or otherwise directly or indirectly connected with, or under the control, direction, or influence of respondent or any of respondent's subsidiary or affiliated corporations.

Opinion of the Commission

NOVEMBER 26, 1963

By Elman, *Commissioner:*

The Commission's complaint, issued on September 30, 1957, charged that respondent's acquisition on August 1, 1957, of all the assets of Clorox Chemical Company violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). After extended hearings, the hearing examiner rendered an initial decision in which he found the acquisition unlawful and ordered divestiture. On appeal, the Commission, concluding "that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition * * * on competition", and hence that the record "should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits", ordered on June 15, 1961, that the initial decision be vacated, that the case be remanded to the hearing examiner for the reception of additional evidence, and "that after receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein."

On remand, additional evidence was introduced, and the hearing examiner rendered a second initial decision in which he again found the acquisition unlawful and ordered divestiture. In the course of oral argument on July 11, 1962, before the Commission on appeal from this decision, a question was raised whether the Commission was free to decide the case on the basis of the entire record, or whether it must assume that the record on the first appeal did not support a finding of illegality and confine its attention to the additional evidence introduced on remand. The Commission, believing that the public interest required that the case be decided on the entire record, directed reargument of all contested issues of fact and law (order of November 30, 1962). Reargument was held on January 30, 1963. The case is now ready for final decision on the entire record.

I. "Law of the Case"

We meet at the threshold the contention that notwithstanding the Commission's order of reargument, in which its intention to consider the issues of this case on the entire record was clearly announced, such a course is barred by the principle of "law of the case". The principle, that an appellate tribunal will not reconsider its own rulings of law on a subsequent appeal in the same case, is not, we think, applicable here.

The language of the Commission's order of remand, quoted above, should dispel any inference that a ruling on the sufficiency of the evidence to support the complaint was intended. The basis of the order, in fact, was that the record was inadequate for the making of any ruling, and hence required supplementation; decision of all the issues of the case was expressly postponed by the Commission pending receipt of the additional evidence; and the hearing examiner was directed to file a new initial decision on the basis of the entire record.

It is true that in its opinion accompanying the order of remand, the Commission expressed the view that the post-acquisition data on which the hearing examiner had relied heavily in his first initial decision did not support the examiner's finding of illegality. However, even if this tentative expression of opinion be deemed a ruling of law, plainly it affected only a single, narrow aspect of the case. Inasmuch as the post-acquisition evidence introduced in this case is not a material factor in our decision (see pp. 1582–1583 below), whatever ruling the Commission may earlier have made as to the relevance or sufficiency of such evidence to support a finding of illegality is, at this point, moot.

In any event, the doctrine of law of the case is not an inexorable command, but "only a discretionary rule of practice." *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199; see Note 65, Harv. L. Rev. 818, 822 (1952). Every consideration of fairness and of the public interest weighs in favor of our now deciding this case on the entire record. For one thing, only one of the present members of the Commission (Commissioner Anderson) participated in the decision of the first appeal. It would be a forced and unnatural exercise for us to consider the evidence introduced on remand in isolation from the rest of the record or attempt to divine how our predecessors would have reacted to that additional evidence. If we are to decide this case fairly and rationally, we must be free to draw our own inferences from the entire record.

In addition, it is a widely recognized basis for relaxing application of the doctrine of law of the case that the law has changed in the interim. Note, *supra*, at 822, n. 15. The expressions of opinion accompanying the order of remand were based on the view that post-acquisition evidence is crucial in a case of this sort—a view which has been undermined, if not rejected, by two supervening decisions of the Supreme Court (see discussion at p. 1556–1560 below.)

Accordingly, we feel free to consider the issues of this case unfettered by the observations made in the earlier opinion.

Nor can respondent argue that it has been unfairly surprised by being compelled to argue the case on the entire record. It was to eliminate any such possibility of unfairness that the Commission ordered reargument and gave the parties full opportunity to brief and argue the case on the entire record.

The consequence of the Commission's order of remand has been a regrettable delay in the final disposition of an already protracted litigation. However, delays of this kind are perhaps inevitable where, as here, difficult questions of law are presented which the courts have not authoritatively resolved. In any event, the remedy for such delays is not decision of the case in a truncated posture, but clarification of the issues through reasoned decision on the entire record.

II. The Facts and Background

The complaint alleges that the effect of the acquisition by respondent, The Procter & Gamble Company (Procter), of the assets of Clorox Chemical Company (Clorox), "may be substantially to lessen competition, or to tend to create a monopoly", in the manufacture of household liquid bleach throughout the nation.

Household liquid bleach is a 5¼% sodium hypochlorite solution which is used in the home as a germicide and disinfectant and, more importantly, as a whitener in the washing of clothes and fabrics. To a certain extent, the use of household liquid bleach overlaps that of other products, especially powdered bleach; also, liquid bleach in somewhat stronger solution has industrial uses. Nevertheless, the parties appear to agree that household liquid bleach is a distinctive product, recognized as such by the consumer and by the trade, and that it has no close substitutes (see p. 1560 below).

At the time of the acquisition, Clorox was the nation's leading manufacturer of household liquid bleach. Its annual sales of slightly less than $40,000,000 represented almost 50% of the national total,[1]

[1] Complaint counsel and respondent's counsel have stipulated the accuracy of the A. C. Nielsen Food Index, a compendium of statistics on the sales volume of various grocery products. The Index gives the following picture of household liquid bleach sales in 1957:

Market Shares of Household Liquid Bleach Manufacturers (consumer dollar basis)

Brand:	*Percentage of total U.S. sales*
Clorox	48.8
Purex	15.7
Roman Cleanser	5.9
Fleecy White	4.0
Hilex	3.3
Linco	2.1
Total	79.8
All other brands	20.2

and its market share had been growing steadily for at least five years prior to the acquisition.

As the table in note 1 shows, Clorox's principal competitor is the Purex Corporation. Unlike Clorox, which is engaged almost exclusively in the manufacture of household liquid bleach, Purex manufactures a number of products, including an abrasive cleanser (Old Dutch Cleanser), a toilet soap (Sweetheart), and detergents (Trend and News). Total sales of all its products were approximately $50,000,000 in 1957.

The table shows that in 1957 Clorox and Purex between them accounted for almost 65% of the nation's household liquid bleach sales, and, together with four other manufacturers, for almost 80%. The remaining 20% was divided among 132 listed (in Dun & Bradstreet), and a number of unlisted (roughly 91), small producers. (These figures may be somewhat overstated.) In addition, there seems to be a large number of extremely small, so-called "garage" or "down-cellar" bleach producers. Only eight manufacturers of liquid bleach have assets of more than $1,000,000; very few, in fact, have assets of more than $75,000.

Most manufacturers of household liquid bleach sell at least part of their production to grocery stores and supermarkets for resale to the consumer under the stores' own brand name. These private or house brands, however, appear to account for only a small proportion of the total sales of liquid bleach.[2] Clorox sells no private brand liquid bleach—all of Clorox's bleach is sold under the "Clorox" brand name—and Purex very little.

The equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive, and neither the product nor its process is the subject of a patent or trade secret. However, owing to its weight, to its low sales price per unit, and to the fact that it is ordinarily sold in bottles, household liquid bleach is expensive to ship. Freight, which the manufacturer pays for—the liquid bleach industry uniformly sells on a delivered-price basis—commonly averages more than 10% of unit cost. For this reason, household liquid bleach cannot profitably be distributed outside a radius of perhaps 300 miles from the point of manufacture. Most manufacturers, since they have only a single plant, are limited to a regional market. Indeed, Clorox, which has 13 plants distributed throughout the country, is the only producer selling on a national scale. Although Purex has as many plants as Clorox, it does

[2] In the Nielson Index, the private brand production of all manufacturers is included in the 20.2% residual category. The Safeway supermarket chain is evidently the only retailer of household liquid bleach that actually manufactures its private brand.

not distribute its bleach in the northeast or middle-Atlantic states. In 1957, Purex bleach was available in less than 50% of the national market. The other manufacturers of liquid bleach are still more limited territorially.[3]

As a result of the territorial limitations of Clorox's competitors, the percentage figures in the table in note 1 do not give an adequate picture of Clorox's position in the various regions of the country. For example, Clorox's seven principal competitors did no business in New England, metropolitan New York or the middle-Atlantic states, and Clorox's share of the liquid bleach sales in these areas was 56%, 64%, and 72%, respectively. Even in areas where the principal competitors of Clorox were active, Clorox's share of total liquid bleach sales was high. Except in metropolitan Chicago and the west-central states, Clorox accounted for at least 39%, and often for a much higher percentage, of liquid bleach sales in the various regions.

It is not immediately apparent how Clorox was able to obtain a leading position in the household liquid bleach industry. Clorox is not sold to the consumer at a lower price than other bleaches; on the contrary, it is a premium brand that commonly sells for several cents per quart more than regional, local or private brands. Nor is Clorox a better bleach than other brands; all household liquid bleaches are chemically identical. Nor is the industry plagued by inadequate productive capacity or shortages; none of Clorox's competitors is producing at full capacity, and, as was mentioned earlier, the manufacturing process is relatively simple and inexpensive.

The explanation seems to lie in the way in which household liquid bleach is marketed. It is a low-price, high-turnover consumer product sold mainly to housewives in grocery stores. As a consequence of the growth of the self-service grocery store or supermarket, the consumer is no longer dependent upon the storekeeper's advice in purchasing commonly used, inexpensive household items such as liquid bleach. The housewife purchases the brand that she sees displayed prominently on the shelf or that is familiar and attractive to her by reason of advertising or sales promotions. Since the amount of shelf space that the grocer gives a particular brand is largely a function of the sales volume of the brand, it is apparent

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[3] For example, 60% of the sales of Linco, the sixth-largest-selling liquid bleach brand (see note 1, *supra*), are made in metropolitan Chicago. There was evidence that some liquid bleach brands are marketed only in the Italian neighborhoods of New York City.

that the success of a particular brand of liquid bleach depends upon the manufacturer's successfully pre-selling it, whether by means of attractive packaging, a low price, advertising and sales promotion efforts, or otherwise. Cf. *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 893 (S.D.N.Y. 1963).

Prior to its acquisition by Procter, Clorox had not been active in "sales promotions", a term which embraces such selling devices or gimmicks as price-off labels, two-for-one offers, coupons, free samples, premiums and contests. But it had advertised extensively. In 1957, for example, Clorox spent $1,750,000 for newspaper advertising, $560,000 for magazine advertising, $258,000 for radio and billboard advertising, and $1,150,000 for television advertising. Advertising expenditures, thus, were equal to almost 10% of total sales.

As a result of Clorox's long-continued mass advertising, its trade name had become widely known to and preferred by the consumer notwithstanding its high price and lack of superior quality. Most manufacturers of liquid bleach lack the financial resources to advertise or promote extensively. Purex, it is true, is a large advertiser, but its advertising—and *a fortiori* that of Clorox's lesser competitors—is very possibly less effective than Clorox's because of Purex's territorially limited distribution. It is apparent that the effectiveness of advertising in media of mass circulation normally is enhanced if the product is sold nationally. See, e.g., Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, 20 J. of Marketing 336, 340, 344 (1956). Obviously, it is relatively inefficient to pay for national advertising coverage, e.g., in national magazines or network television, without having national distribution of the advertised product. In general, moreover, it is rarely possible to adjust the dissemination of an advertising message to the precise bounds of the territory in which the advertised product is distributed. In addition, in a nation such as ours, which has a very mobile population, a brand obtainable by the consumer in every part of the country is likely to be better known than and preferred to a product marketed only regionally or locally.

The allegiance to a particular brand that is created by mass advertising and promotion tends, in the case of low-cost, high-turnover household products, to be somewhat ephemeral; the housewife is easily lured from her accustomed brand by promotional and advertising efforts on the part of rival manufacturers. The record in this case contains a graphic illustration of the volatile quality of consumer brand preferences. In Erie, Pennsylvania, Purex launched a major "attack" on Clorox's theretofore entrenched position (Clorox enjoyed more than 50% of the sales in the area) by marketing Purex liquid bleach in a new container and by promoting the "improved" product intensively by means of price-off labels and coupons. Within a few weeks, Purex, which previously had done no business in the area, had won a market share of more than 30%. Clorox immediately counter-attacked, however, and, by means of strenuous promotional efforts (consisting of price-off and premium offers), coupled with intensive advertising, soon forced Purex's share down to 7%.

At the time of its acquisition of Clorox, Procter was one of the nation's 50 largest manufacturers, with total net sales in 1957 of $1,156,000,000. Procter manufactures a wide range of low-priced, high-turnover household consumer items sold through grocery, drug and department stores,[4] but prior to the acquisition of Clorox, it did not produce household liquid bleach. Procter's major locus of activity is in the general area of soaps, detergents and cleansers.[5] In 1957, of total domestic sales, more than one half ($514,000,000) were in this field. In packaged detergents alone,[6] Procter's sales were $414,000,000, and this was 54.5% of the national total. In the household cleansing agents industry, Procter's principal competitors are Colgate-Palmolive and Lever Brothers. Together, these three firms account for more than 80% of total sales. Procter is the leading firm of the three. In 1957, total sales of Colgate-Palmolive and Lever Brothers were $291,000,000 and $250,000,000, respectively. There are no other firms in the industry of comparable size. Purex was the next largest after the "Big Three", with sales, as was noted

[4] In the answer to the complaint, respondent offered the following "list of the most important brands sold by respondent": *"Soaps, Detergents and Cleansers:* Ivory Soap—all-purpose bar soap; Ivory Flakes—mild all-purpose flake soap; Ivory Snow—mild all-purpose granulated soap; Camay—hard-milled perfumed toilet soap; Lava—pumice hand soap; Duz—detergent and granulated soap; Tide—heavy-duty detergent; Cheer—heavy-duty detergent; Dreft—light-duty detergent; Oxydol—heavy-duty detergent; Dash—low sudsing heavy-duty detergent; Joy—liquid general purpose detergent; Comet—scouring cleanser; Cascade—detergent for automatic dishwashers; Spic and Span—paint and linoleum cleaner; Zest—detergent toilet bar; *Food Products:* Crisco—vegetable shortening; Golden Fluffo—vegetable and lard shortening; Big Top—peanut butter and peanuts; Duncan Hines—prepared baking mixes—15 kinds; *Toilet Goods:* Crest—fluoridated toothpaste; Gleem—toothpaste; Drene—liquid shampoo; Prell—paste and liquid shampoo; Shasta—cream shampoo; Lilt—home permanent; Pin-It—home permanent; *Paper Products:* Charmin—household toilet tissue; Lady Charmin—household toilet tissue; Charmin—facial tissue; Charmin—paper napkins; Charmin—paper towels; Evergreen—industrial paper towels and tissue. On a consumer dollar basis, Procter in 1957 had 31% of the nation's total sales of toilet soap; 32%, dentifrices; 30%, lard and shortening combined; 19%, shampoo; and see p. 1541 below.

[5] Soaps, detergents and cleansers, we shall call, for the sake of simplicity, "household cleansing agents". The term is meant to exclude mops, waxes, polishes, brooms and other such relatively high-priced, specialty items used in household cleaning.

[6] The term "packaged detergents" embraces heavy-duty high-sudser detergents, heavy-duty low-sudser detergents, heavy-duty soaps, heavy-duty liquids, light-duty synthetics, light-duty liquids, and light-duty soaps.

earlier, of about $50,000,000 in 1957 followed by B. T. Babbitt, Inc., with sales of less than $22,000,000.

In the marketing of soaps, detergents and cleansers, as in the marketing of household liquid bleach, extensive advertising and sales promotion seem to be the key to success. Procter is one of the nation's leading advertisers. In 1957, it spent upwards of $80,000,000 on advertising (principally television advertising) in the United States, and was, in fact, the nation's largest advertiser in that year. In addition, it spent $47,000,000 for domestic sales promotions alone. (Procter's total domestic sales in 1957 were approximately $900,000,000.) Colgate-Palmolive and Lever Brothers, Procter's principal competitors, also rank high among the nation's largest advertisers.

The record in this case contains a striking example of the role of advertising and promotion in the household cleansing agents industry. In 1957, Procter introduced a new abrasive cleanser, which it called "Comet". Over a 22-month period, Procter spent $7,200,000 for the advertising and sales promotion of Comet; 20 months after it first appeared on the market, Comet had attained 36.5% of the national market in abrasive cleansers. (The abrasive cleansers industry had total sales of $53,000,000 in 1957—somewhat more than one-half the total sales of household liquid bleach in that year.) It would appear that Comet's success is traceable mainly to the intensive advertising and promotional efforts made on its behalf. (See generally *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963); Klaw, "The Soap Wars: A Strategic Analysis", *Fortune*, June 1963, p. 122.)

Procter's acquisition of Clorox was the culmination of two years of study of the liquid bleach industry undertaken by its promotion department in order to determine the advisability of Procter's entering the industry. The first report from the promotion department observed that liquid bleach accounted for 90% of the large and expanding household bleach market and predicted that its ascendancy over powdered bleach would continue in the foreseeable future. The report, however, recommended not that Procter attempt to market its own brand of bleach, as it had repeatedly and successfully done with other household products, but rather that it purchase Clorox. Since, the report advised, "a very heavy investment" would be required for Procter to obtain a satisfactory market share for a new brand of liquid bleach, entry into the industry through acquisition of its leading firm was an attractive alternative. "Taking over the Clorox business * * * could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." The report predicted that Procter's "sales, distributing and manufacturing setup" could increase Clorox's share of the market in certain areas where it was low and effect a number of savings that would increase the profits of the business considerably.

A subsequent report from the promotion department confirmed the earlier recommendation, emphasizing that Procter management would be able to make more effective use of Clorox's advertising budget and that the merger would enable advertising economies.

A few months after the second report was filed, Procter acquired the assets of Clorox in the name of a wholly owned Procter subsidiary, The Clorox Company, in exchange for stock of Procter having a market value of approximately $30,300,000.[7] At the time of the exchange, Clorox's assets were valued at $12,600,000.

Since the acquisition, the top management of Clorox has been placed in the hands of Procter officials, and some degree of integration of Clorox and Procter activities has taken place (see p. 1583 below). By and large, however, Clorox has been operated as a separate entity within the Procter organization.

III. The Legality of the Merger Under Section 7

A. *Categories of Mergers*

The hearing examiner, respondent, and complaint counsel concur in describing the merger of Clorox and Procter as "conglomerate". This term, far from denoting a homogeneous class of mergers, tells us only that the instant merger is neither conventionally "horizontal" nor conventionally "vertical". An analysis of each of these terms is necessary before we proceed further in the discussion of this case.

A horizontal merger, as ordinarily understood, is one between firms that make or sell the same product, or products which are close substitutes for each other. However, unless the firms actually operate within the same geographical market, the merger will have no immediate impact upon the market share of the acquiring firm—the hallmark of a conventional horizontal merger. Where the merger involves companies selling in different geographical

[7] The Proctor shares received in the exchange were distributed to Clorox's shareholders, whereupon Clorox Chemical Company was dissolved. We shall refer loosely to the entire transaction as the merger of Clorox and Procter or the acquisition of Clorox by Procter.

markets (or, what may amount to the same thing, to different customer classes, cf. *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided January 17, 1964)) [64 F.T.C. ——————] we have what has been termed a market-extension merger. See *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962) [60 F.T.C. 944]. It may be a merger in which the acquired firm sells the same product as the acquiring firm and is a prospective entrant into the geographical market occupied by the acquiring firm. See *United States* v. *El Paso Natural Gas Co.*, 1962 CCH Trade Cases § 70571 (D. Utah), prob. juris. noted, 373 U.S. 930; *Foremost Dairies, Inc.*, *supra*, pp. 1087, 1088. Or the acquiring firm may be a prospective entrant into the market of the acquired firm. *Foremost Dairies, Inc.*, *supra*, pp. 1088, 1089.

Another variant of the conventional horizontal merger is the merger of sellers of functionally closely related products which are not, however, close substitutes. This may be called a product-extension merger. The expression "functionally closely related", as used here, is not meant to carry any very precise connotation, but only to suggest the kind of merger that may enable significant integration in the production, distribution or marketing activities of the merging firms. An example of a merger enabling integration at the production level would be the merger of a liquid bleach with a liquid starch manufacturer; the manufacturing processes involve many of the same raw materials and equipment. Integration at the level of physical distribution might occur in the case of products which, for example, are shipped together. Integration at the marketing level (including integration of advertising and sales-promotion activities) might result where products manufactured by the merging firms are sold to the same customers or through the same outlets, or are actually complementary.[8]

A vertical merger, conventionally understood, is one between firms at different points on the same chain of distribution, that is,

[8] See Hale, *Diversification: Impact of Monopoly Policy Upon Multi-Product Firms*, 98 U. Pa. L. Rev. 320, 331–32 (1950). A complementary relationship between products exist "when a rise in the consumption or purchases of one cause a rise in the demand for the other * * *." Boulding, Economic Analysis 226 (3d ed. 1955). See *United States* v. *Winslow*, 227 U.S. 202. See generally Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19 (1957). It has been suggested that a multi-product firm's activities be termed "divergent" when integration is enabled at the production level and the products are sold in different markets, and "convergent" when the products, though made through different processes, are sold through the same channels, by the same marketing techniques, or to the same customers. Thorp & Crowder, The Structure of Industry 146 (T.N.E.C. Monograph No. 27, 1941).

firms which actually or potentially are in the relationship of supplier and customer. Rather similar effects on competition, however, may result from a merger involving the acquisition not of a supplier but of a supplier's supplier.[9] And effects akin to the "reciprocity" which such a merger fosters may flow from any merger involving firms that deal in common with other firms. Thus, the merger of two firms having common marketing outlets might facilitate tie-in or full-line forcing agreements.

Only when the various subcategories of horizontal and vertical mergers have been exhausted (and the foregoing discussion of such subcategories is intended to be suggestive only) do we reach the true diversification or conglomerate merger, involving firms which deal in unrelated products. Cf. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949). An extreme example might be the purchase of a newspaper kiosk in New York by a bakery in California.

The merger of Clorox and Procter may most appropriately be described as a product-extension merger. Packaged detergents—Procter's most important product category—and household liquid bleach are used complementarily, not only in the washing of clothes and fabrics, but also in general household cleaning, since liquid bleach is a germicide and disinfectant as well as a whitener. From the consumer's viewpoint, then, packaged detergents and liquid bleach are closely related products. But the area of relatedness between products of Procter and of Clorox is wider. Household cleansing agents in general, like household liquid bleach, are low-cost, high-turnover household consumer goods marketed chiefly through grocery stores and pre-sold to the consumer by the manufacturer through mass advertising and sales promotions. Since products of both parties to the merger are sold to the same customers, at the same stores, and by the same merchandising methods, the possibility arises of significant integration at both the marketing and distribution levels.

The functional relationship between household liquid bleach and products manufactured by Procter appears to hold even if we look beyond household cleansing agents to the food, paper and toilet products which round out the Procter line. They also are low-cost, high-turnover household consumer goods which are sold largely,

[9] See *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided March 22, 1963) [62 F.T.C. 929]. Cf. Bigness and Concentration of Economic Power—A case Study of General Motors Corporation, Staff Rep. of the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong., 2d Sess. 41 (1956).

although not entirely, through grocery stores and are heavily advertised and promoted.

By this acquisition, then, Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established, and which is virtually indistinguishable from them insofar as the problems and techniques of marketing the product to the ultimate consumer are concerned. As a high official of Procter put it, commenting on the acquisition of Clorox, "While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low prices, rapid turn-over consumer products."

B. *General Principles in the Interpretation and Application of Section 7*

The lawfulness, under Section 7 of the Clayton Act, as amended, of the kind of merger involved in the instant case, is a question largely of first impression. In general, the conglomerate merger (in the broad sense of that term) has received little attention under the antitrust laws.[10] Its history of neglect appears to be due, first, to the erroneous view that Section 7 in its original form applied only to horizontal mergers[11]—a view which stultified enforcement of the antitrust laws against conglomerate mergers until the amendment of Section 7 in 1950—and, secondly, to economists' preoccupation with the number and size distribution of firms in a single market.[12] But at the same time that the conglomerate merger was being ignored by lawyers and economists, businessmen were resorting to it increasingly as a mode of corporation expansion. Today, many,

[10] The problems of conglomerate power occasionally arise, however, in the context of other provisions of the antitrust laws. See *United States* v. *Griffith,* 334 U.S. 100; *United States* v. *Swift & Co.,* 286 U.S. 106; *United States* v. *Swift & Co.,* 189 F. Supp. 885 (N.D. Ill. 1960); *Alexander Milburn Co.* v. *Union Carbide & Carbon Corp.,* 15 F. 2d 678 (4th Cir. 1926); cf. *United States* v. *E. I. duPont de Nemours & Co.,* 188 Fed. 127 (Cir. Ct. D. Del. 1911).

[11] This view was ultimately rejected by the Supreme Court in *United States* v. *E. I. duPont de Nemours & Co.,* 353 U.S. 586. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 313, n. 21.

[12] See, e.g., such assertions as, "The fact is that a truly conglomerate merger cannot be attacked in order to maintain competition, because it has no effect on market structure." Adelman, *The Antimerger Act, 1950–60,* 51 Am. Econ. Rev., 236, 243 (Papers and Proceedings, 1961). Cf. *United States* v. *Winslow,* 227 U.S. 202, 217. For a pathfinding study of the problems of the conglomerate merger under the amended Section 7, see Neal, *The Clayton Act and the Transamerica Case,* 5 Stan. L. Rev. 179 (1953).

perhaps most, mergers involving substantial firms are conglomerate, and concern has begun to be voiced.[13]

The absence of authoritative, specific precedents in this area compels us to look to basic principles in the interpretation and application of Section 7. The Commission and the federal courts have now had the benefit of more than a decade of enforcement of the amended Section 7, and the numerous decisions construing the statute include two by the Supreme Court. To the principles which have emerged, we turn for guidance in the instant case.

First. All mergers are within the reach of the amended Section 7, whether they be classified as horizontal, vertical or conglomerate, and all are to be tested by the same standard. This is plain not only from the statutory language, but from the legislative history as well: "[T]he 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."[14] The inclusion of conglomerate mergers within the scope of the statute cannot be dismissed as casual or inadvertent. This Commission's Report on the Merger Movement (1948), which played an important role in the deliberations leading to the amendment of Section 7, had emphasized the dangers presented by conglomerate mergers: "[T]here are few greater dangers to small business than the continued growth of the conglomerate corporation." *Id.*, at 59. Congress' clearly expressed concern with the conglomerate merger is in striking contrast to the preoccupation of lawyers and economists with tests that look only to the number and size distribution of firms in a single market, and is a challenge to this Commission and to the courts to devise

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[13] "In a word then, we find that the antitrust laws have failed to stem the horizontal and vertical merger movements of the 1890's and the 1920's, and have had no deterrent effect on the conglomerate merger movement of the 1950's and 1960's." Houghton, *Mergers, Superconcentration, and the Public Interest*, in Administered Prices: A Compendium on Public Policy 152, 158 (Comm. Print 1963). See Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *id.*, at 109–10, 130: Federal Trade Commission, Report on Corporate Mergers and Acquisitions 50–51, 54 (1955); Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, Staff Rep. of the H. Select Comm. on Small Business, 87th Cong., p. 44 (Comm. Print 1962). A suggestive statistic in this connection is that between 1947 and 1958, the 50 largest manufacturing firms in the nation increased their share of total value added by manufacture from 17% to 23%: the top 100, from 23% to 30%; the top 150, from 27% to 35%; and the top 200, from 30% to 38%. Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra*, at 13. See also Collins & Preston, *The Size Structure of the Largest Industrial Firms, 1909–58*, 51 Am. Econ. Rev. 989 (1961). One economist has suggested that the increasing concentration of the nation's industrial assets in the hands of large firms is attributable to the conglomerate-merger movement. Houghton, *supra*, at 154–55.

[14] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949); see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317.

tests more precisely adjusted to the special dangers to a competitive economy posed by the conglomerate merger.[15]

It must be stressed, however, that Congress, in seeking to bring "conglomerate" mergers within the reach of Section 7, did not thereby express the view that conglomerates are analytically a distinct merger class. Congress meant only that however a merger be characterized, its legal status under Section 7 is the same. As we have seen, even for purposes purely of description, the traditional threefold classification—horizontal, vertical and conglomerate—is unsatisfactory without considerable further refinement. More important, these definitional distinctions import no legal distinctions under Section 7. The legal test of every merger, of whatever kind, is whether its effect may be substantially to lessen competition, or tend to create a monopoly, in any line of commerce in any section of the country.

Second. The Supreme Court has recently declared, "Subject to narrow qualifications, it is surely the case that competition is our fundamental national policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 372. This policy informs all the federal antitrust laws, but some more explicitly than others. Section 7 predicates illegality specifically on the probability of a substantial anti-competitive effect; like the other sections of the Clayton Act, it singles out a particular class of business practices—corporate acquisitions—for especially strict antitrust scrutiny by the courts and the Commission. If the adverse effects on competition specified in Section 7 are proved, it will normally not be open to the respondent to show that redeeming social or economic benefits will flow from the acquisition.[16] In the words of the Supreme Court:

> We are clear * * * that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence,

[15] "Section 7 should be able to check a merger producing or enhancing the power of a giant firm without reference to the effect on concentration ratios in any particular market." Dirlam, *supra*, note 13, at 105. See Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 Antitrust Bull. 175, 178 (1956).

[16] The single exception is the failing-company defense (see *International Shoe Vo.* v. *F.T.C.*, 280 U.S. 291, 299–303), which, although not mentioned in the statute, seems plainly to have been intended by Congress to be carried forward in the enforcement of the amended Section 7. See H.R. Rep. No. 1191, 81st Cong., Ist Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). No contention has been made in this case that Clorox at the time of the acquisition was other than a profitable, healthy concern.

and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. *Philadelphia National Bank*, *supra*, at 371.

While a broad Rule of Reason may not be read into Section 7, it is clear that mergers are not to be judged according to a so-called *per se* standard. In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se rule* by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se unlawful*. In every case the determination of illegality, if made, must rest upon specific facts. There may be cases in which a relatively simple test of illegality is appropriate, as the Supreme Court has shown in the *Philadelphia National Bank* case, but this is possible only where consideration of the nature and circumstances of the merger in question indicates that such a test will provide an adequate basis for ascertaining whether the statute has been violated; and even in such cases no *per se* rule or conclusive presumption of illegality is applied.[17]

Third. The concept of competition which underlies the amended Section 7 has no simple or obvious meaning, and was defined by Congress neither in the statute itself nor in the course of the deliberations that led to its enactment. But some of its elements, at least, are clear. It has been observed by the Supreme Court that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[18] Congress' emphasis on concentration reflected its deep concern with what economists would call the problem of oligopoly (see S. Rep. No. 1775, 81st Cong., 2nd Sess. 5 (1950))—a problem that centers on undue or excessive market concentration. Indeed, the relationship between concentration (and related market-structure characteristics) and lessened competition is clearly, we think, at the core of Section 7. For this reason, the

[17] The rule applied in the *Philadelphia National Bank* case was one of presumptive illegality. The Court did not suggest that the substantial change in the concentration ratio in the relevant market as a result of the merger created an irrebuttable presumption that the merger would have the effects on competition specified in Section 7.

[18] *Brown Shoe Co., supra*, at 315. See *Philadelphia National Bank, supra*, at 363; Bok, *Section 7 of the Clayton Act and the Mergering of Law and Economics*, 74 Harv. L. Rev. 226, 306–07 (1960).

specific issues of this case must be placed in a larger frame of reference. Section 7 deals with the fundamentals of a free competitive economic system, and it is in the context of first principles that we must approach this case.[19]

In a market of, say, 100 sellers of roughly equal size, no seller need—or can—take into account his competitors' probable reactions in establishing his pricing or other business policies. No one seller in such a market is so powerful that he can retaliate effectively against a competitor who cuts prices or otherwise attempts to increase his market share; there are too many firms for deliberately interdependent pricing and other policies to be feasible (actual agreement, of course, would violate Section 1 of the Sherman Act); and no one seller's competitive behavior, however vigorous, is apt to endanger seriously the market share of any of his competitors, or even be apparent to them, since even if one seller increases his market share by 50%, the *pro rata* effect on each other seller's share will be only 1/200th. For these reasons, each seller is likely to establish his business policies in disregard of the actions of any individual competitor.

Conditions are very different in a market which has only, say, three sellers, each of equal size. If one cuts prices so as to increase his market share by 50% (i.e., to 50% of the market), each of his rivals will experience a 25% diminution in his respective market share. Unless they can operate profitably with their output thus curtailed, they must meet the price cut of their competitor. If there is active price cutting in such a market, the prices of all sellers will soon be forced down to the point at which they equal or barely exceed marginal cost—and no firm will be making a profit. Rather than incur price warfare that is bound to be mutually disadvantageous, each seller in a market of few sellers (an oligopolistic market) is likely tacitly to renounce price competition, and perhaps other forms of rivalry as well.[20]

What makes such tacit renunciation of price competition feasible in the oligopolistic market, as it is not in the atomistic market, is

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[19] The discussion of oligopoly and related economic concepts in the following pages is drawn from works generally accepted as authoritative in the field. See, *e.g.*, Bain, Barriers to New Competition (1956); Bain, Industrial Organization (1959); Chamberlin, The Theory of Monopolistic Competition (7th ed. 1956); Fellner, Competition Among the Few (1949); Machlup, The Economics of Sellers' Competition (1952); Business Concentration and Price Policy (National Bureau of Econ. Research 1955); Monopoly and Competition and Their Regulation (Chamberlin ed. 1954). See also Kaysen & Turner, Antitrust Policy (1959). The Supreme Court in the *Philadelphia National Bank* case, by its repeated citation of economic analyses such as the above works, has clearly indicated the propriety of a reviewing tribunal's consideration of such analyses in reaching its decision in a Section 7 case.

[20] Bok, *supra*, note 18, at 310.

the fact that the attempt of one seller to increase his market share is bound to have significant repercussions upon the market shares of his competitors, who are compelled, in consequence, to retaliate immediately with a matching price cut. The price cutter "can't get away with it" for very long, and so he is better off refraining from systematic price cutting. The consequence of each firm's refraining from price competition is likely to be an unnaturally high price level in the market and a general deadening of competition. Price leadership, "conscious parallelism", excess capacity, emphasis on heavy advertising in lieu of technological innovation, and "administered prices", are some of the symptoms of oligopoly.

Of course, not all market structures are so easily classifiable as either atomistic or oligopolistic as those we have described. There is no ascertainable critical point, in terms of the number and size distribution of sellers in the market, at which behavior characteristic of the atomistic market ends and that characteristic of the oligopolistic begins, for everything depends on the psychology of business planners.[21] Analysis of market structure does not tell us at exactly what point a particular firm, by reason of its own and its rivals' market shares, will decide it can no longer afford to ignore the probable reactions of its competitors in setting business policy.

Three further points about market concentration should be made. The first is that a market may be oligopolistic though a number of small firms exist alongside the few dominant firms. See *Philadelphia National Bank, supra*, at 367. But the small firms, in such circumstances, will not enjoy the same freedom of action as they would in an atomistic market, for they will not be competing on equal terms with the dominant firms. Where the disparity in market shares as between competitors is very large, the competitive disadvantage of the small firms is apparent. For example, if a firm with a market share of 2% doubles its production, a firm with a 33⅓% share of the same market will lose 2% of its sales. This may well be a sufficiently sharp decline to induce the large firm to meet the small firm's competitive foray, and, if the large firm reacts with great vigor, the result may be the destruction of its small rival. For should the large firm, by dint of vigorous competitive conduct, increase its market share from 33⅓% to 40%, the small firm's market share might shrink to nothing. In an oligopoly market, then, given the retaliatory power of companies having a strong market position,[22] small firms tend to exist at the sufferance of their large

[21] "Oligopoly is * * * characterized by the state of mind of a seller *vis a vis* other sellers * * *." Machlup, *op. cit. supra*, note 19, at 351.

[22] See Comment, 68 Yale L. J. 1627, 1639, n. 57 (1959). Cf. Edwards, *Conglomerate Bigness As a Source of Power*, in Business Concentration and Price Policy, *op. cit. supra*, note 19, at 331, 335.

rivals, and for that reason are likely to opt for peaceful coexistence—not vigorous competition—with those rivals. Small firms in such circumstances characteristically pursue the "quiet life", following the price leadership of the dominant firms in the market and otherwise conforming to the competitive norms established by those firms.

The second point is that oligopoly behavior does not depend upon there being any fixed size ratio among the leading firms. Nor need there be more than a single dominant firm. A market in which one firm enjoys, say, a share of 70%, with the balance divided among a number of other firms, will still exhibit the characteristics of oligopoly. The leader will have the kind of market power that compels his rivals to take his reactions into account in their business planning, and his disproportionate strength will tend to deter his small rivals from vigorous competitive activity.[23]

The third point is that market concentration is a variable of market structure, not of market behavior. Undue concentration itself is not a form of anti-competitive conduct, as, for example, raising prices in the face of declining demand may be; but undue concentration increases the probability that behavior in the market will be noncompetitive. In distinguishing market "structure" from "behavior", we do not mean to suggest that our concern is limited to a static, abstract model of market relationships. As will be seen shortly, market structure in a particular industry depends in significant respects upon the techniques of competition, and other dynamic factors, prevailing in that industry.

Although concentration may be the most important market structure variable and the one that was in the forefront of Congressional deliberations on the anti-merger statute, it is not the only such variable and it cannot be adequately understood apart from others. For present purposes, the most significant market structure variable after concentration is the condition of entry into the market by new competitors.[24] No firm will contemplate entry into a new market unless it feels reasonably sure of being able to obtain a satisfactory market share. If the firms in a concentrated market use their market power to maintain a very high price level, the attractiveness

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[23] Congress, indeed, appears to have been specifically concerned with the problem of single-firm dominance (short of outright monopoly) in amending Section 7. "The bill is intended to permit [legal] intervention * * * when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. Such an effect may arise in various ways: such as * * * [an] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive". H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

[24] It is not the only other such variable, however. For example, competition may be affected by whether the number of buyers from the firms in the market is small (oligopsony).

of entry is enhanced. For, in such circumstances, the new entrant, by selling somewhat below the prevailing price level in the market, will be able to obtain a foothold in the market yet still operate well above his break-even point, so long as his costs are not substantially higher than those of the firms presently active in the market. Thus, the possibility of entry—potential competition—may exercise a restraining influence on oligopolists, who will be inclined to maintain a price level low enough to discourage entry, i.e., actual competition. For this reason the existence of barriers to entry into a concentrated market, which enable the established firms to raise prices above a low, entry-discouraging level, is a factor that bears significantly on the existence of oligopoly conditions in the market.[25]

At least three factors may retard entry. The first is the possession of cost advantages by the firms presently occupying the market vis-a-vis prospective entrants.[26] Such advantages may stem from, for example, control of patents, a scarcity of raw materials, or impeded access to channels of distribution (absolute cost advantages), or from scale of operation (advantages or economies of scale). In the case of absolute cost advantages, the prospective entrant can compete with the established firms only at a substantial disadvantage, and the chances that he will be able to obtain a reasonable position in the market are, in consequence, reduced. Even if the prevailing price level in the market is well above his cost level, he will be vulnerable to retaliation by established firms which have a lower cost level and hence a greater flexibility in pricing. As for advantages of scale, the prospective entrant, if he is to compete on equal terms with the established firms, must be prepared to operate on a sufficiently large scale to be able to obtain the same advantages of scale enjoyed by the established firms. If the scale of optimum efficiency in the industry is substantial, a heavy initial investment may be required. To justify such an investment, the entrant must be in a position to obtain a large market share within a reasonable period of time. In these circumstances, the entrant is not only being made to play the competitive game for high stakes, but, by being forced to enter on a large scale, he is virtually ensuring a swift competitive response by the established firms. They might tolerate the obtaining of a small foothold by a new entrant, but they can hardly sit by while a large share of the market is absorbed by the newcomer.

[25] This is not to say, however, that the absence of substantial entry barriers will ensure effective competition in the market. See Bain, Barriers to New Competition 189 (1956).

[26] See Bain, Industrial Organization 249–51 (1959); Bain, *Conditions of Entry and the Emergence of Monopoly*, in Monopoly and Competition and Their Regulation 215, 226–36 (Chamberlin ed. 1954).

Another, and perhaps more important, entry-retarding factor is "product differentiation".[27] The term refers to consumer preferences as between very similar, close-substitute products or brands. Such preferences need not, and frequently do not, rest on real or substantial differences in terms of quality or usefulness. By reason of distinctive packaging, the firm's long history, mass advertising and sales promotions, or other factors, a firm may succeed in establishing such a definite preference for its brand that the consumer will pay a premium to obtain it, although it is functionally identical to competing brands. Such brand allegiance, which the prospective entrant, marketing a new brand, will not, of course, command, may be the cumulative result of the expenditure of many millions of dollars over a period of many years to promote the brand, and may, in consequence, be very difficult to counteract even if the entrant makes a very substantial initial investment to promote his own brand.[28] As a result, in an industry in which product differentiation is an important factor, not only may the new entrant find it especially difficult to pry customers loose from the established firms, but the higher price obtainable for a brand that has been successfully differentiated in the public mind from competing brands may impart a flexibility in pricing, akin to that imparted by cost advantages, which the newcomer may not be able to achieve for many years.

The third entry-retarding factor is the financial size or strength of the established firms in comparison to that of prospective entrants. Plainly, entry is more effectively deterred by the prospect of an established firm which can well afford to meet a competitive challenge, then by the prospect of a firm small compared to the entrant (though large in its market) or in poor financial condition.

[27] "[T]he most important barrier to entry discovered by detailed study is probably product differentiation." Bain, Barriers to New Competition 216 (1956). Some commentators, see, e.g., Kaysen and Turner, Antitrust Policy 74 (1959), follow Chamberlin in classifying product differentiation as a distinct market structure variable, rather than subsume it under condition of entry. Since, as will appear, condition of entry as we use that term is relevant not only to new entry, but equally to the competitive vigor of the existing firms in the market, it is of no practical significance whether product differentiation be deemed an independent factor or an aspect of condition of entry.

[28] See Bain, Industrial Organization 240, 250, 320 (1959); Bok, *supra* note 18, at 239. The Supreme Court has given explicit recognition to the role, in the repulsion of new competition, of heavy expenditures for product differentiation:

"The record is full of the close relationship between * * * large expenditures for national advertising of cigarettes and resulting volumes of sales * * *. Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 797.

The three entry-retarding factors obviously interact, most notably perhaps in industries in which the dominant firms have succeeded in differentiating their products through mass advertising and sales promotions. As noted earlier (see p. 1539 above), advertising in the mass media may not be optimally efficient except on the part of a firm which operates on a national scale; and, obviously, advertising on a national scale demands considerable financial strength. Moreover, the effectiveness of advertising and sales promotions would appear to increase, at least up to a certain point, in direct proportion to their volume. A seller with an advertising and sales promotion budget twice that of his principal competitor not only may be able to recoup his additional selling costs in the premium price that he is able to charge for his brand; in addition, his more intensive advertising and promotional efforts are very likely to increase his market share at the expense of his rivals, because the more advertising and promoting a firm does, the more intensively is the public exposed to and persuaded to buy the firm's brand. Thus, financial strength and large absolute size may be indispensable attributes in enabling a substantial market share to be acquired and maintained in industries characterized by product differentiation through advertising and promotions.[29] At the same time, given the extent to which effectiveness in the utilization of advertising and other promotional activities seems to be a function of size and strength, the scale necessary for a firm to operate at optimum efficiency in the market may become very large indeed. See Bain, Barriers to New Competition 138 (1956).

It is important to note that the factors making for high entry barriers also make for domination of small competitors by large, and so tend to eliminate actual as well as potential competition. If the large firm enjoys substantial competitive advantages by virtue of product differentiation, cost advantages or financial strength, any attempt by a small firm to expand its market share at the expense of the large firm is unlikely to succeed.[30] By the same token, should the large firm desire to expand its market share, the small firm, lacking comparable financial reserves, pricing flexibility, or a

[29] See Bain, Industrial Organization 172–73 (1959); Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, 20 J. of Marketing 336, 341 (1956).

[30] "In many cases * * * the most important benefit [from increased firm size] is the ability to support far larger budgets for advertising and promotion than a small firm could feasibly assume. Thus, by growing larger, the producer of a retail commodity can increase its capacity to establish consumer preferences for its product to an extent that cannot easily be matched by its smaller rivals. In this way, the relative strength of the largest firm is enhanced, since efforts by smaller concerns to expand their share of the market will tend to be somewhat blunted by the popularity of the more highly advertised product." Bok, *supra* note 18, at 276. See Bain, Industrial Organization 174 (1959).

reservoir of accumulated consumer preference, is apt to be the first to lose ground. The power to repel or discourage new competitors, then, is the power to control or discipline existing competitors, to make them reluctant to engage in conduct, such as price cutting, which might provoke retaliatory action on the part of the dominant firms. In sum, high entry barriers, like excessive concentration, impair effective competition.

Fourth. The concept of competition upon which Section 7 rests has aspects which transcend the narrowly economic. "Other considerations [besides the danger to the economy posed by unchecked corporate acquisitions] cited in support of the bill [to amend Section 7] were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." *Brown Shoe Co., supra,* at 315–16.[31] One commentator has suggested that the legislative history of Section 7 invites "reliance upon a structural theory of competition which stresses the advantages of large numbers of small-sized firms."[32]

We cannot shut out the broad policy considerations which figured so prominently in the deliberations leading to Section 7, however difficult they may be to translate into precise legal criteria. To disregard them, moreover, would be to close our minds to a persistent theme in federal trade regulation. "Throughout the history of these statutes [the federal antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (2d Cir. 1945).[33] On the other hand, there is no warrant in the language or history of Section 7 for subordinating the protection of *competition* to the protection of small-business *competitors.*[34]

If the effect of a merger is to place a number of small firms at a severe competitive disadvantage, and the merger cannot be shown

[31] The legislative history is reviewed by Bok, *supra* note 18, at 234–37, 247.

[32] Bok, *supra* note 18, at 247. Professor Bok, however, criticizes such a test as unworkable. *Id.,* at 248.

[33] See Thorelli, The Federal Antitrust Policy: Origination of an American Tradition 227 (1954); Dirlam & Stelzer, *The DuPont-General Motors Decision: In the Antitrust Grain,* 58 Col. L. Rev. 24, 41 (1958).

[34] See *Philadelphia National Bank, supra,* at 367, n. 43; *Brown Shoe Co., supra,* at 320; *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 588, 592 (S.D.N.Y. 1958).

to enhance the general competitive vigor of the market, it may be appropriate, in implementing Section 7, to note Congress' patent concern with the preservation, to the extent compatible with social and economic progress, of the fundamental benefits of a small-business, decentralized economy. The interest in fostering equality of opportunity for small business and in promoting the diffusion of economic power, although it may not be identical to the economists' notion of competition, was unquestionably intended by Congress to be relevant in any scheme for the enforcement of Section 7.[35]

Fifth. Section 7 embodies a *preventive* antitrust philosophy; Congress wanted the enforcement agencies to be able to arrest the anticompetitive effects of market power in their incipiency. A corollary of Section 7's prophylactic function is that the requirements of proving a violation are less strict than they would be under the Sherman Act. A further corollary is that evidence of market behavior, as opposed to evidence of market structure, is not a necessary ingredient of the prima facie case. If the enforcement of Section 7 against a particular merger were impossible until actual noncompetitive practices had been discovered in the market affected by the merger, all opportunity to attack those practices at their root would be lost. Economists teach, and Congress, in enacting the amended Section 7, postulated, that market behavior follows market structure; hence, proof that a merger has created or aggravated a market structure conducive (in a practical, not theoretical or abstract, sense) to practices that substantially lessen competition, or tend to monopoly, is sufficient under the statute. *Cf. Brown Shoe Co.*, *supra*, at 322.

The preventive philosophy reflected in Section 7 has significance not only in fixing the requirements of a prima facie case in a Section 7 proceeding, but in defining the standards of relevancy and materiality governing such a proceeding. The Supreme Court has been quite explicit as to the latter:

> * * * [T]he ultimate question under § 7 [is] whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when

[35] Compare Adelman, *supra* note 12, at 236; Dewey, *Mergers and Cartels; Some Reservations About Policy*, 51 Am. Econ. Rev. 255, 261–62 (Papers and Proceedings, 1961). "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co., supra,* at 344.

it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency." Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. *Philadelphia National Bank, supra*, at 362 (citations omitted). See *Brown Shoe Co., supra*, at 341 & n. 68; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 313.

The Court's emphasis appears to be twofold. On the one hand, a statute aimed at arresting practices in their incipiency can deal only with broad probabilities. The very nature of such a statute makes a quest for certainty delusive.[36] This is especially true in an area in which lawyers, not trained in economic analysis, must nonetheless grapple with what must often appear to be an unintelligible mass of complex economic materials. Not surprisingly, the less sophisticated in economic matters a lawyer is, the more "thorough" a job of economic inquiry he is likely to believe necessary.[37] The emergence of a class of business practices as to which, under the Sherman Act, a substantial anti-competitive effect is conclusively presumed (so-called *per se* offenses) testifies to the exigent need of simplifying the economic issues in antitrust litigation. Even where a *per se* rule is inappropriate, some limitation of the scope of economic inquiry will almost always be necessary and proper, for "the demand for full investigation of the consequences of a market situation or a course of business conduct is a demand for nonenforcement of the antitrust laws." Mason, *Market Power and Business Conduct: Some Comments*, 46 Am. Econ. Rev. 471, 478 (Papers and Proceedings, 1956). In a Section 7 proceeding, an inquiry bent on obtaining and digesting all data arguably relevant in making "some ultimate reckoning of social or economic debits and credits" of the merger (*Philadelphia National Bank, supra*, at 371), but not genuinely probative in making "an appraisal of the immediate impact of the merger upon competition * * * [and] a prediction of its

[36] "A preventive antitrust policy * * * should be directed at activities which on their face have a general and important tendency to reduce competition * * *." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 177 (1955). *Cf. Brown Shoe Co., supra*, at 323 (Congress' "concern was with probabilities, not certainties").

[37] "[E]rrors in logic and inference will increase when large amounts of complex data must be considered in a conceptual framework that is but partially understood." Bok, *supra* note 18, at 295.

impact upon competitive conditions in the future" (*i.d.*, at 362), is inevitably self-defeating, as the Commission's experience in this class of cases has amply demonstrated.

Furthermore, the danger is acute that if proceedings under Section 7 are allowed to become top-heavy with masses of economic and business data which are not strictly probative, the statute will become useless as an enforcement tool. In a merger proceeding, relief short of divestiture is rarely adequate. But divestiture is not a practical remedy unless it is accomplished within a reasonable time after the consummation of the merger. If too much time elapses, the property, good will, management, customers, business opportunities, and other assets and attributes of the acquired and acquiring firms tend to become irremediably commingled, and the acquired firm may lose all vestiges of independence. It may be impossible to reconstitute the acquired firm as a going concern; the patient, as it were, will be too far gone for medicine, or even radical surgery, to do him any good.

Other interests press for the simplifying and expediting of Section 7 proceedings. One is the interest in business stability and progressiveness. While an action under Section 7 is pending, the business decisions of the merged firm may be characterized by hesitancy and indecisiveness, due to uncertainty about the future of the firm. So also, perfectly lawful mergers may be deterred by the prospect of protracted legal proceedings whose outcome cannot reasonably be predicted. Finally, the effectiveness of Section 7 to check, where necessary in the interest of protecting competition, the very large annual wave of mergers [38] will be impaired if the limited staff and budget of this Commission (and of the Antitrust Division of the Department of Justice) that can be devoted to the enforcement of Section 7 are allowed to be frittered away in unduly complex and protracted proceedings.

That effective relief in a Section 7 proceeding becomes increasingly difficult, to the point of impossibility, over time, coupled with the other considerations we have mentioned, argues in favor of sharply narrowing, wherever possible, the scope of permissible legal inquiry. Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central con-

[38] In 1959–61, an average of 650 firms disappeared annually through mergers—more than at any time since 1926–30, the crest of the last great merger movement. These figures are rough estimates, are confined to manufacturing and mining firms, and probably underestimate the actual number of mergers even among those firms. See Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra* note 13, at 266. This Commission counted, for example, 1260 industrial mergers in 1962. F.T.C. News Release, Feb. 8, 1963.

cerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity.

Specifically, we think that the admission of post-acquisition data is proper only in the unusual case in which the structure of the market has changed radically since the merger—for example, where the market share of the merged firm has dwindled to insignificance—or in the perhaps still more unusual case in which the adverse effects of the merger on competition have already become manifest in the behavior of the firms in the market. See *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962). If post-acquisition data are to be allowed any broader role in Section 7 proceedings, a respondent, so long as the merger is the subject of an investigation or proceeding, may deliberately refrain from anti-competitive conduct—may sheathe, as it were, the market power conferred by the merger—and build, instead, a record of good behavior to be used in rebuttal in the proceeding. One consequence of a receptive attitude toward post-acquisition evidence on the part of the tribunals deciding Section 7 cases is that there will be frequent remands for further such evidence, as the instant case illustrates, until eventually the proceeding may become so protracted as to preclude effective relief, or may terminate in the respondent's favor only because his good-conduct evidence has been considered persuasive. At that point, the respondent is free to take the wraps off the market power conferred by the merger.

More important, given the nature of the concerns that moved Congress to amend Section 7, post-acquisition evidence will rarely have substantial probative value even if the respondent's post-acquisition conduct is not influenced by the threat of legal action. Congress postulated that certain kinds of market structure would ordinarly lead to non-competitive company behavior. If a market structure conducive to non-competitive practices or adverse competitive effects is shown to have been created or aggravated by a merger, it is surely immaterial that specific behavioral manifestations have not yet appeared. In many cases, the converse will also hold true. The fact that non-competitive practices have persisted or even increased in the market since the merger may reveal little about the merger's effects. The behavior of firms is a complex matter; it may be impossible to separate out the various casual factors so precisely as to be able to attribute non-competitive behavior to a particular merger. The same strictures apply to evidence of changes in market *structure* that have occurred since a merger. The full significance of such changes may not become apparent until long after they occur, and their relationship to a particular merger is likely to be obscure.

At all events, the ineffectuality of a wait-and-see policy on the part of the agencies charged with the enforcement of Section 7 should be obvious. If the agencies postpone the commencement or completion of an action challenging a merger in order to see what trends or results will stem from it, they thereby disable themselves from obtaining or granting effective relief. It bears repeating that an order divesting corporate assets that were acquired a long time before the issuance of the order rarely advances the polices of Section 7.

C. *The Effects of the Instant Merger on Competition*

With the foregoing general principles in mind, we now address ourselves to the ultimate question in this, as in every Section 7, case: whether the effect of the particular merger "may be substantially to lessen competition, or to tend to create a monopoly", "in any line of commerce in any section of the country."

The relevant line of commerce (product market) in this case is alleged to be household liquid bleach (5¼% sodium hypochlorite solution). No contention is made that industrial bleach should be included, and the contention, urged below by respondent, that dry or powdered bleach is sufficiently interchangeable with liquid bleach to be part of the same line of commerce, has not been pursued on appeal. It is clear, at all events, that the examiner's exclusion of powdered bleach from the relevant line of commerce was correct. The evidence shows that liquid and dry bleaches are used for different purposes: dry bleaches are in the light-duty category; liquid bleaches are in the heavy-duty category. Dry bleaches are approximately twice as expensive to use as liquid bleaches and their primary utility is in bleaching fine fabrics that do not respond well to stronger bleaches. To the consumer, liquid and dry bleach are economically and functionally distinct products that are poor substitutes for each other. See *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223, 226–27 (D.C. Cir. 1962); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 811 (9th Cir. 1961). In any event, at the time of the merger dry bleach accounted for only about 10% of total household bleach sales, so that even if it were included as part of the relevant product market, the market shares of Clorox and its competitors would not be changed substantially.

The relevant geographical market in a Section 7 case ("section of the country") is, in the words of the Supreme Court, "where

* * * the effect of the merger on competition will be direct and immediate." *Philadelphia National Bank, supra*, at 357. The complaint charges that the effects of the merger on competition will be felt in the national market for household liquid bleach and in a number of regional submarkets as well. Since high shipping costs impose definite territorial limitations upon the distribution of household liquid bleach, and since Clorox is the sole producer for the national market, the appropriateness of appraising the merger in terms of its alleged impact upon the national market is somewhat questionable. The effects of Procter's acquisition of Clorox will be felt differently in the different regions of the country, according to the market position occupied by Clorox vis-a-vis its competitors in each region. *Cf. American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F. 2d 524 (2d Cir. 1958). No uniform national impact can be forecast.

Despite the fact that the proper sections of the country in this proceeding are a series of distinct regional markets, no attempt has been made to demarcate these markets, and it is probably not a feasible undertaking.[39] In such circumstances, it is appropriate to use aggregate national figures as approximations of conditions obtaining in the several regional markets. Cf. *Brown Shoe Co., supra*, at 342–43. If anything, the use of such figures favors respondent. Even if the regional sales figures in the Nielsen Index cannot be accepted as accurate market share percentages, they strongly suggest that in many of the geographical markets for liquid bleach Clorox's market share must be considerably higher than its national average, in places approaching monopoly proportions.

Having established the relevant market, we are prepared to analyze its structure, disregarding, for the moment, the impact of the merger upon it. Manifestly, the household liquid bleach industry is highly concentrated and oligopolistic. A small number of firms (6) account for an overwhelming proportion of the industry sales (80%), and what is left is divided among firms which, absolutely and relatively, are very small. The concentration ratio, in other words, is

[39] The regional breakdowns given in the A. C. Nielsen Food Index (see p. 1538 above) represent standardized zones which Nielsen uses for all grocery products, and are not drawn so as to reflect meaningful geographical markets for the household liquid bleach industry. In rejecting these zones as geographical markets for present purposes, we do not mean to suggest that extreme rigorous standards of proof in this area are appropriate or allowable. The Supreme Court has cautioned that certainty in the calculation of the relevant market cannot, and need not, be achieved. *Philadelphia National Bank, supra*, at 361.

that characteristic of oligopoly.[40] Among the market leaders, a single firm, Clorox, is dominant.[41] It enjoys almost 50% of the total sales of the industry. Moreover, as the only national seller in an industry strongly characterized by product differentiation through advertising, Clorox enjoys a decisive competitive advantage, and has succeeded in creating a definite consumer preference for the Clorox brand, enabling it consistently to be priced at or above the level of any competing brand. In point of either market share or financial strength, no firm except Purex can be regarded as a significant competitive factor in the industry, and Purex does not compete with Clorox at all in about one-half of the nation. Indeed, in several areas of the country, Clorox faces no competition whatever from the principal firms, such as they are, of the industry (see p. 1538 above).

The factors which make for dominance by Clorox of its rivals also make for formidable barriers to new entry. To be fully efficient, a new entrant into the bleach industry would have to advertise and operate from the outset on at least a broad regional scale,[42] and consequently incur a very heavy initial investment for advertising. To undertake to operate on such a large scale profitably, a prospective entrant must, as we noted earlier, be able to obtain a substantial market share within a reasonable period of time. But if a firm did succeed in acquiring a significant share of one of the regional liquid bleach markets, it would almost certainly provoke a competitive response from Clorox, which, could not afford to remain passive in the face of a significant encroachment upon its market position. In the resulting competitive struggle, Clorox, by reason of the substantial, accumulated consumer preference for the Clorox brand, would have a great advantage.

There is evidence in this case that before a new brand of liquid bleach can be safely launched, it must be test-marketed locally. Since Clorox is active in every part of the country, it is in a position, by responding promptly to every such test, to prevent a prospective entrant from acquiring the market data it needs in order even to

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[40] Professor Bain would probably categorize the household liquid bleach industry as "highly concentrated". See Industrial Organization 127 (1959). Professors Kaysen and Turner would categorize it as a "Type One structural oligopoly", wherein "the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales." Antitrust Policy 27 (1959). In the *Philadelphia National Bank* case, after the merger the leading firm in the relevant market had a 30–35% share, and the top 4 firms combined, roughly 78%.

[41] "[W]hen one firm has forty or fifty percent or more [of the market] * * * competition will seldom plague the industry." Stigler, *supra* note 36, at 181.

[42] *Cf.* Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion, supra* note 29, at 344.

begin to compete. Indeed, this is what Purex claims Clorox did in Erie, Pennsylvania—responded so promptly and vigorously to Purex's competitive sortie that Purex was unable to complete the test-marketing of its new container (see pp. 1539, 1540 above). This incident illustrates, moreover, the two-edged quality of Clorox's dominant position. Not only is it a significant impediment to new entry; it is also an effective barrier to the growth or expansion of Clorox's existing rivals in the bleach industry, and thus an inhibitor of vigorous competitive activity.

Clorox's dominant position in the liquid bleach industry is dramatically shown by the fact that Procter, the nation's largest advertiser and perhaps leading maufacturer of household products comparable to liquid bleach, preferred to pay a very large premium for the good will of Clorox (the $17,700,000 difference between the purchase price of Clorox, $30,300,000, and the valuation of Clorox's assets, $12,600,000, suggests the size of this premium), rather than enter the industry on its own. Few firms—certainly none of the firms now active in the liquid bleach industry, with the possible exception of Purex—are in a position to make the investment evidently required to become a fully effective competitor in the liquid bleach industry. Perhaps entry or slight market expansion on the part of very small, neighborhood bleach producers is possible notwithstanding Clorox's dominant position. But the conclusion seems inescapable that at the time of the merger, the industry was concentrated, and barricaded to new entry, to a degree inconsistent with effectively competitive conditions.

What are the consequences for competition if, an industry such as we have described, a firm such as Procter is substituted for the industry's dominant firm? We find that there are significant areas in which absorption by Procter is likely to affect Clorox's competitive position.

In the first place, the record shows that in the liquid bleach industry the merger of a relatively small, single-product firm with a very large, multi-product firm enables substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising.

The maximum annual volume discounts available to the largest advertisers amount to 25–30% for network television advertising and somewhat smaller but still substantial percentages for magazine, newspaper, and radio advertising. In addition, the discount rates available for local "spot" television advertising favor the large advertiser. In 1957, Clorox spent $1,150,000 on television advertising of all kinds on all stations. While complete discount rates are not included in the record, it is virtually certain that an expenditure of this size spread over all networks and stations did not entitle Clorox to discounts of any substance. For example, a $3,000,000 expenditure on NBC or CBS night time is required for the maximum discount. The record shows that Purex, in time bought in behalf of its complete line of products, received a 6% discount on an expenditure of $1,400,000 on one network, and a 15% discount on an expenditure of $2,400,000 on another. This was possible because Purex, unlike Clorox, is a multi-product firm, and because an advertiser can combine all of his advertising for all of his products to obtain the volume discount, which is then applied to the advertising for each brand. It is conceded that Procter is entitled to, and receives, the maximum volume discounts available in television advertising and, no doubt, in other media as well. With Clorox now a part of the Procter line, for the same amount of money Clorox spent on network television advertising prior to the merger, at least 33⅓% more network television advertising can now be obtained.

Analogous benefits are obtainable in the other advertising media. The record discloses that maximum volume discounts of between 12% and 17% are available to advertisers in the leading women's or family magazines. An annual expenditure of $1,000,000 or more may be necessary to earn the maximum in a particular magazine. Prior to the acquisition, Clorox received no discounts for magazine advertising. Purex, the record shows, received a small discount in one magazine.

The scale advantages of a large, multi-product firm in advertising are not limited to volume discounts. According to uncontradicted evidence of record, a commercial announcement during a television program is substantially more effective in promoting a product than one during the between-program station break. Not only is the viewer apt to be less attentive during the station break—he may be switching stations, or he may leave the room momentarily—but a brand becomes better known to the consumer by being associated with a program which the consumer watches. Unless Clorox had been willing to put a disproportionate share of its advertising budget into a single venture, it could not, prior to the acquisition, have afforded to buy an entire network television program. Cf. *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 899 (S.D.N.Y. 1963). Procter, however, can and does buy the sponsorship of such programs in behalf of several of its products, and this means that if Procter includes Clorox among the products advertised on such a program, Clorox can realize the advantages of network program advertising at a fraction of the cost that would have been required prior to the merger. Moreover, even if Clorox could have purchased sponsorship of a program prior to the merger, the same investment, if used now to buy one-third of three shows sponsored by Procter, will result in broadened consumer exposure to the Clorox brand, thereby increasing the effectiveness of the investment.

Another advantage in network program advertising that can be derived from the association of Clorox with Procter arises from the ability of a multi-product national advertiser to run commercials for different products in different sections of the country during a single commercial break. If Procter decides that Clorox needs advertising support in some area where Clorox faces particularly intense competition, it can place a Clorox commercial in that area, and that area only, while the remainder of the country is watching a commercial for one or more of Procter's other products. Clorox thereby gains the advantage of association with network television while actually limiting its advertising expenditures to selected regional markets.

Similar advantages are obtainable by joint promotions, and by joint advertising in the other media. Procter can incorporate promotions for Clorox on the same in-store display cards as are used for other Procter products and thus receive point-of-sale promotion for several products at the cost of printing, distributing and installing one set of cards. Similarly, premium and special-offer coupons for Clorox can be mailed in the same envelope as those for other Procter products. In this way Clorox reaps the advantage of this type of promotion without having to pay full processing and mailing costs or make the initial investment necessary to launch this promotional method. The record shows that Procter has frequently engaged in combined-product displays and promotions of this sort.

Joint newspaper or magazine advertising of Procter products, including Clorox, also offers the possibility of considerable cost advantages.

A related point is that while prior to the merger Clorox distributed bleach to retailers by means of a network of independent brokers, Procter has a direct sales force for its products, and, were Procter to distribute Clorox bleach through this sales force, distinct promotional advantages would probably result. Independent brokers handle the products of many manufacturers and frequently carry competing brands; they have no particular interest in pushing one brand rather than another. Procter's sales force deals only in Procter products and spends considerable effort assuring these products adequate and prominent shelf space and special displays. In light of the critical role played by shelf space in liquid-bleach competition, use of a direct sales force—a device that may be fully efficient only for a multi-product firm—would in all likelihood substantially increase Clorox's already great market power.

The acquisition also has consequences for the bargaining position of Clorox in its dealings with retailers of liquid bleach. That Procter is the leading producer of a number of products marketed through grocery stores may enable it to induce retailers to give favored treatment to Clorox in the crucial fight for shelf space or otherwise concede especially advantageous terms involving the retail selling of Clorox bleach. We need not go so far as to find that leverage of the kind that supports tie-in and full-line forcing arrangments may be Procter's to wield in behalf of Clorox. Given Procter's position as a well-established producer of a broad range of common grocery items—many of them "must" items (see pp. 1578, 1579 below)—it would seem likely that Procter can obtain from retailers, as a matter not of coercion but of convenience or expediency, certain advantages in the display or marketing of its products which are not available to a single-product producer, such as the pre-merger Clorox. Cf. Machlup, The Political Economy of Monopoly 111–12 (1952).

Another material consequence of the merger is the advent, in the liquid-bleach industry, of a firm with a breadth of experience and degree of financial strength beyond anything possessed by the existing members of the industry. We have already indicated the importance of absolute size in effective advertising; Procter's size, whether measured by sales or assets, is many times greater than that of the largest firm operating in the industry prior to the merger. Furthermore, there is testimony in the record that sales promotions are considered in the main too expensive for a single-product firm in the relatively small-scale bleach industry; thus, at the time of the merger, Clorox was engaged in virtually no sales-promotion activities. Procter, a firm that in 1957 incurred sales-promotion expenses in an amount greater than Clorox's total sales, is in an obvious position to utilize the sales-promotion technique on a wide scale in behalf of Clorox.

Financial ability, moreover, may play a substantial competitive role in an industry such as liquid bleach quite apart from advertising and sales promotions. The record shows that one way in which a producer may obtain increased shelf space is by offering the merchant a special price, thus enabling the merchant to obtain a higher resale profit margin. To be able to do this frequently and effectively requires the kind of pricing flexiblity available only to a firm with ample reserves. So also, it is a fact that consumer preferences for particular liquid bleach brands, even for Clorox, are not invulnerable to competitive inroads; the Erie, Pennsylvania, incident (see pp. 1539, 1540 above) demonstrates the prevalence of local price cutting. Even local price cutting, however, cannot long be maintained by a firm short on reserves. In a price fight to the finish, Procter, whose aggregate scale of operations and fiscal resources dwarf the entire liquid bleach industry, can hardly be bested.

Consideration must also be given to the danger that a multi-product firm such as Procter, operating in a market otherwise consisting of single-product firms, may engage in systematic underpricing having most unfair and destructive effects even though the firm is wholly innocent of any predatory intent. "[T]otal profit may be maximized [in a multi-product firm] * * * by selling some lines below accounting costs."[43]

> A concern that produces many products and operates across many markets need not regard a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of each of its products, as has been presupposed in our traditional scheme. It may classify its products into such categories as money-making items, convenience goods, and loss leaders, and may follow different policies in selling the different classes. Edwards, *Conglomerate Bigness As a Source of Power*, in Business Concentration and Price Policy 331, 332 (National Bureau of Econ. Research ed. 1955).

Thus, the greater flexibility in pricing enjoyed by the multi-product firm may lead, without predatory motive or purpose, to below-cost selling of a particular product which is in competition with a small firm's single product.

In addition to the concrete competitive advantages in liquid bleach competition which stem from Procter's substitution for Clorox in the liquid bleach industry, some account must be taken of certain intangibles of reputation which Procter unquestionably possesses. Whether or not Procter is in fact a well-managed and aggressive competitor, a question on which the record in this case permits no expression of opinion, the record does disclose that Procter is so regarded by the firms in the liquid bleach industry. To them, Procter

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[43] Thorp & Crowder, The Structure of Industry 667 (T.N.E.C. Monograph No. 27, 1941). "[D]iversification may so cloud a concern's cost structure as to result in the shelter of inefficiently made products; a given product may be subsidized without the knowledge of its producer." Hale, *supra*, note 8, at 361.

is a more feared competitor than was the pre-merger Clorox. Since, as was noted earlier, market behavior is determined by the state of mind of the firms in the market, Procter's history of success, its general size and its prowess, which loom large in the eyes of the small liquid bleach firms, must for that reason alone be reckoned significant competitive factors.

Enough has been said to establish that the merger of Procter and Clorox adversely affects the market structure of the liquid bleach industry. While the merger has no immediate impact on the number or size distribution of firms in the market, it does have an immediate impact upon another important variable of market structure—the condition of new entry. Procter, by increasing the Clorox advertising budget, by engaging in sales promotions far beyond the capacity of Clorox's rivals, and by obtaining for Clorox the advertising savings to which Procter, as a large national advertiser, is entitled, is in a position to entrench still further the already settled consumer preference for the Clorox brand, and thereby make new entry even more forbidding than it was prior to the merger. In addition, because a multi-product firm of large size enjoys, as has been seen, very substantial competitive advantages in an industry strongly marked by product differentiation through mass advertising, sales promotions, shelf display and related merchandising methods, the prospects become increasingly remote, given the substitution of Procter for Clorox in the liquid bleach industry, that small or medium-sized firms will be minded to enter the industry. The scale of optimally efficient operation in the industry has been so increased, by reason of Procter's advent, that only very large firms—firms on the scale of Procter itself—can reasonably be expected to be able to compete on roughly equal terms in the industry.

In short, the barriers to entry, already very high, have been markedly heightened by the merger—to the point at which few firms indeed would have the temerity or resources to attempt to surmount them. And, as has been observed, a heightening of entry barriers concomitantly enhances the power of market leaders to dominate their small rivals, and so smother effective competition. Given Procter's materially greater strength, compared to Clorox, as a liquid bleach competitor, vigorous competition by the small firms in the industry would appear still more effectively and substantially inhibited than prior to the merger.

Our finding that, as a result of this merger, the market structure of the liquid bleach industry is significantly less conducive to competition than was the case prior to the merger, is not in any way dependent upon the actual course of Procter's post-merger conduct. We need not attempt to ascertain or predict whether, and to what extent, Procter has taken or will take active steps to obtain for Clorox the potential scale or other advantages accruing from the merger. As has been pointed out, the conditions which retard competition in an industry are to an important degree psychological. They stem from competitors' appraisal of each other's intentions, rather than from the intentions—or the actions taken upon them—themselves. The appropriate standpoint for appraising the impact of this merger is, then, that of Clorox's rivals and of the firms which might contemplate entering the liquid bleach industry. To such firms, it is probably a matter of relative indifference, in setting business policy, how actively a Procter-owned Clorox pursues its opportunities for aggressive, market-dominating conduct. The firm confined by the high costs of shipping liquid bleach, and the high costs of national or regional advertising, within a geographically small area, cannot ignore the ability of a firm of Procter's size and experience to drive it out of business (not necessarily deliberately) by a sustained local campaign of advertising, sales promotions and other efforts. See Blair, *The Conglomerate Merger in Economics and Law*, 46 Geo. L.J. 672, 688–89 (1958). A small or medium-sized firm contemplating entry cannot ignore the fact that Procter is a billion-dollar corporation whose marketing experience extends far beyond the limited horizons of the liquid bleach industry and whose aggregate operations are several times greater than those of all the firms in the industry combined. Even a large firm contemplating entry into such an industry must find itself loath to challenge a brand as well-established as Clorox bleach, when that brand is backed by the powerful marketing capacities of a firm such as Procter.

If we consider, in other words, not what Procter will in fact do to exploit the power conferred on it by the merger, or has done, but what it can and is reasonably likely to do in the event of a challenge to its dominant market position in the liquid bleach industry, we are constrained to conclude that the merger has increased the power of Clorox, by dominating its competitors and discouraging new entry, to foreclose effective competition in the industry.

D. *The Substantiality of the Instant Merger's Anti-Competitive Effects*

In finding that the merger of Procter and Clorox has an undesirable effect, from the standpoint of maintaining competition, on the market structure of the liquid bleach industry, we have not determined the legality *vel non* of the merger under Section 7. The statutory test, whether the effect of the merger may be *substantially* to lessen competition, or tend to create a monopoly, has yet to be applied to the facts as found.

The language of Section 7 refutes any notion that every merger whose probable effect on competition is adverse is, for that reason, unlawful. Congress plainly meant to exclude from the proscription of Section 7 mergers having a negligible, abstract, or merely theoretical impact upon the structure of the relevant market. The impact must be significant and real, and discernible not merely to theorists or scholars but to practical, hard-headed businessmen; in a word, it must be "substantial". But substantiality, in the sense used in Section 7, is not a precisely ascertainable quantity; if the statute is to have meaningful application, the courts and the Commission must be content with approximations and estimates. In the *Philadelphia National Bank* case, the Supreme Court, confronted with a conventional horizontal merger, held that where such a merger conferred a 30% market share on the acquiring firm and significantly enhanced the combined market shares of the leading firms in the market (by more than 33%), the merger was unlawful, absent mitigating circumstances. The percentages selected by the Court as manifesting undue concentration were admittedly only rough indicators that the merger would have the effect on competition specified in Section 7; but, in the absence of any more precise indicators, they were deemed to satisfy the statute's requirements.

The merger at bar, because it is not a conventional horizontal or vertical merger, does not afford the tribunal which must decide its legality the ready crutch of percentages. The market structure variable—condition of entry—here involved, unlike concentration (or foreclosure, in the case of a conventional vertical merger), is not even roughly translatable into a percentage. We cannot say that barriers to new entry into the liquid bleach industry have been raised, as a result of this merger, by 10%, 50% or any other exact figure. Nor do the raw figures on, say, cost savings in advertising enabled by the merger permit any dependable quantitative appraisal of the impact of the merger on existing barriers to entry. But the difference here between substantial and insubstantial, like that between night and day or childhood and maturity, is no less real because the dividing line cannot be precisely drawn.

If mergers not falling within certain familiar categories, such as "horizontal" and "vertical", are to be effectively subject to Section 7, as Congress plainly intended them to be, other means—non-percentile and non-quantitative—of roughly, but fairly, estimating the substantiality of a merger's probable adverse effect on competition in the relevant market, must be found. There is, of course, only one place to look for such tools—the area of the basic policy considerations which moved Congress to enact Section 7 in its amended form and which must therefore govern the enforcement of the statute. We find that there are five factors in this case which, taken together (we need not, and do not, consider whether one or more of these factors, taken separately, would be dispositive of the case), persuade us that the instant merger violates Section 7. This set of factors plays the same role in the decision of this case as percentage ratios play in the decision of other merger cases, that of enabling the deciding tribunal to infer with reasonable assurance that the merger has the specified statutory effect, namely, of probably lessening competition substantially, or tending to create a monopoly, in the relevant market. These factors are: (1) the relative disparity in size and strength as between Procter and the largest firms of the bleach industry; (2) the excessive concentration in the industry at the time of the merger, and Clorox's dominant position in the industry; (3) the elimination, brought about by the merger, of Procter as a potential competitor of Clorox; (4) the position of Procter in other markets; and (5) the nature of the "economies" enabled by the merger.

First. An important consideration is the very great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry. In 1957, Procter's sales of packaged detergents alone were 10 times the total sales of Clorox and 8 times the total sales of all of Purex's products combined. Procter's total sales were more than 20 times the total sales of Purex and more than 25 times the total sales of Clorox. In fact, Procter's advertising and sales promotion budget in 1957 was substantially larger than the combined total sales of Purex and Clorox, and very many times the size of Clorox's advertising budget. Such comparisons could be multiplied; they show plainly that Procter is of a different order of magnitude from that of the principal firms in the liquid bleach industry. Indeed, as has been observed, Procter's financial resources and scale of operations overshadow the entire liquid bleach industry.

A size disparity of this magnitude is significant in several ways. First, it is a reliable indicator that the cost advantages enabled by the merger will be substantial and will substantially affect competitive conditions in the market. It would not be practicable to attempt a full-scale cost study of the firms involved in a merger, with a view toward predicting the actual, quantitative impact of the merger on competition. See Bok, *supra* note 18, at 285–86. We must make do, as has been pointed out, with less exacting but nonetheless useful working criteria; and in the circumstances involved in this case, the scale relationship between the acquiring firm and the principal firms in the relevant market is such a criterion. A merger between Clorox and, say, Purex might not enable substantial cost advantages, since Purex is not very much larger than Clorox; and the acquisition by Procter of, say, a small automobile manufacturer, even if the acquisition enabled substantial cost savings, would not be likely to impart a decisive competitive advantage to the acquired firm, given the scale of its competitors. But we have in this case a situation in which the pooling of expenditures by the merging firms places the acquired firm in a size class many times greater than that in which its own expenditures placed it and many times greater than that of *any* of its competitors. The inference is warranted, therefore, that the effect of this merger is to enable substantial cost savings which impart a substantial competitive advantage to the acquired firm.

To be sure, we might hesitate to draw such an inference in the case of a merger between firms in unrelated industries, or where the obtaining of cost advantages as a result of the merger depended on complex technological factors. But it has been found that Procter and Clorox are functionally closely related firms, the integration of whose marketing activities is not at all a remote hypothesis. And we have found also that the most substantial cost savings obtainable as a result of the merger, savings in the cost of advertising, depend principally on nothing more arcane than the total amount of the pooled expenditures for advertising on a particular network or in a particular magazine.

Second, the size disparity of the acquiring firm vis-a-vis the firms in the relevant market has an obvious materiality where, as here, that market is strongly marked by product differentiation through mass advertising. The effectiveness of advertising, we have seen, is a function in part of sheer weight, of the sheer volume of a firm's expenditures for advertising. It is therefore intensely relevant not only that Procter must in absolute terms be deemed a large and affluent corporation well able to finance large advertising campaigns but, more important, that the firms in the liquid bleach industry are decidedly small and weak *relative* to Procter.

Third, size disparity of the unusual degree involved in this case takes on special significance in light of Congress' expressed concern, in amending Section 7, with the preservation, to the extent practicable and consistent with economic and social progress, of competitive opportunities for small business.

Prior to the advent of Procter, household liquid bleach was basically a small-firm industry. The industry's total sales were less than $100,000,000 annually (i.e., less than 10% of Procter's total sales); many very small firms, perhaps as many as 200, were active in the industry; and the low costs of manufacturing enabled a firm to produce liquid bleach with a relatively small capital investment. Clorox, to be sure, overshadowed the other firms in the industry, but with assets of only $12,600,000, Clorox itself could hardly be regarded as more than a small medium-sized firm. The distinctive nature of the industry threatens now to be utterly transformed by the substitution, for Clorox, of a billion-dollar corporation. Not only does Procter's great size and wide experience permit advertising and sales promotions on a scale hitherto unknown in the liquid bleach industry, but the remaining firms may now be motivated to seek affiliation by merger with giant companies. The practical tendency of the instant merger, then, is to transform the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals.

To be sure, there may be firms in this industry that are so small—firms with a purely neighborhood business which engage only in local advertising—as to be relatively unaffected by the substitution of Procter for Clorox, although such firms might very likely be the first casualties in any attempt by Procter to increase Clorox's market position through enhanced advertising or other marketing activities. Nevertheless, in the range between these very small firms, at the lower end, and Clorox, at the upper end, are to be found a number of relatively small firms whose continued existence as independent entities is gravely threatened by this merger.

Precisely this phenomenon, the transformation through mergers of a small-business into a big-business industry, was at the heart of Congress' concern with what it conceived to be an accelerating trend toward excessive concentration of economic power. In the deliberations leading to the amendment of Section 7, illustration after illustration was cited of industries, formerly characterized by the vigorous competition of small firms on a footing of approximate equality, transmuted by mergers into arenas of "monopolistic competition".[44] This manifest Congressional policy has a place in the

[44] See, e.g., H.R. Rep. No. 1191, 81st Cong., 1st Sess. 3 (1949); Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra* note 13, at 15.

enforcement of Section 7, and it cannot be disregarded in the instant case, where over 100 small firms, most with assets of less than $75,000—not to mention prospective small-firm entrants—must now contend with Procter's vast, wide-flung enterprise. In this respect, we may compare the Supreme Court's *Brown Shoe* decision, holding unlawful a merger that did not itself create or aggravate an oligopolistic market structure, but, rather, was feared to be the first step in the transformation of a traditionally small-business, atomistic industry into one dominated by corporate giants.[45]

It should be very clear that, in deeming Procter's size a pertinent consideration in the decision of this case, we are most emphatically *not* adopting any view that business *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute. Procter's size is significant in this case only insofar as it is hugely disparate compared with the size of the firms in the relevant market. Disparity of size, not absolute size, has importance in a merger case of this kind. Moreover, we do not suggest that size disparity is relevant to the decision of every merger case. Quite possibly, there are industries in which size disparity has little or no competitive significance. But we are dealing, in this case, with an industry in which advertising figures very prominently as a factor in competition. And not only is effective advertising at least a partial function of sheer weight (and may, indeed, only be fully practical for a large regional or national seller), which in turn is a function of the financial scale and capacity of the advertiser, but the discount structure of the advertising industry favors very large, national advertisers to an unusual extent. As we have seen, a multimillion dollar diversified firm such as Purex may not be able to qualify for substantial advertising discounts, while a firm the size of Procter can qualify for very substantial such discounts indeed. Size, then, is a factor bearing significantly on competition in the special circumstances of this case, and we need not, and do not, have occasion to expatiate in general terms on the significance of bigness in the application of Section 7 and other antitrust statutes.

Second. Our conclusion, in the foregoing discussion, that liquid bleach is an industry in which Congress would not have wished to see domination by large firms, and that the size disparity of Procter vis-a-vis the small firms of the industry is likely to have a significant effect on the competitive structure of the industry, is not, we think, affected by the fact that, at the time of the acquisition, the market

[45] See Adelman, *supra* note 12, at 241; Dean, *What the Courts Are Deciding: An Economist's View,* in The Climate of Antitrust—Second Conference on Antitrust in an Expanding Economy 23, 35 (National Industrial Conf. Bd. ed. 1963).

structure of the industry, from the standpoint of the maintenance of a competitive regime, was already decidedly unhealthy. On the contrary, this factor has positive weight in our determination that the merger is unlawful. As the Supreme Court has stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank*, *supra*, at 365, n. 42. A merger that aggravates an already oligopolistic market structure, not by affecting the concentration ratio, as was the case in *Philadelphia National Bank*, but by affecting some other market structure variable, such as condition of entry, is highly suspect under Section 7.

It is arguable, to be sure, that the market structure of the liquid bleach industry was already so inauspicious that the substitution of Procter for Clorox cannot have made things worse, that to a firm with resources of a million dollars or less, confined to a small regional market, the difference between a Clorox and a Procter as a competitor must be largely academic. Whatever deleterious effect on competition Procter's entry into an atomistic market might have had, it might be argued, its entry into a market dominated by one firm, by purchase of that firm, could have had no measurable such effect: the market was already rigidly non-competitive.

We are not persuaded by this argument. Despite Clorox's ascendancy, competition has never been wholly absent from the liquid bleach industry. The industry's non-competitiveness has always been relative, rather than absolute. The record is replete with instances of local, often intense, price rivalry (for example, the Erie, Pennsylvania, incident) and other kinds of competition (for example, in container design). The substitution of Procter for Clorox, by lending further rigidity to an already oligopolistic industry, could eliminate what competition remains.[46] Even if Procter's entry into the industry by purchase of Clorox has no immediate impact on competitive behavior, which is by no means clear, it must eliminate virtually all possibility of an eventual movement toward deconcentration in the liquid bleach industry. The barriers to entry, already formidable, become virtually insurmountable when the prospective entrant must reckon not with Clorox, but with Procter.

In addition, by taking the place of Clorox, the dominant firm in the highly concentrated liquid bleach industry, Procter obtains a protected market position built up by Clorox over many years, and, by virtue of Clorox's position of strength in the industry, Procter

[46] See *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided March 22, 1963) [62 F.T.C. 929, 959]; Bok, *supra* note 18, at 310; Blair, *supra* p. 51, at 693.

may be able to strengthen its position in other markets. Economists teach that the possession of market power enables a firm to derive higher profits ("monopoly profits") from its activities in the market than it could under more competitive conditions; the additional profits, in turn, endow the firm with added power to meet its rivals in other markets. In this fashion, substantial market power, which Clorox, as the dominant firm in an oligopolistic market, seems clearly to possess, is transferable as between seemingly unrelated industries.[47] This kind of leverage has long been familiar in many contexts of antitrust enforcement. See, e.g., *United States* v. *New York Great A. & P. Tea Co.*, 173 F. 2d 79, 86–87 (7th Cir. 1949). For example, it is one of the premises upon which various forms of vertical integration have been held unlawful. See, *e.g.*, *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962). It was recently deemed material in a Section 7 proceeding involving a market-extension merger. *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962), [60 F.T.C. 944, 1084].

Since Procter is already a leading manufacturer of a number of products, its acquisition of Clorox, by strengthening Procter's aggregate market position, may lead to an impairment of competition in many industries besides liquid bleach. And since Clorox and Procter are engaged in the manufacture of closely related products, more direct possibilities of exploiting in other markets Clorox's substantial market power arise—for example, the use of Clorox bleach, as a tying product, loss leader, or cross-coupon offering, in connection with efforts to promote other Procter products. These too are forms of extending monopoly or market power that have long been familiar in antitrust enforcement. See, *e.g.*, *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1. The president of Procter put the matter succinctly: "We may be able to derive additional value from the Clorox name for other new and related products." Purex, for example, is already hard pressed to compete effectively with Clorox in the liquid bleach industry and with Procter in the abrasive cleanser, packaged detergent, and toilet soap industries; it may find itself in a powerful competitive pincers as the result of the fusion of its leading rivals in the several industries in which it is active.

Moreover, it would be a curious result, and one hard to reconcile with the Supreme Court's emphasis on the importance of fostering

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[47] See Burns, The Decline of Competition 453 (1963): Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 142–150 (1954); Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 45–46 (1949); Stigler, *supra* note 36, at 184; Blair, *supra* p. 51, at 686–87; Comment, 72 Yale L. J. 1265, 1269, n. 22, 1270, no. 28 (1963).

deconcentration in an already unduly concentrated industry,[48] for this Commission to hold that a firm, if it succeeds in dominating, and substantially eliminating competition in, its own market, thereby becomes freely salable at a high premium to a giant conglomerate enterprise. For the Commission to conclude that the acquisition of a firm which has successfully snuffed out most of the competitive vigor in its market raises no question under Section 7, would be to provide an incentive to firms to achieve market dominance in order to become attractive offerings to the large conglomerate corporations.

In light of these considerations, we are persuaded that a merger involving a leading firm in a market that is already well on the way to a non-competitive structure may be unlawful under Section 7 even where the aggravation of non-competitive market conditions by the merger may seem relatively slight because of the already advanced oligopoly condition of the market. Perhaps conceptual difficulties are encountered if such a merger is deemed to violate Section 7's "substantially to lessen competition" clause, since effective competition may already have substantially disappeared. If so, resort may be had, with entire propriety, to the statute's tendency-to-monopoly clause. For " 'tend to create a monopoly' clearly includes aggravation of an existing oligopoly situation." *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y. 1958). See *Blair*, *supra* p. 51, at 699–700. Cf. p. 27, n. 23 above.

Third. A factor closely related to the foregoing is that the merger eliminates the salutary effect of Procter as a *potential* competitor of Clorox in liquid bleach. At the time of the merger, Procter was a progressive and experienced manufacturer of many products in the same product line as liquid bleach; it had in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own. By virtue of all these facts, Procter must have figured as a tangible influence on Clorox's policies until the merger eliminated it as a potential competitor. Procter, though *in absentia*, was nonetheless, by reason of its proximity, size, and probable line of growth, a substantial competitive

[48] See pp. 1574, 1575 above. Cf. Edwards, Big Business and the Policy of Competition 125 (1956).

factor in the liquid bleach market. We have said that the possibility of new entry may exercise a restraining influence upon oligopolistic firms, inclining them to maintain prices at a level low enough to discourage entry. Prior to the merger, Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect. Once the threat of Procter's entry vanished, one of the last factors tending to preserve a modicum of competitive pricing and business policies in the liquid bleach industry was removed. As the Commission, in a related context, has had occasion to observe, "When market concentration is high, the main, and sometimes the only, restraint on the use of market power by oligopolistic sellers is potential competition." *Foremost Dairies, Inc., supra*, at 1089.

We have no occasion to speculate on such questions as whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own, or whether or not, had it done so, the result would have been to increase competition in the industry—although, with reference to the second question, we note the Supreme Court's recent observation that "one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra*, at 370. See Kaysen and Turner, Antitrust Policy 135 (1959). It is sufficient that the tangible possibility of Procter's entry on its own into the liquid bleach industry was a continuing and important pro-competitive influence in that industry, and that the acquisition of Clorox, by eliminating that possibility, thereby removed a critical check on the power of Clorox to stifle effective competition in the sale of household liquid bleach.

Fourth. Another factor which supports a finding that this merger is illegal is Procter's strong market position in other (and larger) industries, notably packaged detergents, which we have already mentioned. No rigorous analysis of market structure in the other industries in which Procter is active was attempted in this case. It would be impractical, in light of the critical importance of channeling Section 7 proceedings within reasonable bounds of simplicity, to undertake, in every case of a conglomerate merger, a comprehensive study of each market in which the conglomerate enterprise operates. But, if we are not entitled to infer that Procter is able to subsidize Clorox's activities in the liquid bleach market out of "monopoly profits" (including profits attributable to market power short of outright monopoly) gleaned by Procter from its activities in other markets, or otherwise to transfer monopoly or market power enjoyed in other markets into the bleach market (see pp. 1575, 1576 above), we at least know, from the record of this case, that Procter is well established in a number of separate product markets (see p. 1540, n. 4 and pp. 1540, 1541 above). We know, for example, that Procter possesses a 54.5% share of one market, packaged detergents, in which three firms account for 80% of total sales and which we earlier found (see p. 1544 above) closely resembles the household liquid bleach industry. On these facts, it is scarcely to be doubted that Procter, the biggest of the "Big Three" of the household cleansing agents industry, possesses some degree of market power in the packaged detergent and other product markets within the general field, although perhaps not so much as Clorox possesses in its market.

At the least, Procter's manifest strength in markets other than liquid bleach rebuts any inference that Procter cannot wield the advantages that flow both from its own financial size and strength and from the dominant position in the liquid bleach industry enjoyed by Clorox. If Procter were shown to be spread thin throughout its many fields of endeavor, the significance of its apparently decisive competitive advantage over its liquid bleach competitors might be impaired; but that, clearly, is not the case.

Procter's strength in other markets may have, as well, a positive—though by no means conclusive—significance in appraising the effect of this merger on competition in the liquid bleach market. Even if such strength has not been proved to reach the level at which monopoly profits or other fruits of great market power are forthcoming, it is relevant to the psychological response of the members of the liquid bleach industry to Procter as a competitor. To the extent that Procter is thought by them to be not only a large and affluent firm, but also, a powerful firm, in terms of market power enjoyed in related markets and possibly transferable into the bleach market, its prowess as a competitor gains an added and even sinister dimension in the eyes of its liquid bleach rivals—a factor of considerable importance to the impact of the merger on competition in the bleach industry. Cf. Blair, *supra*, p. 51, at 690; Edwards, *supra* n. 22, at 335–36.

Thus, just as ownership of Clorox may enable Procter to enhance its competitive edge in other markets, so Procter's position in other markets may enhance its dominance, through its acquisition of Clorox, of the liquid bleach industry. Purex, we noted, now competes with Procter in the liquid bleach as well as in the packaged detergents industry, and it may be inclined to act cautiously in the liquid bleach market for fear of provoking Procter's retaliation along the whole front of Purex's activities.

The short of it is that a conglomerate merger involving firms which have dominant power in their respective markets tends to reinforce and augment such power. Procter's willingness to pay a very substantial amount of money for the good will of Clorox bespeaks its ability, as a large and diversified firm which has seemingly exhausted the possibilities of further expansion in the numerous markets in which it has won a dominant position, to use the ample surplus it has accumulated in the process in order to achieve dominance in still another market by purchase of that market's dominant firm.[49] We emphasize here that we are discussing only corporate expansions through *acquisition*, and not through internal growth. In enacting Section 7, which deals only with mergers, Congress was expressing its special concern with those *acquisitions* which result in the mutual entrenchment of unhealthy market situations, and thus bear grave consequences for the future of our competitive economy.

Fifth. In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies". The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition. As the Supreme Court has held (see pp. 1547, 1548 above), Congress did not mean the adjudicators of Section 7 cases to attempt to weigh the ultimate social and economic merits and demerits of a merger, but only to determine its effect on competition and monopoly. A merger that results in increased efficiency of production, distribution or marketing may, in certain cases, increase the vigor of competition in the relevant market.[50] But the cost savings made possible by the instant merger serve, we have seen, not to promote

[49] See Klaw, "The Soap Wars: A Strategic Analysis", *Fortune,* June 1963, pp. 122, 198; Blair, *supra* p. 51, at 693; Boggis, *Merger Movements in Industry—The Diversification Threat,* 13 Cartel 32, 37 (Jan. 1963). In this connection we note that between 1955 and 1957, Procter acquired, besides Clorox, a manufacturer of paper products and several manufacturers of food products, for a total consideration, in cash and stock, of about $30,000,000.

[50] However, the danger is very great that where any two firms in an oligopolistic market merge, the fruits of the merger will be used not to enhance, but to retard, competition. See *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 152 F. Supp. 387, 399–400 (S.D N.Y. 1957), *aff'd,* 259 F. 2d 524 (2d Cir. 1958); Comment, 68 Yale L. J. 1627, 1674 (1959).

competition, but only to increase the barriers to new entry into the relevant market, and thereby impair competition.

A more complete answer to the argument that this merger should be upheld on account of its "efficiencies" is that cost advantages of scale are of more than one kind, and that the kind involved in this merger, far from representing a net social benefit, is independently offensive to at least the spirit, if not the letter, of the antitrust laws. For one thing, the savings chiefly involved here, which are savings in advertising and sales promotions (Procter does not contend that the merger will enable substantial economies of production or physical distribution), are, it seems, achievable only by firms of very large absolute size. See Bain, Industrial Organization 170, 172–73 (1959). When we reflect that a firm, Purex, with total sales of almost $50,000,000 in 1957 and a proportionally large advertising budget, was evidently unable to obtain any but the minimum volume discounts available to large television advertisers, we can only conclude that the large-scale advertising "economies" involved in this case represent price concessions available only to giant firms, and bear little relationship to ordinary notions of economic "efficiency".

More important, while we do not doubt that marketing economies, including those of advertising and sales promotion, are as socially desirable as economies in production and physical distribution, there does come a point "at which product differentiation ceases to promote welfare and becomes wasteful, or mass advertising loses its informative aspect and merely entrenches market leaders."[51] We think that point has been reached in the household liquid bleach industry. In short, the kind of "efficiency" and "economy" produced by this merger is precisely the kind that—in the short as well as the long run—hurts, not helps, a competitive economy and burdens, not benefits, the consuming public.

Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives that he should consider in seeking to make an optimal allocation of his necessarily limited economic resources. Advertising, then, should stimulate competition and, by increasing the sales of the advertised product, lower the unit cost of that product. But this process is distorted in the case of a homogeneous product, such as household liquid bleach, produced under conditions of oligopoly, such as obtain in the liquid bleach industry. Since there is no reason (save cheapness and availability) for a

[51] Dirlam, *supra* note 13, at 103.

consumer to prefer one brand of liquid bleach over another, there is no real need for the various manufacturers to incur as heavy advertising expenses as they do—except to protect their market shares. Heavy advertising, under such conditions, does not, in any meaningful sense, serve to broaden the consumer's range of product alternatives. Moreover, since oligopolists typically refrain from price competition, large advertising expenditures in the liquid bleach industry have not resulted in a lower unit price to the consumer. (Clorox, the most extensively advertised liquid bleach, is also the most expensive for the consumer.) Thus we have a situation in which heavy advertising benefits the consumer, who pays for such advertising in the form of a higher price for the product, not at all.[52]

This situation is simply an example of a latent ambiguity in the term "competition". All forms of business rivalry are, in a sense, "competition", but not necessarily in the sense contemplated by Section 7 and the other antitrust laws. Price cutting is normally a manifestation of healthy competition. Predatory price cutting, however, is not. It tends to stifle true competition, and is often itself a violation of the antitrust laws. Similarly, sellers who vie with one another, through advertising and other promotion activities, to create a consumer preference for their brands, may be laudably engaged in competition such as the antitrust laws are intended to protect. On the other hand, such sellers may, as here, be engaged in brand "competition" to the end only of maintaining high prices, discouraging new entry, and, in general, impairing, not promoting, socially useful competition.

In sum, the undue emphasis on advertising which characterizes the liquid bleach industry is itself a symptom of and a contributing cause to the sickness of competition in the industry. Price competition, beneficial to the consumer, has given way to brand competition in a form beneficial only to the seller. In such an industry, cost advantages that enable still more intensive advertising only impair price competition further; they do not benefit the consumer.

E. *Post-Acquisition Evidence*

In holding this merger unlawful under Section 7, we expressly decline to place reliance on certain facts which, in the view of the hearing examiner, helped demonstrate the merger's unlawfulness. It should be noted that the hearings in this case were conducted, for

[52] See Taplin, Advertising: A New Approach 107–110 (1963); Blair, *supra* p. 51, at 681.

the most part, under the aegis of the Commission's decision in *Pillsbury Mills, Inc.*, 50 F.T.C. 555. Experience in the trial of merger cases, now confirmed by the Supreme Court, has exposed the fallacy of supposing that a broad-gauged inquiry into every business and economic fact remotely relevant to the economic effect of a merger—the kind of inquiry the Commission in *Pillsbury Mills* held it must undertake under Section 7—is productive of more rational decisions. Broad principles of relevancy and materiality may have been appropriate when the law of Section 7 was still fluid and unsettled, but it is now clear that the path toward just and effective enforcement of the statute lies in the direction of narrowing the scope of necessary or permissible inquiry.

In the particular circumstances here, most of the considerable amount of post-acquisition evidence introduced at the hearings was entitled to little weight. We have already canvassed the considerations that make such evidence rarely of much probative value (see pp. 1559, 1560 above); suffice it to say that those considerations are applicable in this case. Were the post-acquisition evidence in this case to be considered, it might furnish some support for the finding we have made wholly on the basis of other factors. Since the merger, Clorox's market share has continued to increase. In 1961, Clorox's overall market share was 51.5% as compared to 48.8% in 1957, while its share in, for example, the New England region, had risen in this period from 56% to 67.5%. Procter has introduced sales promotions on a fairly large scale ($2,000,000 in four years) in behalf of Clorox. Purex has acquired the fourth largest liquid bleach producer (thus increasing concentration in the industry), after, and according to an official of Purex, in part because of, losing a "brand war" to Clorox-Procter in Erie, Pennsylvania. And Procter has obtained, for Clorox, certain advertising economies. None of these phenomena, we think, proves that the merger is unlawful, for it is difficult to know to what extent they were produced by the merger, and not by other factors. However, if we were to consider them, we would have to find that they corroborated or confirmed the conclusion of illegality grounded in solid evidence of the structure of the market at the time of the merger.

Had Procter in fact fully integrated the marketing and other activities of Clorox in its overall organization, perhaps dramatic post-acquisition changes, directly traceable to the merger, would have occurred. But, save for taking advantage of certain advertising cost advantages and introducing sales promotions, Procter in the period covered by the post-acquisition evidence has carefully refrained from changing the nature of the Clorox operation; even the network of independent brokers has been retained. Such restraint appears to be motivated by a general Procter policy of moving slowly and cautiously in a new field until the Procter management feels totally acclimated to it. It is possible, as well, that the pendency of the instant proceeding has had a deterrent effect upon expansionist activities by Procter in the liquid bleach industry.

Most important, however, so far as post-acquisition evidence in this case is concerned, is the fact that there has been no dramatic change in market structure or behavior in the years since the merger. This means that there is no reason to suppose that an analysis based upon market structure at the time of the merger need be reexamined, qualified or discarded in the light of subsequent events. Where, as here, the period since the acquisition has been relatively uneventful, there is certainly no basis for according particular weight to the post-acquisition evidence that found its way, needlessly, into the record.

IV. Relief

The last point to be considered is the nature of the relief to be ordered. The order in the initial decision would require respondent to divest itself of the acquired assets through sale. Respondent raises two main objections to this order.

First, it contends that divestiture is not called for in these circumstances, because the public interest can be protected by an order enjoining Procter from exercising the opportunities for enhancing Clorox's dominance of the liquid bleach industry which the Commission has found resulted from the merger. It is settled, however, that divestiture is normally the appropriate remedy in a Section 7 proceeding. *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316. This case would be a particularly inappropriate one in which to make an exception. The anti-competitive effects of this acquisition are not enjoinable. They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry, and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of the acquisition.

Second, respondent objects to the provision in the order entered by the hearing examiner that sale of the acquired assets cannot be made to anyone "who is at the time of divestiture, or for two years before said date was, a stockholder * * *" of Procter. Recognizing that the purpose of a Section 7 proceeding is in no sense punitive, that the sale of an absorbed firm may be difficult to accomplish within a reasonable period of time, and that in the case of a large publicly-owned corporation the common ownership by the shareholders of both the acquired and the acquiring firms is not necessarily inconsistent with a meaningful separation of the firms, the Commission recently approved an order permitting a Section 7 respondent to spin off the acquired assets to a new corporation, the stock of which would then be distributed to the shareholders of respondent. *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided March 22, 1963) [62 F.T.C. 929, 961], see *id.*, Memorandum Accompanying Final Order (issued March 22, 1963) [62 F.T.C. 964]. There is no apparent reason why this respondent should not be permitted thus to spin off the acquired assets to a new corporation or corporations, if it so desires, and we have modified the order entered by the hearing examiner accordingly.

Commissioner Anderson concurs in the result.

Final Order

NOVEMBER 26, 1963

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner filed on February 28, 1962. The Commission has rendered its decision, denying the appeal in all respects, and adopting the findings of fact and conclusions of law made by the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That:

I.

Respondent, The Procter & Gamble Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, shall divest, absolutely and in good faith, all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and good will, acquired by The Procter & Gamble Company as a result of the acquisition by The Procter & Gamble Company of the assets of Clorox Chemical Company, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Clorox Chemical Company since the acquisition.

II.

By such divestiture, none of the assets, properties, rights or privileges, described in paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of The Procter & Gamble Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

III.

If respondent divests the assets, properties, rights and privileges, described in paragraph I of this order, to a new corporation or corporations, the stock of each of which is wholly owned by The Procter & Gamble Company, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of The Procter & Gamble Company, in proportion to their holdings of The Procter & Gamble Company stock, then paragraph II of this order shall be inapplicable, and the following paragraphs IV and V shall take force and effect in its stead.

IV.

No person who is an officer, director or executive employee of The Procter & Gamble Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of The Procter & Gamble Company, shall be an officer, director or executive employee of any new corporation or corporations described in paragraph III, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in paragraph III.

V.

Any person who must sell or dispose of a stock interest in The Procter & Gamble Company or the new corporation or corporations, described in paragraph III, in order to comply with paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of The Procter & Gamble Company.

VI.

No method, plan or agreement of divestiture to comply with this order shall be adopted or implemented by respondent save upon such terms and conditions as shall first be approved by the Federal Trade Commission.

VII.

As used in this order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VIII.

Respondent shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

By the Commission, Commissioner Anderson concurring in the result.

IN THE MATTER OF

BERCO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C–621. Compaint, Nov. 29, 1963—Decision, Nov. 29, 1963

Consent order requiring New York City distributors of watches to retailers to cease selling watches with bezels of base metal processed to simulate precious metal or stainless steel, without disclosing the true metal composition; selling watches without disclosing that the cases were imported from Hong Kong; and falsely marking and advertising certain watchcases as "water resistant" and "water protected".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Berco, Inc., a corporation, and Ernest Grunwald and Ilse Grunwald, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof