

Unclassified

English - Or. English

4 June 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Conglomerate effects of mergers – Note by the United States

10 June 2020

This document reproduces a written contribution from the United States submitted for Item 1 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

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JT03462557

United States

1. Overview

1. The Antitrust Division of the U.S. Department of Justice (“DOJ”) and the U.S. Federal Trade Commission (“FTC”) (together, “the Agencies”) submit this paper to describe antitrust analysis in the United States (U.S.) with respect to so-called conglomerate effects of mergers.

2. For purposes of this Roundtable, the OECD Secretariat describes conglomerate effects as a distinct category of competitive effects arising from transactions in which the parties’ products are not in the same antitrust product market and the products are not inputs or outputs of one another, but in which the products are complementary or in closely related markets. The Agencies typically do not view such mergers through a distinct lens, finding that our standard theories of horizontal and vertical harm capture most modern, economically-sound theories of what the OECD Secretariat describes as “conglomerate” effects.

3. Throughout this submission, we will distinguish between mergers of complements and mergers of unrelated products, both of which could potentially fall under the OECD’s description of conglomerate mergers. Mergers of complements may raise concerns analogous to those raised by mergers of vertically related firms, and these concerns are more appropriately addressed through vertical merger analysis. While common vertical arrangements involve a goods manufacturer and either an “upstream” input supplier or a “downstream” retailer, the U.S. vertical framework encompasses a broader range of commercial relationships involving suppliers of complementary assets, goods, or services. The U.S. vertical framework is broad enough to address the potential for competitive harm from “diagonal” mergers (which combine firms or assets at different stages of competing supply chains) and mergers of complements. Also, some mergers between firms supplying broad product ranges can raise horizontal concerns about a loss of future competition, even if the portfolios contain limited substitute products. Conglomerate mergers that raise neither vertical nor horizontal concerns are unlikely to be problematic under U.S. merger law.

4. Mergers involving complementary products can harm consumers and competition in a variety of ways that are readily addressed through enforcement using established theories of horizontal or vertical harm. For example, horizontal “potential competition” concerns can arise where there is reason to believe that the firms could or would offer substitute products or services in the future, even if they are not offering substitutes in the market today. Vertical concerns can arise if there is reason to believe the merged company will have the ability and incentive to exclude competitors or raise its rivals’ costs. Mergers of complements can also diminish competition by enabling or encouraging post-merger coordinated interaction among firms in one or more relevant markets. Adverse competitive effects under any of these scenarios can involve higher prices, lower product quality, or reduced investment and innovation that otherwise would occur absent the merger.

5. Mergers that combine unrelated products can result in procompetitive benefits if their production or distribution uses the same assets, inputs, or know-how. For instance, when suppliers combine their assets to jointly produce multiple final products for customers, a merger can eliminate contracting frictions and allow for profit maximization over a larger set of products. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution.

6. Mergers that combine complements may allow additional benefits. For example, a merged firm that controlled the production and distribution of complements may be able to create innovative benefits from using the products together in ways that would have been hard to achieve through arm's-length contracts. As compared to arm's-length contracting, an integrated firm making complementary products may more readily internalize pricing externalities, or realize lower costs or improved quality. A key lesson learned from prior U.S. experience is that, in the absence of evidence of consumer harm in a relevant market, the presence of these sorts of efficiencies *benefits* competition and consumers, even if the merged firm will become a more effective competitor or gain share.

7. In the following sections, this paper will first describe the legal framework that applies to all mergers, including mergers of complements and unrelated products, in the United States. Next, we describe the evolution of the U.S. approach to evaluating conglomerate mergers. We then consider how current economic literature could inform merger analyses going forward. Finally, we note examples of recent horizontal and vertical cases in which the merging firms' presence in complementary or adjacent markets was an important factor in competitive effects and remedy analysis.

2. Legal Standard for Review of Mergers

8. In the United States, mergers are subject to review under Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits mergers if “in any line of commerce or . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” In applying Section 7, all mergers are “tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other.”¹ In 1950, Congress even redrafted Section 7 in part “to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.”²

9. U.S. courts apply a three-phase burden-shifting framework when analyzing mergers under Section 7. First, the plaintiff bears the burden of establishing a prima facie case that the merger is likely to produce anticompetitive effects in a relevant market.³ Anticompetitive effects may include increased price, reduced output, diminished innovation, or reduced variety and quality.⁴ If the plaintiff succeeds at the first step, the court determines whether the defendants have rebutted the plaintiff's prima facie case with evidence that the merger is unlikely substantially to lessen competition (*e.g.*, by demonstrating that the merger is likely to generate sufficient efficiencies that would not otherwise be achieved). Finally, if the defendants do rebut the government's prima facie case, the burden of producing additional evidence of anticompetitive effects shifts back to the plaintiff, and merges with the ultimate burden of persuasion, which remains with the plaintiff at all times.⁵ If the result of the presentation of evidence is an “appreciable danger”

¹ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

² *Brown Shoe Co. v. United States*, 370 U.S. 294, 316–17 (1962). The associated House Report specifically included non-horizontal mergers within the amendment, stating that “the law would be violated, even though there did not exist any competition between the acquiring . . . and the acquired . . . firms.” HR. Rep. No. 81-1191 at 11 (1949).

³ *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337-38 (2016).

⁴ *United States v. Anthem, Inc.*, 855 F.3d 345, 366-67 (2017).

⁵ *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (1990).

of anticompetitive effects,⁶ then Section 7 requires the court “to arrest [those] anticompetitive tendencies in their incipiency.”⁷

10. Although the same framework applies regardless of the type of merger under review, courts have established a presumption of harm from horizontal mergers that is not applied for vertical and conglomerate mergers. For horizontal mergers, harm to competition is presumed from “undue concentration in the market for a particular product in a particular geographic area.”⁸ For vertical and conglomerate mergers, no such presumption is available because such mergers do not involve an increase in market concentration. Rather, the plaintiff must prove that the merger under review is likely to substantially lessen competition by a fact-specific inquiry into whether there is an appreciable danger of anticompetitive effects relying on sound theories of economic harm.

3. Evolution of the U.S. Approach to Evaluating Mergers of Complements and Unrelated Products

11. Today, the United States is firmly committed to the core values that antitrust laws protect competition, efficiency, and consumer welfare rather than individual competitors. During the ten-year period from 1965 to 1975, however, the Agencies challenged several mergers of unrelated products under theories that were antithetical to those values.⁹ The “entrenchment” doctrine, in particular, condemned mergers if they strengthened an already dominant firm through greater efficiencies, or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals. This approach is no longer viewed as valid under U.S. law or economic theory.

12. The entrenchment theory is embodied in the U.S. Supreme Court decision in *FTC v. Procter & Gamble Co.*¹⁰ In that case, Procter & Gamble, a large, diversified manufacturer of household products, primarily soaps and detergents, was attempting to acquire Clorox, which had a 49 percent market share in the household bleach market. Although P&G did not manufacture bleach, the Supreme Court agreed with the FTC that the acquisition might substantially lessen competition. In addition to concerns that the acquisition would eliminate P&G as a potential entrant into the bleach market (a valid horizontal theory), according to the Court, “the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing.”¹¹

13. These cases stimulated a critical examination, and ultimate rejection, of the theory by legal and economic scholars and the Agencies. In their *Antitrust Law* treatise, Phillip Areeda and Donald Turner showed that to condemn conglomerate mergers because they might enable the merged firm to capture cost savings and other efficiencies, thus giving it

⁶ *United States v. H&R Block*, 833 F. Supp. 2d 36, 49 (2011).

⁷ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 362 (1962).

⁸ *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (2017).

⁹ These theories are discussed in more detail in the DOJ’s submission for the October 2001 Roundtable on Portfolio Effects in Conglomerate Mergers, “Range Effects: The United States Perspective,” <https://www.justice.gov/atr/department-justice-11>.

¹⁰ 386 U.S. 568 (1967).

¹¹ *Id.* at 578.

a competitive advantage over other firms, is contrary to sound antitrust policy, because cost savings are socially desirable.¹² It is now recognized that efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally “good deal” suffer loss of sales or market share. Mergers are one means by which firms can improve their ability to compete. It would be illogical, then, to prohibit mergers *because* they facilitate efficiency or innovation in production. Unless a merger creates or enhances market power or facilitates its exercise through the elimination of competition—in which case it is prohibited under Section 7—it will not harm, and more likely will benefit, consumers.¹³

14. Another theory put forward in early cases posited that an acquisition could violate Section 7 if it created a substantial possibility for reciprocal dealing. Reciprocity arises in situations in which a company may have leverage in selling to another company because it is a purchaser or potential purchaser of a product from that company. In *FTC v. Consolidated Foods Corp.*,¹⁴ the Supreme Court held that the creation of such opportunities through merger could violate Section 7 because the reciprocity made possible by such an acquisition injects “‘an irrelevant and alien factor’ . . . into the choice among competing products, creating at the least ‘a priority on the business at equal prices.’” It went on to explain, “a threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice.”¹⁵ Like entrenchment, this theory has been heavily criticized and today would be pursued only where there would be a significant foreclosure effect.¹⁶

15. Critical reflection on these early cases ultimately led the Agencies to increase economic rigor in antitrust analysis and place greater emphasis on consumer welfare and efficiency. This shift led to the DOJ’s decision in 2001 to clear with minimal conditions the *GE/Honeywell* merger and a rare divergence with the European Commission’s DG Competition, which decided to block the merger. In that case, both GE and Honeywell manufactured airplane engines, but the DOJ determined that there was no direct overlap because GE’s business focused on jet engines for large commercial aircraft, while Honeywell’s focused on engines for small regional jets, avionics, and nonavionics systems such as landing gear and auxiliary power units. DG Competition blocked the merger based on concerns that it would strengthen GE’s market power for large jet engines, and that it would enable Honeywell to gain a dominant position in the small engine, avionics, and nonavionics markets. The DOJ did not share these concerns, which it viewed as reminiscent of the discarded entrenchment theories of the 1960s and 1970s.¹⁷

16. On the other hand, the Agencies have challenged mergers of complements based on vertical theories. For example, in March 2020, DOJ required divestitures to address vertical concerns arising from the proposed merger of United Technologies Corporation

¹² Phillip E. Areeda & Donald F. Turner, *Antitrust Law* (1980).

¹³ Horizontal Merger Guidelines, U.S. Dep’t of Justice and Fed. Trade Comm’n (Aug. 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>. Note that a merger can entrench market power by raising the costs of competitors and entrants.

¹⁴ 380 U.S. 592 (1965).

¹⁵ *Id.* at 594.

¹⁶ *See, e.g., McWane Inc., v. FTC*, 783 F. 3d 814 (11th Cir. 2015), *cert. denied* 136 S. Ct. 1452 (2016).

¹⁷ For a detailed discussion of *GE/Honeywell*, see DOJ’s submission for the October 2001 OECD Roundtable on Portfolio Effects in Conglomerate Mergers, “Range Effects: The United States Perspective,” <https://www.justice.gov/atr/departement-justice-11>.

(UTC) and Raytheon.¹⁸ As alleged in the complaint, UTC and Raytheon were among the few firms capable of producing several components for space-based electro-optical/infrared (EO/IR) reconnaissance satellites, which provide the Department of Defense and U.S. intelligence community customers with essential information, including early warning of missile launches. Specifically, UTC was one of only two companies able to build large space-based optical systems, and Raytheon was a leading supplier of detectors called focal plane arrays (FPAs). Large space-based optical systems and FPAs are components of EO/IR reconnaissance satellite payloads – the system that carries out the mission of the satellite – which Raytheon also produces. According to the complaint, the merged firm would have the ability and incentive to require EO/IR payload builders seeking to purchase Raytheon’s industry-leading FPAs to also purchase UTC’s large space-based optical systems, and could deny Raytheon’s EO/IR payload competitors access to UTC’s large space-based optical systems. As a result, the transaction likely would result in higher prices, less favorable contract terms, and diminished innovation for large space-based optical systems and EO/IR reconnaissance satellite payloads. To resolve these concerns, DOJ required the parties to divest UTC’s optical systems business to an acquirer to be approved by DOJ.¹⁹

17. In 1997, the FTC investigated the proposed merger of Cadence and Cooper & Chyan. Cadence Design Systems, Inc., the dominant supplier of integrated circuit layout environments for microchips, proposed to acquire Cooper & Chyan Technology, Inc., the only firm with a commercially viable “routing tool” used to map the microscopic electrical component connections on microchips. To be effective for a particular user, routing tools must interface with a circuit layout environment (circuit layouts) (the related product) and means of distribution. The Commission’s investigation found likely competitive harm in the relevant market for routing tools. Post-transaction, given Cadence’s dominant position in circuit layouts, it would have the ability and incentive to thwart routing tool competition by foreclosing or degrading would-be routing tool producers from accessing Cadence’s layout environments. The Commission’s decision and order required Cadence to permit routing tool developers to interface with Cadence’s layout environments on the same terms as developers of other complementary design tools (with which Cadence did not have a competitive offering).

4. Looking Ahead

18. The Agencies have not brought in modern times any challenges to mergers of unrelated products that rely on “conglomerate” theories outside the horizontal and vertical frameworks.

19. The Agencies continue to consider new learning about potential effects from mergers. In evaluating any potential theory of harm, the Agencies will consider whether the anticompetitive concern adheres to economic theory and the factual evidence while addressing harm to competition and consumer welfare rather than, for example, harm only to competitors. In this regard, studies of consummated mergers can uncover new

¹⁸ See Press Release, Dept. of Justice, (March 26, 2020), <https://www.atrnet.gov/subdocs/2020/377470.pdf>. DOJ also required divestitures to address horizontal concerns.

¹⁹ Under procedures established by the Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, DOJ filed the complaint, a competitive impact statement, and a proposed final judgment in a federal district court. DOJ will ask the court to enter the final judgment after a public comment period.

mechanisms of harm and provide a sound basis for new thinking or new ways of evaluating evidence of harm.²⁰

20. Some potential theories that, at first sight, appear to involve products without an obvious vertical or complementary relationship may, on closer examination, involve horizontal overlaps after all. One such theory relates to mergers through which a hospital chain expands its geographic reach by acquiring an independent hospital or system whose facilities are too far away for many patients to consider them to be an alternative to the chain's existing facilities for most services. There is mixed evidence about whether such mergers can raise prices. To the extent that they do, the reason may be the existence of less obvious horizontal overlaps.²¹ The hospitals may be substitutes for some specialized services. In addition, or alternatively, depending on the facts, they may be substitutes for insurers when constructing provider networks. In the United States, the reimbursement the hospital receives for many patients depends upon the terms of coverage provided by a health insurer's separate contracts with the patient's employer and with the hospital. Through their contracts with hospitals and physicians, commercial health insurers form networks of medical care providers through which their enrollees can obtain medical care at discounted prices. Competition with rival health insurers spurs insurers' efforts to assemble attractive provider networks that they can sell to employers. If there are many employers with employees both in the area served by the hospital chain's incumbent hospital and in the area served by the acquired hospital, and if those employers place little incremental value on a network that includes both hospitals compared to a network that includes only one, then the merger may increase the hospital's bargaining leverage over health insurers. With these employer preferences, the hospitals in the two areas would be substitutes for insurers.

21. Other research explores collusive strategies that rely on multimarket contact. Under this theory of potential harm, when firms compete against each other in multiple markets, they may condition their behavior in one market based on their rival's behavior in another common market. The degree to which collusion among these firms can sustain prices above competitive levels may be enhanced by an alignment between each rival's markets of comparative advantage with their opponent's ability to discipline prices in those markets.²² A merger may have anticompetitive effects if it impacts the alignment of

²⁰ For example, the FTC's Hospital Merger Retrospective Project, which was announced in 2002, led the FTC to refine its approach to geographic market definition in hospital merger challenges. See FTC, "Preserving competition among hometown hospitals," (2014), <https://www.ftc.gov/news-events/blogs/competition-matters/2014/03/preserving-competition-among-hometown-hospitals>.

²¹ The empirical literature on whether such mergers lead to price rises is mixed. On the one hand, Cooper *et al* find no price effects for mergers between hospitals further than 30 miles apart (Zack Cooper & Stuart V Craig & Martin Gaynor & John Van Reenen, 2019. "[The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*](#)," *The Quarterly Journal of Economics*, vol 134(1), pages 51-107). On the other hand, Dafny *et al* find price rises for mergers between hospitals that are in the same state, but still too distant for patients to consider them substitutes for most services (Leemore Dafny, Kate Ho & Robin S. Lee, "The price effects of cross-market mergers: theory and evidence from the hospital industry," 50 *RAND J. ECON.* 286 (2019)). See also the following, among others, for discussion of mergers among healthcare providers that are not considered substitutes by patients: Craig T. Peters, "Bargaining Power and the Effects of Joint Negotiation: The 'Recapture Effect.'" DOJ Discussion Paper, EAG 14-3, 2014; Keith Brand, & Ted Rosenbaum, "A review of the economic literature on cross-market health care mergers," *Antitrust Law Journal* 82 (2), 533-549, 2019.

²² See B. Douglas Bernheim & Michael D. Whinston, Multimarket contact and collusive behavior, 21 *RAND J. ECON.* Pp 1-26, 1990, including their discussion of symmetric advantage.

advantages and threats across markets in a way that can be shown to sustain a higher level of collusive pricing.²³

5. Consideration of Firms' Presence in Multiple Markets in Recent Merger Reviews

22. In several recent mergers, the Agencies analyzed whether the merging firms were particularly close competitors due to their similarly large scale and scope. In the cases discussed below, the Agencies considered whether a product-by-product or area-by-area analysis understated the horizontal competitive concerns caused by the merger. There were two general reasons supporting broader concerns. First, the parties' large size or presence in multiple markets gave the merging parties advantages in competing for a particular set of customers, and the merger would reduce competition for these customers.²⁴ Second, the Agencies had concerns stemming from the loss of competition between close innovation rivals. We have found that in dynamic sectors characterized by high R&D costs, firms with broad scale and scope may have unique incentives and capabilities to invest in innovation. For example, where a firm can exploit synergies across product lines or earn returns on research and development projects across multiple geographies, it may have greater incentives to make investments in such projects than firms with more limited operations.

23. Concerns regarding such changing incentives can create challenges with respect to remedy design. As shown in the matters described below, the Agencies have been careful to ensure that any structural remedy fully replaces competition lost by a merger, including any loss of innovation competition. In *Halliburton/Baker Hughes*, DOJ determined that the merger could not be remedied, despite the parties' offer of billions of dollars of divestitures to address concerns with respect to overlapping product lines. In *Bayer/Monsanto*, an effective remedy required divestiture of a broad set of assets, including R&D capabilities, in addition to overlapping products and pipelines. Likewise, in *Teva/Allergan*, the remedy required traditional divestitures along with provisions to prevent input foreclosure and the Commission considered, but ultimately dismissed any concern about innovation. These cases are summarized below.

5.1. Halliburton/Baker Hughes

24. In April 2016, DOJ sued to block Halliburton, the largest oilfield services company in the United States, from acquiring its closest rival, Baker Hughes.²⁵ Along with Schlumberger, these companies were the "Big Three" in this business because they were, by a wide margin, the largest globally integrated oilfield services companies. The DOJ found that the Big Three were unique in many respects, and were often the only suppliers qualified to bid on difficult projects involving offshore or deep onshore wells where products must function in high temperatures and at high pressures. The DOJ delineated 23 relevant products and services where the proposed merger would result in markets

²³ See Compl. *U.S. et al v. US Airways Group, Inc. and AMR Corporation* (2013); the discussion of Advantage pricing articulates a coordinated effects theory of harm reliant on multimarket contact among legacy airlines.

²⁴ See, e.g., *FTC v. Sysco Corp.*, 113 F. Supp.3d 1 (D.D.C. 2015) (merger reduced competition for broadline foodservice distribution for national customers who preferred to deal with a single supplier that could service all of their locations); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017) (merger reduced competition for the sale of medical health insurance to "national accounts" with 5,000 employees or more where the evidence "made it clear that the larger a customer becomes, it requires greater customization, sophistication, and network coverage, and its range of choices narrows").

²⁵ Compl. *U.S. v. Halliburton* (2016), <https://www.justice.gov/atr/file/838661/download>.

dominated by the Big Three. It also alleged that “the elimination of competition between Halliburton and Baker Hughes would have more profound anticompetitive effects than market shares and HHI measures alone would indicate.”²⁶

25. Innovation competition played a key role in the analysis, as the Big Three were the undisputed technology leaders in the oilfield services business. They competed head-to-head in driving technological innovation and quality for the industry, in particular in complex tenders for large global clients. The Big Three demonstrated “persistent innovation leadership,” supported by their global scale and scope, allowing them to capture higher returns from their investment in R&D, to exploit synergies across product lines, and to have access to more opportunities to gain experience with new technologies. Each invested hundreds of millions of dollars annually in research and development. For products where innovation was most important, there were few other competitors.

26. Although Halliburton proposed billions of dollars worth of divestitures to address every overlap market, the DOJ was not satisfied that the proposed remedy would fully replicate the capabilities and dynamic competitive position of Baker Hughes. Because the merged firm would generally retain the more valuable assets from either Halliburton or Baker Hughes while divesting the less significant assets, the divestiture buyer would be acquiring a “worst of breed” mix of technologies.²⁷ Even in the relevant markets where the proposed divestiture was nominally global, the DOJ noted that the buyer might not continue operations at a global scale. The DOJ observed that in some countries, it is common for exploration and production companies to seek a single integrated provider for all oilfield services. If the buyer of the divestiture assets failed to qualify for such projects due to its limited scope, it would have less incentive to continue operations in those countries. Eventually, its position as a competitor for technologies with global applications would have eroded.

27. The DOJ determined that the remedy was inadequate and sued to block the merger. The parties ultimately abandoned their plans to merge.

5.2. Bayer/Monsanto

28. In May 2018, the Division cleared Bayer’s proposed \$66 billion acquisition of Monsanto subject to a comprehensive divestiture of assets to a third party, BASF.²⁸

29. Bayer and Monsanto were two of the largest agricultural companies in the world. The complaint alleged that the acquisition would have resulted in the loss of current and future competition in a number of areas, including genetically-modified seeds and traits in a number of important crops (cotton, soybean and canola), certain types of herbicides, and also weed-management systems (the combination of a non-selective herbicide with an herbicide-tolerant seed). In addition to harm to price competition, the DOJ’s complaint alleged that the merger would harm innovation, particularly innovation in the “bundle” of traits and herbicides, recognizing the importance of complementarities across traits and herbicides.²⁹ Only two firms in addition to the merging companies would be able in the

²⁶ Id., paragraph 70.

²⁷ Id., paragraph 78.

²⁸ See *Compl. U.S. v. Bayer AG* (2019), <https://www.justice.gov/opa/press-release/file/1066646/download>.

²⁹ *U.S. v. Bayer AG*, Competitive Impact Statement, 22, <https://www.justice.gov/atr/case-document/file/1066681/download> (“Bayer is motivated to pursue trait research in part because successful commercialization of a trait will generate additional returns through the sale of the associated herbicide, and vice versa”).

future to offer integrated solutions to farmers (*e.g.*, combinations of seeds, traits and pesticides, coupled with digital farming technologies).

30. To resolve the competition concerns, DOJ required Bayer to divest businesses and assets worth approximately \$9 billion to BASF. The assets included Bayer businesses that currently competed with Monsanto, including Bayer’s cotton, canola, soybean, and vegetable seed businesses, Bayer’s herbicide business, as well as structural divestitures to remedy vertical concerns. The settlement also required the divestiture of certain intellectual property and research capabilities, including “pipeline” R&D projects. Finally, in order to fully prevent competitive harm from the merger, the settlement required the divestiture of additional complementary assets that were needed to ensure that BASF had the same innovation incentives, capabilities and scale that Bayer would have as an independent competitor including, most notably, Bayer’s nascent “digital agriculture” business.

5.3. Teva/Allergan

31. The FTC challenged Teva Pharmaceutical Industries Ltd.’s \$40.5 billion acquisition of Allergan’s generic pharmaceutical business. Both companies engaged in the research, development, manufacture and sale of a wide range of generic formulations for the treatment of hundreds of diseases and conditions. In addition, Teva supplied Allergan and others with active pharmaceutical ingredients (APIs) that were necessary to the production of generic pharmaceuticals. According to the FTC, the merger would have eliminated direct or potential competition between Teva and Allergan for 79 products, and required the divestiture of assets related to each product to a total of eleven divestiture buyers. The FTC also required Teva to offer long-term supply agreements for 8 active ingredients that were necessary inputs for 15 generic drugs over concerns about potential input foreclosure.

32. The Commission also evaluated whether the merger would have anticompetitive effects beyond those occurring in individual product markets. At the time, Teva was the largest generic pharmaceutical company in the United States, with 13 percent of sales, and Allergan was the third largest, with a 9 percent share. Overall, the Commission found that the U.S. market for generic pharmaceuticals was relatively unconcentrated, with over two hundred suppliers and the top five firms holding less than half of overall generic sales. Nonetheless, given the importance of competition to driving low cost, high quality, and innovative generic treatments, the Commission closely considered the potential impact of the merger not only on a product-specific basis, but also whether Teva’s broad portfolio of products post-merger could have other adverse effects, notwithstanding the extensive divestitures and other remedial obligations required by the Commission’s order.

33. The FTC examined whether the merger would likely decrease challenges to the patents held by brand-name pharmaceutical companies and bring new generic drugs to market.³⁰ Under U.S. law, a major incentive for a generic firm to file a patent challenge is the 180-day exclusivity period awarded to the first generic drug that the Food and Drug Administration approves in a market. Based on a review of patent challenges filed during the prior year, the Commission found no evidence that there would be insufficient firms

³⁰ The regulatory framework governing generic pharmaceuticals, the Hatch-Waxman Act, provides specific procedures for identifying and resolving patent disputes related to new generic drugs. Under the Hatch-Waxman Act, a company seeking to introduce a new generic drug may file what is commonly known as a “Paragraph IV challenge” to a brand-name pharmaceutical product’s patent. This filing triggers a process, including potential litigation, to resolve patent issues surrounding the proposed generic product’s entry into the marketplace.

able and willing to challenge patents, nor that either Teva or Allergan were particularly better positioned to win the first-to-file race or that they have substantially greater incentives or ability to succeed in patent challenges than many other generic companies, nor that the post-merger Teva would face a diminished incentive to continue to pursue such challenges.

34. Finally, the Commission analyzed whether the proposed transaction might dampen incentives to develop new generic products. There, evidence largely showed that the companies' in-house technical capabilities to develop complex generic drugs did not overlap, and that there are a number of other firms with similar capabilities such that the transaction would not substantially lessen competition. Given that generic firms often partner with third parties (e.g., specialized contract development and manufacturing organizations) to obtain the technical capability to develop complex generic drugs, these opportunities would remain after the merger.

6. Conclusion

35. Some theories of harm that may be called “conglomerate effects” in other jurisdictions are encompassed within the horizontal and vertical frameworks in the U.S. Horizontal potential competition, vertical foreclosure, and raising rivals' costs are examples of theories of harm that can arise from conglomerate mergers. Historically, the Agencies challenged mergers if they would create a financially strong company or if they enabled the merged firm to achieve efficiencies not available to other firms. This approach is no longer viewed as valid under U.S. law or economic theory. Today, the Agencies focus on protecting competition, efficiency, and consumer welfare rather than individual competitors. We are committed to basing decisions on sound economics, and we remain flexible and forward-looking, continually considering new economic learning and evolving market realities.