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CONGLOMERATE MERGERS AND SECTION 7
OF THE CLAYTON ACT*Richard C. Clark***Introduction*

In 1950, Congress passed an amendment to Section 7 of the Clayton Act that was deemed by many to be long overdue. The relevant portion of section 7 provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire 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.¹

Since the passage of this legislation, debate has swelled over the scope of its provisions, the criteria of judgment to be used in applying its provisions, and the wisdom of the measure. Anyone addressing himself to the task of analyzing the antitrust laws of our country is necessarily awed by the immense mass of literature already written on the subject.² The gnawing suspicion is ever-present that nothing new can be added, a suspicion that suggests to the timid that nothing new should be attempted. But, mindful of these hazards, this article will explore yet further terrain, and attempt to throw some light on a problem that has at least the redeeming feature of being heretofore largely neglected. An analysis will be made herein of the relation between the amended Section 7 of the Clayton Act and that type of corporate integration known as the conglomerate merger.

At the outset, it is well to note the familiar distinction taken between the three varieties of corporate merger: horizontal, vertical, and conglomerate. No definition can ever be asserted with confidence that it takes into account all dimensions of the thing defined. But, for purposes of this article, certain broad

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1 64 Stat. 1125, 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914).

2 See, e.g., the listings of books and articles published since 1959 on various aspects of the antitrust problem in 17 A.B.A. Antitrust Section 33-37, 134, n. 30 (1960).

operational descriptions will serve as adequate definitions of these three types of mergers.

A horizontal merger is the acquisition by one firm of another firm competing in the same market with the acquiring firm, at the same level of production or distribution. Examples of horizontal mergers abound. Two corporations, both manufacturing, say, home appliances, and setting their prices on a competitive basis, would be parties to a horizontal merger. A vertical merger, on the other hand, involves not the integration of two firms competing at the same level, but the integration of two firms at different levels of production or distribution, but who stand in some relation to each other with respect to product flow. If, for example, a manufacturing firm were to acquire its main retail outlet, this would be known as a forward vertical merger. Were the same manufacturer to acquire its main source of raw materials and supplies, this would be referred to as a backward vertical merger.

The conglomerate merger is, obviously, neither of these types, but represents an integration between two firms which are non-competitive with respect to the same market, and further, who stand in no direct relation to one another at different levels of economic organization and product flow. There is no visible agreement among authorities as to the exact content of the term "conglomerate merger." Failing any precision, conglomerate merger is oftentimes a catch-all used to gather under one head all the residual integrations remaining after the categories of horizontal and vertical have been exhausted. For purposes of this article, it will be sufficient to define a conglomerate merger as the fusion of two firms sharing no common competitive market between them and bearing no vertical relationship to one another of supplier-customer.

Until very recently, it was assumed that Section 7 of the Clayton Act had reference only to horizontal mergers, and consequently, the main thrust of governmental attack has been in this direction. However, it is now clear that section 7 also has applicability to vertical mergers, this step having been taken by judicial extension³ and also by the 1950 amendment to the act.⁴ But the antitrust landscape is virtually barren of any instances where a conglomerate merger as such has been questioned by the antitrust enforcement agencies of the government. But there is reason to believe this situation may not long persist. Recent indications hint that the government may be preparing a frontal attack on conglomerate mergers.⁵ What this means, of course, is that a vast expanse of trackless ground must be traversed by government agency and private lawyer alike, in an effort to evolve sufficiently reliable criteria by which to judge and predict the anticompetitive effects of this form of corporate acquisition. And this in a field already large with criticism of its uncertain standards. This article will attempt to place in some measure of perspective the

3 *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). Though handed down after the amendment to section 7 of the Clayton Act, the case is based on the provisions of the act as they existed prior to 1950.

4 See H. R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949), wherein the intent of Congress to include vertical mergers within the ambit of section 7 is clearly revealed.

5 *Wall Street Journal*, Jan. 23, 1961, p. 10, col. 1. This editorial states that the "... word in Washington is that more emphasis will be put on acquisition against business mergers intended for true diversification purposes—that is, acquiring new or different lines of products."

problems that must be confronted in this undertaking, and to suggest certain broad lines of analysis and judgment that may be used in examining the relevant data.

I. *Legislative History of Amended Section 7*

After several abortive attempts in the late 1940s,⁶ the proponents of stronger antitrust laws were able, in 1949, to bring to the floor of the House of Representatives a bill⁷ to strengthen the antimerger provisions of the Clayton Act. Section 7 had been largely emasculated by alert corporate counsel and sympathetic decisions from the Supreme Court.⁸ Briefly, section 7 as originally enacted forbade only those anticompetitive mergers that were achieved by the purchase of stock of the acquired corporation. The statute did not prevent mergers consummated through purchase of assets of the acquired firm. This legislative omission, perhaps deliberate at the time of the passage of the act,⁹ was quickly seized upon as a convenient loophole through which could be steered mergers that would tend substantially to lessen competition, and which would undoubtedly have fallen under the proscription of the act had the purchase of stock method been used. But being carried out through the purchase of assets rather than stock control, there was no legislative mandate for challenging these mergers.

Consequently, the main brunt of the attack mounted by the proponents of a section 7 amendment was directed toward plugging the purchase-of-assets loophole. Evasion of section 7 was a disarmingly easy task for corporations seeking to consummate mergers that might otherwise be forbidden by the act. Proponents of the amendment declared that the original provision had become "nothing but a travesty and laughing stock."¹⁰ One spokesman lamented the failure, almost from the outset, of section 7 to cope with the problem of economic concentration, pointing out that "The law did not check the monopolistic concentration of economic power; it merely encouraged the use of more effective devices for increasing that concentration."¹¹ As long as the statute was on the books, it was imperative to give it the strength and enforceability needed to make it the effective piece of antitrust legislation the original framers in 1914 intended it to be. If this could not be brought about, it was urged, it would be the better to remove the statute from the books altogether by repealing the Clayton Act, rather than permit it to remain as a hapless piece of useless legislation.¹²

The pivot around which the House debate on the amendment to section 7

6 See 95 CONG. REC. 11497 (1949), for a brief history of prior legislative efforts in this direction.

7 H.R. 2734, 81st Cong., 1st Sess. (1949).

8 *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587 (1934); *Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554 (1926).

9 See H. R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949), pointing out that at the time of the passage of the original Clayton Act, acquisition by means of stock control was the most common method of merger. Congress thus apparently deemed it unnecessary to include prohibitions against acquisitions through purchase of assets. See also 95 CONG. REC. 11502 (1949).

10 95 CONG. REC. 11502 (1949) (remarks of Representative Douglas).

11 95 CONG. REC. 11494 (1949) (remarks of Representative Carroll).

12 95 CONG. REC. 11489 (1949) (remarks of Representative Keating).

revolved was a set of statistics furnished by the Federal Trade Commission on the increase in mergers between 1940 and 1947.¹³ The data revealed that during this interval, approximately 2,500 formerly independent firms had disappeared because of mergers, and that the total assets of the acquired firms amounted to \$5.2 billion, or 5½ per cent of the total assets of all manufacturing corporations.¹⁴ The conclusion drawn from this data was that if the rate of mergers continued unchecked, the suffocation of small business would be inevitable. As economic concentration mounted, the small enterprise would find it increasingly difficult to remain in business on a competitive basis. Lacking the economic resources to compete for its share of the market, the small enterprise would knuckle under, sell out, and be drawn into the ever-widening vortex of economic control exercised by the large firms. The projected situation thus presented the classical situation for vigorous enforcement of the antitrust statutes, particularly Section 7 of the Clayton Act.

Section 7 was theoretically tailor-made for the type of situation posed by the FTC report, and for curbing the results predicted by the proponents of the legislation: a growing movement toward economic concentration, loss by small business of its competitive position, and ultimate monopoly by the corporate giants.¹⁵ That the Clayton Act was tailor-made for entry onto this battleground was clear from its original purpose. Congress, realizing in 1914 that the Sherman Act¹⁶ was operational only when economic concentration had achieved full monopoly status, passed the Clayton Act to head off, in advance, conduct that would tend to lessen competition or tend to create a monopoly. Its purpose was to "nip monopoly in the bud,"¹⁷ to head off inchoate economic movement that would eventually result in monopoly were it allowed to run full course.

In fact, however, the Clayton Act was far from tailor-made for the task. The merger activity between 1940 and 1947 had been carried out largely through the purchase-of-assets route, and consequently was outside the sweep of section 7. There was every reason to believe this facile strategy of evasion would be resorted to in the future, and the FTC, as well as the Antitrust Division of the Department of Justice, would be hamstrung in taking effective action. The legislative history thus reveals that one of the chief preoccupations in passing the amendment to section 7 was with the wholesale circumvention of the statute as it was presently written.

Further, in addition to the inability of the Clayton Act to cope effectively with mergers exhibiting substantial anticompetitive consequences, the Supreme Court's decision in *United States v. Columbia Steel Co.*¹⁸ showed that the Sherman Act was likewise incapable of blocking mergers that fell short of thorough-

13 FTC, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT (1948).

14 *Id.* at 17.

15 What the architects of the Bill probably feared more than a thorough-going monopoly situation in American industry was an oligopolistic structure in which three or four large corporations would control an entire industry. 95 CONG. REC. 11493 (1949) (remarks of Representative Yates).

16 50 Stat. 693, 15 U.S.C. § 1 (1958), amending 26 Stat. 209 (1890).

17 *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 169 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953).

18 334 U.S. 495 (1948).

going monopoly but which would nonetheless produce substantial competitive deterioration.

However, it is equally clear that the amendment was designed to improve upon the original in several other important particulars. Under the original act, the only relevant inquiry was whether competition was substantially lessened between the acquiring and the acquired firm. The amendment eliminated this test, substituting the criterion of whether the acquisition will lessen competition "in any line of commerce." This change had a two-fold purpose. First, it makes it clear that Congress did not intend to prohibit all mergers — particularly those between small firms that might be required to merge for survival — but only those mergers having a substantial competitive effect within a particular line of commerce.¹⁹ Second, and more positively, the language was used to strengthen the proscriptions of section 7 by interdicting any merger that would tend to produce substantial competitive deterioration within any relevant market.²⁰ Further, this change was complemented by the substitution of "any section of the country" for the former phrase "any community." That is, the geographical locus of where competition was being diminished was widened, so that the statute would not operate to prevent the merging of two small local businesses situated in the same community.²¹

But the change of greatest significance, for purposes of this article, was that section 7 was now to be used as a weapon against *any* type of merger, horizontal, vertical, or conglomerate. Until 1950, it was assumed that section 7 had no application to acquisitions other than horizontal integrations. The fragile balloon surrounding this assumption, right or wrong, was punctured by the Supreme Court decision in *United States v. du Pont & Co.*,²² squarely holding the provision applicable to vertical as well as horizontal mergers.

In the House of Representatives, one of the spokesmen in behalf of the bill arose to address himself to certain typical questions that might be asked with respect to the measure. Citing examples of horizontal and vertical mergers, the speaker went on to say:

A third avenue of expansion — and this is one of the most detrimental movements to a free enterprise economy — is the conglomerate acquisition. This is the type which carries the activities of giant corporations into all sorts of fields, often completely unrelated to their normal operations. In times such as these, when big corporations have such huge quantities of funds, they are constantly looking around for new kinds of businesses to enter. By this process they build up huge business enterprises which enable them to play one type of business against another in order to drive out competition.²³

This is the sole place in the House debates reflecting any extended reference to conglomerate mergers. Mention is made of conglomerate acquisition in a

19 S. REP. NO. 1775, 81st Cong., 1st Sess. 4 (1950).

20 See generally MARTIN, MERGERS AND THE CLAYTON ACT 305-10 (1959).

21 S. REP. NO. 1775, 81st Cong., 1st Sess. 4 (1950).

22 353 U.S. 586 (1957). The case was decided under the original language of section 7, inasmuch as the Government had challenged a series of stock acquisitions that took place between 1917-19.

23 95 CONG. REC. 11496 (1949) (remarks of Representative Boggs).

few other places in the record, so there can be no speculation allowed that the proponents of the bill were not aware of this type of merger. Speculation that is proper, however, is why the point was not made with greater specificity if the legislators firmly intended to include this type of merger within the ambit of the statute.

Senate floor debate sheds little additional light on the problem. After the House had passed the measure in August, 1949, the bill came to the Senate in 1950. Here also it would seem that the chief pre-occupation of the proponents was with sealing up the widening crack in the statute that permitted mergers to be consummated through purchase of assets. Principal spokesmen for the bill, Senators O'Connor, Kefauver, and O'Mahoney, like their counterparts in the House, also relied heavily on merger data drawn from the FTC report. Conclusions from this data were much the same as those drawn in the House debates. It was urged that the merger trend, underway since 1940 and in sharp advance since the close of the Second War, was forcing the small businessman to sell out. Industrial concentration and market domination were swiftly replacing multiple, diversified ownership and free market competition. If allowed to proceed unchecked, the argument went, America would soon find itself with a monopoly-dominated economy. Senator O'Connor warned of grim political consequences stemming from this growing concentration. One of the "principal reasons" for the bill was:

To protect and preserve the American system of free enterprise. If concentration continues to increase the Nation will surely sink into some form of collectivism — facism, socialism, or communism. The replacement of free-enterprise economy by any of these forms of collectivism is unthinkable. Yet, unless the trend toward increasing concentration is arrested, collectivism may well be upon us.²⁴

Senator Kefauver expressed concern for the small investor who had no control over the economic giant he "owned,"²⁵ and for the shrivelling up of individual initiative and self-sufficient entrepreneurs.

I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations, even though they may have very widespread stockholder distribution, with central-office managers remote from the places where their products are made, and the destiny of the people determined by the decisions of persons whom they never see or never know of? Or on the other hand are we going to preserve small business, local operations, and free enterprise?²⁶

It is clear that the overriding concern in the Senate, as well as in the House, was with the purchase-of-assets loophole in the Clayton Act, and with the foreboding consequences the unchecked merger movement held for the economy

²⁴ 96 CONG. REC. 16507 (1950).

²⁵ On the general problem of the separation between ownership and control in the present-day corporation, and the remoteness of the small investor from the policies and operations of the large corporation, see BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

²⁶ 96 CONG. REC. 16450 (1950).

as a whole. Nowhere is any visible attempt made to demonstrate that conglomerate mergers were to be brought within the ambit of amended section 7. Indeed, the term was used but twice during the entire Senate debate.²⁷ Senator O'Mahoney, interpreting certain data prepared by the Department of Commerce on corporate mergers, made the following statement:

[I]n the study of the Department of Commerce to which I referred a little while ago nearly 25 percent of the 18 mergers by acquisition of assets represented what was known as conglomerate mergers; that is to say, corporations buying other corporations dealing in unrelated businesses. For example, the Universal Match Co. purchased a number of candy corporations. This widespread entry of corporations into unrelated lines of manufacture is, in part, a result of the extraordinary accumulation of liquid assets in corporate treasuries because of their operations during the war, and because we have not taken the steps necessary to prevent this constant concentration which closes the door to enterprise by the citizens of the States which are represented by every Senator upon this floor.²⁸

While floor debate is unsatisfactory and inconclusive on the question under consideration, clear and unequivocal language is found in the House Committee Report.²⁹ Here too, however, discussion of giving the Clayton Act the teeth necessary to block corporate mergers carried out through purchase-of-assets bulks large in the pages of the report. Conglomerate acquisitions are mentioned once in the report, but the reference is strong and unambiguous, rendering perfectly clear the desire of Congress to include conglomerate mergers within the operational perimeter of section 7 enforcement.

[I]n the proposed bill, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that the bill is not intended to prohibit all acquisitions among competitors. But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate, as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.³⁰

Summarizing, then, it can be said that the legislative history of the amendment reveals a certain intention to fashion section 7 as a weapon against the conglomerate merger. The architects of the amendment spoke at length of the calamitous effects of unchecked economic concentration, market control, and the disappearance of competition. Under the rug of this large language could be swept virtually any type of corporate integration, horizontal, vertical, or conglomerate. Clear does the fact remain that the dominant impact of the amendment was to be in foreclosing anticompetitive mergers achieved through the device of the acquiring corporation purchasing the assets of the acquired corporation. But clear too is the evidence supporting the conclusion that conglomerate mergers, as a matter of projected *legal possibility*, are within the

27 96 CONG. REC. 16449 (1950) (remarks of Senator O'Mahoney); 96 CONG. REC. 16442 (1950) (remarks of Senator O'Connor).

28 96 CONG. REC. 16449 (1950).

29 H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949).

30 *Id.* at 11.

ambit of section 7 as it presently reads. Though the legislative history is spotty on the point, and quantitatively there is little time or space devoted to it, there would seem to be no doubt but that section 7 now gives adequate statutory authorization to the Federal Trade Commission and the Antitrust Division of the Department of Justice to proceed against conglomerate mergers.³¹ However, taking lower ground, whether conglomerate mergers are within the ambit of section 7 as a matter of projected *practical economic probability* is a question by no means free from doubt. The balance of this article will attempt to furnish an answer to this question.

II. Federal Trade Commission Decisions

Recent rulings by the Federal Trade Commission furnish some illumination on the pattern of decision that may be expected in the future with respect to conglomerate mergers. The *Procter and Gamble Co.*³² ruling is of particular interest, and deserves extended analysis. Procter and Gamble on August 1, 1957, acquired all the assets of the Clorox Chemical Company, maker of the largest-selling brand of household bleach. At the time of the acquisition, Procter and Gamble was, and still is, the leading producer of soap and detergent products, as well as a major producer of food, paper, shampoos, dentifrices, and home permanents. Procter and Gamble, already a large, diversified company, was able, by its acquisition of Clorox, to enter yet another market. But the market Procter and Gamble chose to enter was one already highly concentrated, and this factor was decisive in the Federal Trade Commission's appraisal of the case.

Prior to the acquisition, Clorox enjoyed a strong dominant position in the industry. For the two months of June and July, 1957, Clorox had 48.8 per cent of the total national sales in the household bleach market. Its closest competitor, Purex Chemical Company, controlled but 15.7 per cent of the total sales. None of the remaining competitors had more than 6 per cent of the market. Following the acquisition, Clorox sales, for the first two months immediately following the acquisition, rose to 49.6 per cent of the total, thus further solidifying its already dominant market position.

The hearing examiner's initial decision ordered a divestiture by Procter and Gamble of all the assets of the Clorox Chemical Co. The ruling declared that the acquisition would tend substantially to lessen competition between Clorox and other bleach companies, by further strengthening Clorox's already dominant market position. Findings made by the hearing examiner were:

- 1) Clorox's dominant market position was increased due to advertising, promotion programs, and other merchandising devices used by Procter and Gamble.
- 2) Procter and Gamble possesses great financial and economic strength compared with other producers in the bleach market competing with Clorox.

31 The Federal Trade Commission and the Antitrust Division of the Department of Justice were given concurrent jurisdiction in the enforcement of section 7. S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950).

32 TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 28881 (July 11, 1960).

3) Procter and Gamble products enjoy a large measure of consumer acceptance. This, combined with Procter and Gamble's ability to obtain choice shelf and display space in retail outlets, further catapults Clorox ahead of its competitors, since Clorox is now able to take advantage of Procter and Gamble's superior marketability.

4) Clorox is now able, through advertising and promotion inspired by Procter and Gamble, to prevent additional competitors from entering the household bleach field.

The case thus illustrates in sharp detail the anticompetitive consequences that can stem from a conglomerate merger. Procter and Gamble, though not in the household bleach market, is able to enter the market through a merger aimed at diversification of its operations. Once in the market, it brings its huge resources to bear upon an industry already concentrated to a high degree. The small competitors of Clorox are thus placed in the position of competing not just with Clorox alone, but also with the formidable market and financial strength of Procter and Gamble.

This strength is felt along several fronts. An increase in managerial skills and executive talents is likely in a conglomerate merger.³³ An increase in total assets and financial resources is almost a certainty, save in those cases where the acquired firm is in a failing condition, bringing more liabilities and losses to the merger than assets and profits.³⁴ A decrease in overhead expenses resulting from consolidated operations oftentimes represents the primary purpose of many integrations.³⁵ The economies of quantity buying, principally reflected in discount rates, will frequently be a measure of increased strength attendant to a merger. Testimony introduced by the FTC in the *Procter and Gamble* case showed that for the 12-month period ending June 30, 1958, the joint purchase of advertising by Procter and Gamble and Clorox, bought at volume discount rates, had saved Clorox \$138,500.

Perhaps more important than any of these items, however, was the promotional and advertising support Procter and Gamble was able to give to Clorox. Evidence showed that Procter and Gamble spent in excess of \$79 million for advertising during the fiscal year ending June 30, 1957. The FTC elicited from one of its witnesses, the executive of a company competing with Clorox in the bleach market, testimony showing that the factor most feared by competitors was the financial resources Clorox had available for advertising as a result of the acquisition.³⁶

33 See Webster, *The Clayton Act Today: Merging and Marketing*, in 1959 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH THE CLAYTON ACT 83.

34 The so-called "failing company" doctrine originated with the Supreme Court decision in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). Under this doctrine, it is a valid defense to an action under section 7 to show that the acquired company is on the verge of financial collapse, and will be driven into bankruptcy if it is not permitted to merge. For a recent discussion and re-examination of the foundations of the failing company doctrine, see Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 GEO. L.J. 84 (1960).

35 See *The Wall Street Journal*, Feb. 24, 1961, p. 2, col. 2, reporting announcement of a proposed merger between the Chicago & Northwestern Railway and the Chicago, Milwaukee, and St. Paul Railroad. It has been estimated by spokesmen of the companies that savings realized as a result of the merger will total \$40 million before income taxes.

36 TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 28881 (July 11, 1960). See also com-

On the basis of all these factors, the FTC hearing examiner ruled that the acquisition would tend substantially to lessen competition in the household bleach industry, and ordered Procter and Gamble to divest itself of all the assets of Clorox it had acquired.

The *Reynolds Metals Co.*³⁷ case offers illustration of a large enterprise making its impact felt in a small industry shared by a number of firms competing on a relatively equal basis in terms of market control. Technically, the merger here was of the forward vertical type. Reynolds, manufacturer of aluminum foil, acquired Arrow Brands, Inc., a producer of florist foil, a thin decorative material made from aluminum foil and used for packaging and display purposes by retail florists. Reynolds produced no florist foil, so its merger with Arrow Brands represented the vertical acquisition of a customer.

Arrow Brands' total annual sales, before the merger, were about \$500,000. Florist foil being a specialty product, sales in the entire industry were never more than \$2 million annually. Into this market picture moved Reynolds, with annual sales of over \$400 million. The impact on the small florist foil industry was soon felt. Arrow Brands built a new plant costing \$500,000. It drastically reduced its prices on florist foil, even selling at below cost in some cases, according to the FTC. Arrow Brands' advertising was substantially increased. According to testimony from other florist foil competitors, it was just a matter of time until they were driven out of business altogether.³⁸ The conclusion, thought the FTC, was inescapable: vast Reynolds' resources standing behind Arrow Brands would drive all other producers from the market, destroying competition and concentrating the entire industry in one firm. The FTC ordered divestiture of all Arrow Brands' assets acquired by Reynolds. A petition by Reynolds for a reopening of the proceedings on the ground of new entrants into the field subsequent to the order of divestiture was denied.³⁹

One commentator has pointed out that the decision may well be a clue to the Commission's future treatment of conglomerate mergers, noting that little attention was paid to the usual features characteristic of a vertical acquisition.⁴⁰ The Commission could have reached the same result, it is argued, if the attempted merger had been conglomerate instead of vertical:

If Reynolds had manufactured batteries instead of aluminum foil, it probably would have absorbed the price decreases and could have constructed a new plant, and practically everything else the Commission said concerning the effects of the merger would have been applicable. Perhaps, then, the *Reynolds* case unintentionally gives us a clue on how the prosecutors might approach conglomerates: namely, select those which involve larger companies moving into predominantly small business fields; let them occur, but then watch

plaint filed in Minnesota Mining & Mfg. Co., TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 28891 (July 13, 1960).

37 TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 28533 (Jan. 21, 1960).

38 Similar charges of widespread price cutting by a large firm, to the detriment of small competitors, have been alleged by the FTC complaint recently filed in the case of Ecko Products Co., TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 29106 (Oct. 12, 1960).

39 TRADE REG. REP. (1959-1960 FTC Cas.) ¶ 28666.

40 Jacobs, *Mergers and the Small Businessman*, 16 A.B.A. ANTITRUST SECTION 83 (1960).

the industries very closely for possible anti-competitive developments. If these appear, then sue for divestiture.⁴¹

Former FTC Chairman Earl Kintner, commenting on the *Reynolds* decision, in a speech before the New York State Bar Association, made the following observation:

The acquisition by a large and powerful diversified company of a small company in a discrete industry historically shared by a number of small companies competing on equal terms followed by drastic competitive injury to the smaller competitors might be a demonstration of anticompetitive effect sufficient to satisfy the statutory requirements even if the acquisition was truly conglomerate. I do not mean to suggest that I am personally or officially wedded to this theory—I mention it only as a possible subject of speculation.⁴²

Mr. Kintner's hedging reservation that he is not wedded to the position presumably represents the official doubt the Commission has entertained since 1950 with respect to conglomerate acquisitions. The fact that the Commission had not taken, as of 1959, any action against a true conglomerate acquisition⁴³ indicates a large misgiving as to the government's ability to make out a satisfactory case in this area. As pointed out above, as a matter of projected *legal possibility*, conglomerates have been within the sweep of section 7 since 1950. But as a matter of projected *practical economic probability*, a large doubt remains. This doubt, exhibited in Mr. Kintner's aside, finds its adequate demonstration in the government's reluctance to take any concerted action thus far.⁴⁴ Mr. Kintner closed his remarks on this point with the prophesy that "it would appear that the long-existing dearth of standards by which to judge the effects of conglomerate acquisitions may not exist much longer."⁴⁵ He may well have spoken the truth. The *Reynolds Metals* case certainly foreshadows a new direction. Of even more direct pertinence is the hearing examiner's ruling in *Procter and Gamble*. If the rationale of this decision survives the scrutiny of full Commission review, and possible further judicial attack, it will stand as the first visible landmark in a field where it has been cautioned that "standards of illegality seem wholly elusive."⁴⁶ Further, personnel and policy changes within the FTC, a certain eventuality with the change to a Democratic administration, may well produce verification of the rumors that the government is mapping a concerted campaign against conglomerate acquisitions.⁴⁷

Principal objections to the Government's taking any action against conglomerate mergers are twofold. First, it is asserted that these mergers are in the best interests of the business community and the public,⁴⁸ representing legi-

41 *Id.* at 88.

42 Address by Earl W. Kintner, 1961 Annual Meeting of New York State Bar Association, pp. 40-41, January 26, 1961.

43 Jacobs, *supra* note 40, at 84.

44 The evidentiary burden that must be borne by the Government in section 7 cases is obviously formidable, considering the statutory language of future prediction involved in "... may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis added.)

45 Kintner, *supra* note 42, at 41.

46 KAYSER & TURNER, ANTITRUST POLICY 131 (1959).

47 See note 5 *supra*.

48 See argument raised by the defendant in *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 615-16 (S.D.N.Y. 1958).

timate expansion and diversification of existing facilities. The going concern can introduce a greater measure of equilibrium and financial stability into its operations by acquiring additional companies.⁴⁹ Second, much is made of the fact that economic standards by which to characterize, analyze, and judge the competitive consequences of conglomerate acquisitions are too illusory and conjectural.⁵⁰ Since we can expect the protests to grow more vocal as conglomerate mergers come under closer scrutiny, it is necessary to examine the problems presented by these objections.

III. *Reasons for Corporate Acquisitions*

In discussing the phenomenon of conglomerate mergers, resort is often had to the reasons prompting a given merger. This poses a distinct problem, for antitrust legislation—at least Section 7 of the Clayton Act—is bottomed on the supposedly objective criterion of market power.⁵¹ That is to say, the question of whether a given industry exhibits excessive economic concentration, or is in fact a monopoly, is measured by market power. If the market is swallowed up by one firm, competition is diminished, weakened, and finally destroyed. But if market power is an objective fact, then what possible relevance can be ascribed to the motives and purposes of the business community in carrying out any given merger?

The problem is raised because of the large number of conglomerate mergers supposedly undertaken for diversification purposes.⁵² The evidence suggests that a large number of mergers—perhaps a plurality—are undertaken today for reasons aside from a wish for market control and monopolistic domination. Combinations in the late 1800's, and in the early part of this century, were inspired by aggressive motives of domination and market power. Government controls being largely non-existent, small economic units were easy prey for robber-barons intent on increasing the size and impact on their corporate empires. In that era, corporate acquisitions and market control were apparently sought for their own sake. Colossal combinations and trusts, already vectored on a sure course of prosperity and success, sought ever further expansion and control.⁵³

By contrast, it is argued that present-day incentives for expansion are far less ambitious and predatory.⁵⁴ Business community spokesmen talk of mergers not in language of 19th-century rugged individualism and competitive survival of the fittest, but in language of cost savings,⁵⁵ tax advantages,⁵⁶ and pooling of

49 See McCarthy, *Premeditated Mergers*, Harv. Bus. Rev., Jan.-Feb. 1961, p. 74.

50 The Wall Street Journal has asserted that any effort by the Government to undertake a large-scale enforcement program against conglomerate mergers carried out for diversification will produce a "metaphysical maze," in which the businessman will be unable to tell what he can and cannot do. Note 5, *supra*.

51 MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 398-400 (1957).

52 KEEZER, NEW FORCES IN AMERICAN BUSINESS 170 (1959).

53 LINDAHL & CARTER, CORPORATE CONCENTRATION AND PUBLIC POLICY 24-26 (1959); KEEZER, *op. cit. supra* note 52 at 169.

54 KEEZER, *op. cit. supra* note 52, at 169-171.

55 See note 34, *supra*.

56 Because of the favorable treatment accorded net operating loss deductions under INT. REV. CODE OF 1954, § 172, a firm with a large net profit will seek to merge with a company

managerial talent.⁵⁷ The chief reasons for postwar mergers in the last 15 years, it has been said, are financial stability, profit protection, and increased sales.⁵⁸ Stress is laid on the fact that a business will seek diversification of its operations to furnish economic protection not available in a one-product enterprise. By expanding into unrelated fields, the large firm can protect itself against the eventuality that future market conditions or unexpected economic factors will drive its primary product into a non-competitive and losing posture.

There can be no doubt that the incidence of conglomerate mergers is high, representing an attempt to expand into new markets such as found in *Procter and Gamble* and in *Reynolds Metals*. A recent study estimates that approximately 40 per cent of all mergers are conglomerate,⁵⁹ in the sense that the chief objective of these mergers is diversification. Diversification, of course, can always be achieved by original capital expenditure, building of new plants, and launching a new enterprise. Firms are more interested in acquiring a going concern, however, rather than inaugurating an entirely new enterprise. The FTC has said that a corporation, intent on diversification, prefers to acquire existing assets rather than construct a new enterprise from scratch, even though the costs would be the same.⁶⁰

On the one hand, then, we find the present-day business community pursuing the benefits of diversification, establishing multi-product and multi-line combinations for reasons of economy of operation and financial stability. On the other hand, we find the philosophy of our antitrust laws, as embodied in amended section 7, prohibiting mergers undertaken for diversification purposes if such mergers have the proscribed effects.⁶¹ Historically, in any conflict of this type, private interests and ambitions give ground before the advance of government regulation and control. But the ground is taken and occupied by government regulation only under a banner of rules and standards possessing adequate clarity and specifications. Failing this, government control and supervision becomes swamped in the morass of unconstitutionality. The most pressing problem, therefore, is the enunciation and elaboration of standards by which the conglomerate merger can be judged in the light of section 7. Obviously, we cannot take a wild swing and condemn all conglomerate acquisitions. Aside from being an impossible mandate for the government to enforce, it would represent foolish and unsophisticated economics, as well as bad law. But some standards must be evolved if the legislative intent is to be carried out. Those conglomerate mergers exhibiting no anticompetitive consequences must be classified and differentiated from acquisitions that produce substantial competitive deterioration.

that has experienced annual operating losses, setting off the losses against the profits and thereby reducing taxes.

57 See Webster, *The Clayton Act Today: Merging and Marketing*, in 1959 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH THE CLAYTON ACT 83 (1959).

58 McCarthy, *supra* note 49, at 74.

59 Nelson, *Do Mergers Kill Competition*, Challenge, Dec. 1960, quoted in KEEZER, *op. cit. supra* note 52, at 170.

60 FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 106-09 (1955). For an excellent study of this problem, as well as of the general economic ramifications of amended section 7, see Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 494 (1957).

61 For a representative reflection of the business community's attitude toward amended section 7, see Cook, *Thinking Ahead*, Harv. Bus. Rev., March-April 1959, p. 15.

It is necessary, in the words of Myron Watkins, to separate "the sheep from the goats."⁶²

In light of the amendment to section 7, it must be insisted that motive is an unimportant and irrelevant consideration. We are not here dealing with conspiracy or collusion restraints under the Sherman Act, where some illegal motive and predatory intent would have to be shown. Section 7 of the Clayton Act very clearly proscribes any merger where the *effect* may be substantially to lessen competition or create a monopoly. Motives and purposes are therefore irrelevant, and the business community cannot hope to exonerate itself from the strictures of section 7 by insisting, however righteously, that 40 per cent or even 90 per cent of its mergers are undertaken with proper objectives in mind.⁶³ It is imperative that the business community be freed from the misconception that merger justifications in the form of cost reductions, pooled assets, economies of scale, etc., will suffice to escape the Clayton Act.

To introduce justifications of this sort would represent a step backward in our antitrust enforcement policy. The Sherman Act, intended to be a tower of strength against undesirable forms of concentration, was whittled down by the Supreme Court's "rule of reason."⁶⁴ Congress then passed the Clayton Act, to put, in Professor Schwartz's phrase, "teeth in the old Sherman Act gums. . . ."⁶⁵ The Clayton Act was supposedly designed with new, more stringent criteria, different from the rule of reason spawned by the Supreme Court. But Sherman Act standards were in turn read into the Clayton Act by the decision in *International Shoe Co. v. F.T.C.*⁶⁶ Consequently, the 1950 amendment to section 7 gave the statute criteria independent of the Sherman Act. This was made clear in the Senate Committee Report, where it was pointed out that

the bill is not intended to revert to Sherman Act tests. The intent here, as in other parts 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.⁶⁷

The Clayton Act was an effort to overcome the "rule of reason" by introducing "per se" tests of illegality. Whereas the rule of reason demands a broad investigation into all relevant economic factors, the per se test more rigidly proscribes certain economic behavior without regard to any mitigating justifications.⁶⁸

Recent cases under amended section 7 make it perfectly clear that new standards of illegality are to be employed in the act's enforcement. Actual monopoly or actual lessening of competition need not be shown. A reasonable probability that these consequences will emerge is sufficient.⁶⁹ Further, it is

62 Watkins, Book Review, 47 AM. ECON. REV. 747, 749 (1957).

63 See *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (dissenting opinion), wherein Mr. Justice Douglas says "The fact that they [leaders of large corporations] are not vicious men but respectable and social-minded is irrelevant."

64 *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911).

65 Schwartz, *Potential Impairment of Competition*, 98 U. PA. L. REV. 10 (1949).

66 280 U.S. 291 (1930).

67 S. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950).

68 See generally, MASON, *op. cit. supra* note 51, at 392-98; Webster, *The Clayton Act Today: Merging and Marketing*, in 1959 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH THE CLAYTON ACT 74 (1959).

69 *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (S.D.N.Y. 1958).

of no moment that the proponents of the merger acted for what they deemed a beneficial purpose. "It [Congress] made no distinction between good mergers and bad mergers."⁷⁰ In proving its case, the government is not required to establish motive or intent for a transaction.⁷¹ If the proscribed effects take place, that is sufficient for section 7 enforcement.

In light of these decisions, as well as the FTC rulings referred to earlier, it seems clear that amended section 7 will be applied and enforced with a good deal of rigorous precision. This being the case, it is necessary to approach the question posed earlier: whether as a matter of practical economic probability, the conglomerate merger can be brought within the effective operational perimeter of section 7 enforcement. To hazard an answer to this question, we must analyze the realities and actualities of economic behavior as they emerge within the framework of conglomerate mergers.

IV. *Relevant Economic Factors*

Any realistic program of antitrust enforcement is necessarily bottomed on economic data. The legal profession turns to economics for information about the performance and behavior of a commercial society. It also looks for criteria by which reasonable, accurate conclusions and reliable predictions can be made, so that by extrapolation from known data and known situations, something relevant can be said about unknown future situations.

Under traditional economic theory, monopoly results when one firm so controls a market that prices are no longer arrived at competitively, but are set by the independent decision of the monopolistic firm. Competitive market conditions and methods of price setting, consequently, are the chief focal points around which monopoly inquiry revolves.⁷² As the situation moves from monopoly to oligopoly, or monopolistic competition between a few very large firms within an industry, standards for judgment are less clear, but the relevant inquiry still concerns market control.

The question that must be raised at this point, however, is whether the traditional nomenclature of monopoly power, with all its connotations, is adequate to the task of description and analysis needed if the diversified, multi-line corporation—the conglomerate—is to be placed in proper perspective *vis-a-vis* the antitrust laws. At the present stage of knowledge and analysis,⁷³ it is the opinion of many authorities that the conglomerate firm, and more specifically, the conglomerate merger, is too far out of focus to be viewed sharply through

⁷⁰ *Id.* at 618.

⁷¹ *United States v. Maryland & Va. Milk Producer's Ass'n*, 167 F. Supp. 799, 804 (D.D.C. 1958), *aff'd*, 362 U.S. 458 (1960). It should be noted that while the court below properly discounted and refused to admit testimony on intent or motive as justification evidence, on behalf of the defendant, it permitted the Government to introduce testimony on motive and intent as condemnatory evidence, so as to make its case even stronger against the particular merger in question.

⁷² See generally Scitovsky, *Economic Theory and the Measurement of Concentration*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 101 (1955).

⁷³ For an excellent study of the shortcomings of section 7 enforcement policy, stemming from a lack of sufficient economic data, see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960). "The primary reason for our present inability to predict the probable effects of most mergers is that so much is still unknown concerning the relative importance of the various factors involved." *Id.* at 270.

the lens of the Clayton Act.⁷⁴ Standards and data are too speculative and conjectural to offer any sound hope that conglomerate acquisitions can ever be brought within the sweep of the Act. As pointed out previously, though there can be little doubt that conglomerate mergers are within the ambit of section 7 as a matter of projected legal possibility, there is widespread doubt among authorities as to whether this form of acquisition is within the statute as a matter of practical economic probability. The misgivings stem from the fact that antitrust enforcement involves far more than a network of abstract legal precepts. Of necessity it also involves painstaking analysis of empiric data drawn from the realities of economic experience and behavior.

Since economic data must be consulted, the next problem arises in determining what kind of data will be presented, and how much. The phrase "quantitative substantiality"⁷⁵ has been brought forward in litigation and discussion under Section 3 of the Clayton Act, only to be scorned and driven from the scene.⁷⁶ Though some groups will wish for a single set of rules delimiting illegal activity under the Clayton Act, economists will warn that all relevant factors must be examined before satisfactory answers can be formulated. But to plunge into the jungle of all relevant economic factors may invite disaster. The confusion introduced by a wholesale examination of all data available in any given case may drive antitrust enforcement programs to the point of unworkability, and may be their undoing.⁷⁷ The method of measuring economic concentration and market power thus becomes crucial.

But if conglomerate concentration cannot be analyzed within the usual conceptual framework and nomenclature of monopoly and market control, then it is submitted that the focus be placed on size and bigness of such, honestly recognizing that the problem of conglomerate strength brought about by diversification mergers is a problem stemming from inherent size and economic power.⁷⁸ The advantage of this approach is that emphasis is shifted from the particularities of market control stated with reference to a particular kind of product. A large diversified company will successfully compete in several product markets at the same time. It may have no monopolistic domination or strong market control in any particular line,⁷⁹ but the impact of its accumulated financial strength will be felt sharply by the small, single-product competitor. The situations presented in *Procter and Gamble* and *Reynolds Metals* amply illustrate this.

74 KAYSEN & TURNER, ANTITRUST POLICY 131 (1959); KEEZER, NEW FORCES IN AMERICAN BUSINESS 170 (1959); Webster, *The Clayton Act Today: Merging and Marketing*, in 1959 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH THE CLAYTON ACT 83 (1959); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 184 (1955); Adelman, *The Du Pont-General Motors Decision*, 43 VA. L. REV. 873, 875 (1957). It is also significant that the report of the Attorney General's Committee specifically excluded any treatment of the conglomerate merger. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 119 n. 11 (1955).

75 Standard Oil Co. of California v. United States, 337 U.S. 293, 298 (1949).

76 See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955), wherein it is asserted that in no merger case under § 7 can the "quantitative substantiality" rule be substituted for a broader examination of the relevant market factors.

77 See Bok, *supra* note 73, at 295-99.

78 This is the line of analysis developed by Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955).

79 *Id.* at 336.

Further, it must be recognized that a truly conglomerate firm is rare.⁸⁰ There will almost always be horizontal and vertical connectives in any large diversified operation, thus further complicating the isolation of particular data necessary to determine the extent of control and anticompetitive power within any particular market.

Let us take but one example of how the conglomerate firm may be analyzed in terms of anticompetitive power without direct resort to concepts of monopolistic domination and market control. Let us say that *A* Corporation produces 50 discrete items, with a sufficient degree of functional independence to warrant calling the firm conglomerate. Let us further say that one of *A* Corporation's items, Product *X*, has 10 per cent of the total sales market, the remainder of the market being fragmented among 10 or 12 other firms in a highly competitive situation. By using Product *X* as a loss leader, selling it at below cost, strong consumer demand can be created.⁸¹ Additionally, if *A* Corporation has integrated retail outlets, the loss leader can create a large consumer attraction for its other products as well. The loss leader thus serves the twin purpose of increased consumer demand for Product *X*, and expanded consumer exposure to the remaining 49 products. The loss taken on Product *X* can be adequately absorbed by the large conglomerate because of its financial strength spread throughout a large number of markets, whereas the competitors of *A* Corporation cannot meet the lower price at which Product *X* is sold. As a result, Product *X* eventually captures a substantial bulk of the total sales, driving the small single-product competitor from the market. *A* Corporation can then adjust its prices upward to meet its production costs of Product *X*.

The only factor preventing *A* Corporation's absorption of the entire market will be another conglomerate, producing the same product, able to match the downward adjustment of *A* Corporation's loss leader. At this point, the market becomes oligopolistic, with two or perhaps three firms controlling the entire market. But the point is unimportant. What is important is that several small competitors have been driven from a market that was formerly highly competitive.

Other examples could be cited showing how a conglomerate, by its sheer size and financial resources, can drive small competitors from the market. As already pointed out in connection with the *Proter and Gamble* case, large-scale advertising is perhaps the most potent weapon available to the large diversified firm. In a small industry, where a dozen competitors may have a roughly equal share of the market, the advertising and promotion capabilities of any one firm will never so far outweigh other producers so as to give a distinct competitive advantage to one firm. But if one firm out of this dozen suddenly merges with a large and prosperous concern, its increment in advertising and promotional potential quickly forces the smaller firms into a non-competitive position. Unable to compete successfully, the small firms are then easy prey, subject to acquisition themselves.

In addition to the strong possibility of driving existing competition from

⁸⁰ *Id.* at 331 n. 1. See also Stigler, *Mergers and Antitrust Policy*, 104 U. PA. L. REV. 176, 184 (1955).

⁸¹ For a general discussion of the concept of loss leader, see CAMPBELL, *THE CONSUMER INTEREST* 231-32 (1949).

the market, the conglomerate acquisition by a large, financially stable firm of a small competitor will also make entry into the market by new competitors more difficult. Economic theory discusses entry by new competition in terms of the ability or inability of existing firms persistently to raise their prices above minimum cost levels without attracting new competitors.⁸² That is, if entry is easy, existing competitors cannot afford to raise prices persistently without running the risk of new firms appearing in the market who can produce the product at a lower cost, thus bringing prices down. On the other hand, if existing firms can continue to raise prices but no new competitor can successfully capture part of the market by setting a lower price, entry becomes more difficult, and the particular industry more nearly approaches a state of monopoly wherein prices are not determined competitively. Inability of potential new entrants to penetrate a market is one of the standard criteria for determining the illegality of a merger under section 7.⁸³

In view of the substantial anticompetitive effects that can be introduced into a given market structure by a large conglomerate, it is puzzling that so eminent an authority as Professor Stigler should say that "... the exact mechanics by which the total power possessed by the firm gets to be larger than the sum of the parts (in individual markets) escape me, and I am not sure that there are any companies that meet the specifications of the conglomerate firm."⁸⁴ Professor Stigler is right in saying that the pure conglomerate firm, functionally and organically distinct in all its operations, is perhaps rare. But it seems impossible to deny the existence of several diversified, multi-line firms in American industry that exhibit "significant degrees of incoherence in business function"⁸⁵ in discrete markets to warrant their separate classification and treatment for antitrust purposes.

Taking the existence of such firms as a working premise, it is submitted that the dominant and individualizing characteristic of the conglomerate firm is *the ability to shift financial resources and competitive strength through a broad front of functionally discrete markets, strategically altering the selected point of greatest impact as time, place, and market conditions require*. As pointed out in the hypothetical case posed above, it is unnecessary that the conglomerate enjoy full domination in any one market. It may have no more than 10 per cent of any one market, but it is able to concentrate its efforts at one point by shifting its financial resources and competitive strength from one market to another.

Consequently, any conglomerate merger which triggers this strategic shifting of financial resources and competitive strength should be prohibited by section 7, if it substantially lessens competition or tends to create a monopoly. This approach follows the general rationale set out in *Reynolds Metals* and also by the hearing examiner in *Procter and Gamble*. If the conglomerate merger cannot be successfully analyzed by means of the traditional nomenclature and conceptual

82 BAIN, BARRIERS TO NEW COMPETITION 3 (1956).

83 See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 606-07 (S.D.N.Y. 1958). See also Finding No. 4 in *Procter and Gamble Co.*, *supra* at 262.

84 Stigler, *supra* note 80, at 184.

85 Edwards, *supra* note 78, at 331, n. 1.

structure of monopolistic concentration and market control, then the alternative holding the most promise is to stress the strategic shifting of financial resources and market strength among a number of different markets.⁸⁶

It has been urged that striking down conglomerate mergers because of an increase in managerial talents and productive facilities, or because of an increase in financial resources "would come close to penalizing economic power without more."⁸⁷ This, it is submitted, is an erroneous conclusion. First, the question under section 7 is whether the merger may substantially lessen competition or tend to create a monopoly. If either of these conditions are produced by a given merger, it is irrelevant *how* the condition was achieved. Was competition in fact lessened within this line of commerce? That is the only relevant inquiry.⁸⁸ The fact that market domination or monopoly was achieved because of large economic power has nothing to do with it. Second, it is important to see the manner in which the large conglomerate is able, strategically, to shift its financial resources and competitive strength from one market to another. The small, single-product firm generally cannot afford many of the techniques and programs so necessary to modern-day economic survival, such as mass advertising, continuing product research, and long-term capital borrowing at low rates.⁸⁹ The competitive superiority of the conglomerate firm seems beyond dispute. If this superiority results in a substantial lessening of competition in a market entered by the conglomerate, the strictures of section 7 should be invoked. Further, as Professor Edwards has pointed out, the large firm also enjoys substantial non-market advantages over its smaller rivals in such activities as litigation, politics, and public relations.⁹⁰ These sources of superior power further strengthen the diversified company's competitive advantage.

It may not be necessary to go this far, however. It has been argued that the conglomerate can be analyzed within the usual conceptual framework of market control and monopoly.⁹¹ This may well be true, at least for purposes of section 7 of the Clayton Act. Inasmuch as section 7 is designed to prevent monopoly in advance, rather than correct a monopolistic condition once it has

86 See Union Carbide Corp., FTC Dkt. No. 6826 (1958), wherein the hearing examiner dismissed a complaint against respondent, a large multi-line conglomerate, which had alleged that it had acquired a non-related industry and then supported its operations with its huge resources. The position unsuccessfully urged by the Government was substantially the same one taken in this article.

87 Webster, *The Clayton Act Today: Merging and Marketing*, in 1959 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH THE CLAYTON ACT 83 (1959).

88 The Supreme Court has said:

We hold that *any* acquisition by one corporation of all or any part of the stock of another corporation, *competitor or not*, is within the reach of the section [7] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. *United States v. du Pont & Co.*, 353 U.S. 586, 592 (1957). (Emphasis added.)

89 See Stigler, *Introduction*, BUSINESS CONCENTRATION AND PRICE POLICY 12 (1955); KEEZER, *op. cit. supra* note 52, at 163-64. The Small Business Investment Act, 72 Stat. 689 (1958), 15 U.S.C. §§ 661-96 (1958), may provide some relief in this area by making long-term credit available to companies that would otherwise be unable to obtain equity capital from commercial banks or other institutional investors.

90 Edwards, *op. cit. supra* note 78, at 345-49.

91 Stocking, *Conglomerate Bigness—Comment*, in BUSINESS CONCENTRATION AND PRICE POLICY 352 (1955).

been achieved, it would seem clear that the conglomerate merger could be analyzed with reference to competitive deterioration and market control in the market occupied by the acquired company.

As the Supreme Court has said, "Monopoly power is the power to control prices or exclude competition."⁹² Consequently, if a large, multi-line firm diversifies its operations even further by acquiring a small firm in a highly competitive market composed of several small units, with competition being excluded and driven from the market occupied by the acquired firm, there is, arguably, sufficient warrant for the application of section 7. If, following the merger, substantial concentration were observed taking place within the market occupied by the acquired company, the provisions of section 7 could be invoked to undo the acquisition.⁹³

Conclusion

The conglomerate merger, slippery and unmeasurable, is now within the scope of the Clayton Act. The legislative draftsmen declared that this form of merger is to be proscribed if it has the effect of substantially lessening competition or tends to create a monopoly. The legal authorization for antimerger activity in this field is clear. The operational dimensions of section 7 are less clear, owing to deficiencies in economic prediction and understanding. Whether these two levels of analysis can be brought together into one coherent formulation, producing an intelligible antitrust enforcement policy, depends on a number of factors. The chief factor, it would seem, is whether the true characteristics of the conglomerate merger are recognized for what they are. The conglomerate firm derives its strength from its financial resources, its size, from a number of non-market power advantages, and most important, from its ability to shift these advantages from one market to another. If these attributes do not fall into the customary theoretical molds of monopoly and market power, then new fronts of economic theory and analysis must be explored, and new dimensions of economic reality must be penetrated.

A large number of mergers intended for diversification of already existing operations will never be subject to attack under section 7, simply because no lessening of competition will result. Indeed, in many such mergers, competition will no doubt be quickened, due to the gathered strength of small business enterprises now more able to match the efforts of larger competitors. As to mergers in this class, we hail them as salutary, sure in the knowledge that the health of our economy would be the worse by preventing them.

But upon conglomerate mergers carried out by firms already well diversified into several markets, the law must look with a more critical eye. When an already large multi-line company moves into a market occupied by small competitors, as occurred in *Reynolds Metals*, alert surveillance by the antitrust enforcement agencies is most decidedly necessary if the relevant market in which the acquired company competes is to be protected. If substantial competitive deterioration

⁹² *United States v. du Pont & Co. (Cellophane)*, 351 U.S. 377, 391 (1956).

⁹³ This is substantially the position taken by Jacobs, referred to above, in his comment on the *Reynolds Metals* case. See note 40 *supra*, and accompanying text.

develops after the merger has taken place, appropriate investigation⁹⁴ and enforcement measures⁹⁵ should be taken. As with all antitrust enforcement, specific guidelines must be hammered out on the forge of individual cases and litigated controversies. With the swift pace of merger activity at the present time, we can hope that such clarifying specifications will soon be forthcoming.

94 See S. 166, 87th Cong., 1st Sess. (1961), recently introduced by Senator Kefauver, which would require that advance notice be filed with the FTC and the Attorney General of any merger wherein the combined capital and surplus of the corporations exceeded \$10,000,000.

95 S. 167, 87th Cong., 1st Sess. (1961), also introduced by Senator Kefauver, which would enlarge the powers of the Justice Department to compel the production of documentary evidence pursuant to an investigation of antitrust violations.