

IV. Conclusion

Let me close by saying that I view retrospectives as an important complement to Commission enforcement efforts. I will be on the watch for more opportunities to conduct new retrospective studies, mindful of resource constraints, other research priorities, and the need to focus on retrospectives that are likely to bring the most value to the agency's enforcement mission.

I also encourage other antitrust enforcers to follow the FTC's lead. Given the convergence we have seen in competition laws in recent years, studies performed in one jurisdiction are now more likely than ever to be relevant in other jurisdictions and can enhance enforcement efforts worldwide for the benefit of consumers.

Thank you.

³⁴ See William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 511 (2006).