Book Review
A Harsh Report Card on the Merger Enforcement Process

John Kwoka
Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy
MIT Press 2015

Reviewed by Robert A. Skitol

John Kwoka’s new book on the effects of merger remedies is particularly interesting to read in the immediate aftermath of the antitrust agencies’ December 2014 celebration of the 100th birthday of the Clayton Act. Officials of both agencies used that occasion to remind the general antitrust community of the “incipiency” feature of that legislation.¹ There is a dramatic disconnect between adherence to that incipiency standard and the picture Kwoka presents on the effects of mergers that the agencies cleared or subjected to negotiated remedies over the last 30 years. More fundamentally, Kwoka undercuts any confidence that the agencies have effectively protected consumers from the anticompetitive effects of merger activity.

The heart of this book is a compilation and synthesis of all available methodologically sound studies of the effects of mergers that survived the antitrust review process over the course of the past three decades. More such “merger retrospectives” were available for this study than most of us might have assumed. Kwoka found nearly 50 qualifying studies encompassing more than 3000 mergers altogether. Combining all of the data from all of these studies, he ends up with a rich lode of material on the extent to which cleared mergers had price-increasing effects or anticompetitive nonprice effects. He was also able to provide observations on the extent to which these effects resulted from mergers subjected to divestiture remedies versus mergers subjected to “conduct” remedies.

It is important to recognize that this book is more than just one more study or summary of prior studies of merger effects. Its contribution is its exhaustive nature. It is a “meta-analysis” of all methodologically sound studies of this sort and thus examines everything presently known about merger effects and about the effectiveness of merger enforcement policies generally. Even for those who might have anticipated the conclusions, this analysis is a substantial advance; for skeptics, it represents a persuasive challenge to their views.

Here are some of Kwoka’s more provocative findings:

• “At the product level, the average outcome for all 119 observations on postmerger prices is an increase of 4.3 percent . . . . More than 60 percent of product price changes show

increases, and those increases average nearly 9 percent. Of all mergers that resulted in price increases, the agencies acted in only 38 percent of cases, suggesting substantial under-enforcement. Incorrectly cleared mergers on average resulted in price increases in excess of 10 percent.\(^2\)

- “For all cases in which the agencies challenged mergers, the outcome was . . . an average price increase of 7.71 percent, indicating incorrect determinations or ineffective remedies to the mergers. . . . [D]ivestiture remedies are associated with price increases of 6.11 percent,” casting doubt on their adequacy. “Conduct remedies result in price increases of 12.81 percent, suggesting that these are largely ineffective in restraining postmerger price increases.”\(^3\)
- “Retrospective studies of groups of mergers collectively reporting only their average effect . . . show a product-level price effect of mergers averaging a 5.42 percent increase.” Those studies also estimate a 4 percent decrease in quality and a 9.73 percent decrease in R&D.\(^4\)
- “At the merger level, grouped-merger studies report an average price increase of 5.92 percent” and nonprice effects mirroring those found at the product level.\(^5\)

Among his overall conclusions are the following:

- “[M]ost studied mergers result in competitive harm, usually in the form of higher price. In a great many cases that harm is substantial, for example, with postmerger price increases exceeding 10 percent. . . . [I]f the sample is representative of mergers that are competitive ‘close calls,’ then it casts direct light on whether the enforcement line is correctly drawn” and “we can conclude that recent merger control has not been sufficiently aggressive in challenging mergers.”\(^6\)
- Merger enforcement “has over time both diminished overall and tilted toward especially problematic mergers. The net effect has been to focus on mergers most directly causing harm, but the diminished attention to mergers involving somewhat lower market shares and concentration appears to have resulted in approval of significantly more mergers that prove to be anticompetitive.”\(^7\)
- “Without much obvious evidence, a view has arisen that most large mergers produce efficiencies and consumer benefits and hence that merger policy at the margin should avoid challenges because of the high likelihood of preventing efficiency-enhancing consolidations. The data compiled in this project demonstrate that relatively few Type I errors [false positives] are in fact made” and “[f]ar more common are Type II errors [false negatives]—clearing anticompetitive mergers—with considerable adverse effects on competition and consumers.”\(^8\)
- While less frequently studied, “the nonprice effects of mergers generally mirror the measured price effects. Anticompetitive price increases tend to be accompanied by reductions in

---


\(^3\) Id. at 156.

\(^4\) Id. at 156–57.

\(^5\) Id. at 157.

\(^6\) Id. at 158.

\(^7\) Id.

\(^8\) Id.
Given Kwoka’s findings and overall conclusions, his recommendations make great sense. The agencies should want to understand why so many of the mergers they have allowed to occur, with or without negotiated remedies, ended up being anticompetitive. Indeed, as FTC Chairwoman Edith Ramirez discussed in some detail two and a half years ago, over the course of the past three decades the FTC has devoted considerable resources to the kinds of retrospective studies that Kwoka seeks to promote. This effort has included studies of the effectiveness of 50 consent orders requiring divestitures; a major study of the effects of consummated hospital mergers that became the foundation for major reforms that decisively strengthened the agency’s ability to win recent contested hospital merger cases; retrospective studies of five petroleum industry mergers; and a retrospective study of grocery store mergers across 14 markets. The Department of Justice has no comparable record. It did undertake, however, at least one such study in recent...
years involving the effect of the 2006 Whirlpool/Maytag merger that was cleared with no remedy after a lengthy Second Request investigation. 16

Indeed, the official release of the Kwoka book in the first week of January 2015 coincided with the FTC’s announcement at the end of that same week of its new proposal to “study the effectiveness of the Commission’s orders in merger cases where it required a divestiture or other remedy. The study would update and expand on the divestiture study the FTC issued in 1999, and should provide information on whether the orders met their remedial goals.” 17 The Kwoka book surely will inform and enrich that study over the year ahead.

A pressing question is whether the 2010 Horizontal Merger Guidelines18 have improved or diminished the agencies’ performance. One test would be whether Kwoka’s data show that mergers that the agencies cleared unconditionally—without extracting any remedy—and that gave rise to anticompetitive effects have been either more frequent or less frequent since adoption of the 2010 Guidelines than in the five years prior to that adoption. If less frequent, the agencies might infer appropriately that the new Guidelines are an improvement over prior iterations. If more frequent, however, the new Guidelines could be part of the problem. It would be disheartening, to say the least, to learn that more, rather than fewer, Type II errors result from merger reviews governed by those new standards versus reviews governed by standards adopted two decades ago. Indeed, if the frequency of Type II errors has not declined, the agencies may want to rethink key parts of the 2010 Guidelines to try to understand why.

More specifically, the agencies should want to look for trends in reasons to close investigations without any action when the transaction ends up being anticompetitive. Perhaps, for example, the agencies would discover that a substantial percentage of those instances involved acceptance of an ease of entry rationale for the clearance. This would invite fresh thinking about the ease of entry standards in the current Guidelines and the desirability of a stricter test for any determination that entry is “likely” or would be “sufficient” to protect against an unwarranted postmerger price increase. The agencies similarly might find that a substantial percentage of those clearances involved markets for differentiated products where the reviewing agency erred in finding that each of the merging parties was a closer competitor to a non-merging party than it was to the other merging party, thereby appearing to obviate concern with the potential for unilateral effects. This might prompt revisions to methodologies for determining the risk of unilateral effects generally.

It is also possible that Type II errors have been increasing for reasons unrelated to new aspects of the 2010 Guidelines. The explanation may be that the merger enforcement staffs at both agencies have been overloaded by increasing numbers of mergers requiring Second Request investigations in the face of increasing levels of concentration in many parts of the economy. In short, the agencies may have become seriously underfunded and thus ill-equipped to deal with all of the

---

16 See Thomas O. Barnett, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives, Lewis Bernstein Memorial Lecture 19 (June 26, 2008) (reporting results “consistent with the predictions made based on our investigation that sufficient competition would remain and that the merger would enable significant efficiencies, which could offset other cost increases, such as the rise in the price of steel”), available at http://www.justice.gov/atr/public/speeches/234537.htm. Kwoka reports the results of a more recent study that concluded that the merger harmed consumers because of price increases in other product lines. Kwoka, supra note 2, at 77–81 (summarizing Orley Ashenfelter et al., The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool, 5 AM. ECON. J.: ECON POLICY, Feb. 2013, at 239).


transactions demanding their full attention. To the extent this is part of the problem, the agencies could make effective use of the Kwoka findings and overall analysis in support of requests for increased funds for merger enforcement activity.

In any event, the agencies should be particularly interested in understanding why divestiture remedies have not sufficed to protect against anticompetitive effects in an apparently significant number of instances. The typical divestiture remedy in FTC consent orders and DOJ consent decrees in recent years has appeared to be quite comprehensive in the specification of assets to be transferred to the agency-approved buyer and has included a host of provisions requiring interim assistance to that buyer to maximize prospects for competitive viability.

Both agencies have taken publicized steps to strengthen their divestiture remedy requirements in recent years.19 Perhaps the problem is that there are significant inherent risks of disruption and loss of momentum accompanying the transfer of a going business from one enterprise to another, and those risks might explain why a divestiture process enables the acquiring firm to increase its market share and its market power before the dust settles. The problem may be exacerbated by difficulty in finding a truly strong buyer interested in entering an already highly concentrated market dominated by entrenched incumbents. If that proves to be the explanation for inadequacy of the divestiture remedy in a significant number of instances, the agencies might need to alter expectations that divestiture can “always” be an acceptable conclusion to a merger investigation. More specifically, the agencies might want to signal generally that some products or market share overlaps in some market settings are “Too Big to Fix” (meaning that the proposed merger should be nixed altogether).

The recommendation that the agencies invest comprehensively in merger retrospectives and, in particular, require merging parties to produce post-merger information relevant to such studies might be resisted on grounds of both undue expense and questionable legal authority. Neither objection withstands scrutiny. The agencies can develop standardized protocols for information requests with sensitivity to burden concerns. As far as legal authority is concerned, there should be no issue in situations where a remedy is justified as a condition to merger clearance. The agency can simply include the postmerger information obligation in the consent order or consent decree. Alternatively, the FTC could utilize its broad authority under Section 6(b) of the FTC Act20 to require periodic submission of information necessary to retrospective analysis from all parties whose merger transactions trigger Second Requests. There is no apparent reason why the FTC could not include in that kind of 6(b) undertaking parties whose transactions are investigated by the DOJ as well as parties whose transactions are investigated by the FTC itself.

Kwoka’s new book effectively sets the stage for both enforcement agencies to undertake initiatives and projects along those lines. As noted above, the FTC is now moving ahead with its own major new study of remedies in its merger cases. By establishing the basic facts with regard to merger policy effects over a substantial period of time, the book moves the debate forward and toward steps to improve the effectiveness of merger enforcement policies.

---
