Antitrust Scrutiny of a Pure Conglomerate Merger: The *Ovation* Case

BY THOMAS B. LEARY

WHEN ANTITRUST COUNSEL advise on the legality of a proposed merger, an inquiry into possible product "overlaps" will usually be the first step. Depending on the answer, it may be the last step as well. Merger enforcement in the United States focuses almost exclusively on so-called "horizontal" transactions or (very rarely) on "vertical" transactions with potential "horizontal" effects.

There is, of course, a good reason for the horizontal focus. The governing statute prohibits mergers that may "substantially . . . lessen competition, or . . . tend to create a monopoly."[1] A horizontal merger, by definition, does eliminate one competitor.

But the standard test for illegality is much more sophisticated than that. The elimination of that one competitor must also have a likely adverse effect on the overall competitive process, and various mathematical tests have been devised to help identify the horizontal transactions that raise a threat. The method of analysis has been explicated in comprehensive guidelines and learned commentary, which are familiar to experienced counselors.

Controversy continues, however, because the current guidelines may not accurately reflect actual practice and because actual practice may be more imprecise and subjective than first appears. These observations have been made before,[2] and this article will not explore that now familiar territory in depth.

The point here is not that the standard analysis of mergers is inadequate in those cases where it has been applied. The point is that present horizontal (and occasional vertical) analysis may incorporate economic assumptions that could be extended, in some special situations, to mergers with no overlaps at all. If so, however, the challenge will be to devise limiting principles that can set appropriate boundaries, with some predictability.

Antitrust counsel have been alerted to this issue by the recent announcement of a Federal Trade Commission complaint against Ovation Pharmaceuticals, Inc.[3]

In August 2005, Ovation purchased from Merck the rights to a drug called Indocin IV, which at that time was the only drug approved for the treatment of a potentially fatal heart condition that primarily affects premature infants. Ovation was not engaged in this particular business, so there were no previous horizontal or vertical relationships. Five months later, Ovation acquired from Abbott Laboratories the rights to a drug called Neoprofen. This drug, then awaiting regulatory approval and since approved, is the only other drug on the market that treats the same condition. The Commission complaint charges that this second acquisition, which fell below the Hart-Scott-Rodino reporting threshold, was a horizontal merger to monopoly. According to the complaint, Ovation raised the price of its Indocin drug by 1300 percent promptly after this second acquisition, and set the Neoprofen price at the same level after it had been approved.

The acquisition of Neoprofen is obviously vulnerable to a challenge, if the facts stated in the complaint are correct, and the Commission vote was a unanimous 4–0. However, two Commissioners (Leibowitz and Rosch) wrote separate concurring opinions, and indicated that they would have challenged the acquisition of Indocin IV, as well, even though it was a pure conglomerate transaction. Commissioner Rosch's concurring opinion explained his rationale:

> If [Merck] profitably could have sold Indocin at a monopoly price it arguably would have done so. However, there is evidence that Merck had a large product portfolio that included a number of pharmaceutical products that were more profitable than Indocin. It is arguable that if it sold at a monopoly price a product used to treat premature babies, that could damage its reputation and its sales of those more profitable products.
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> There is reason to believe that the sale of Indocin to Ovation had the effect of eliminating the reputational constraints on Merck that had existed prior to the sale. There is evidence that Ovation lacked Merck's large product portfolio and thus arguably was not concerned, as Merck had been, that the sale of Indocin at a monopoly price would damage its reputation and sales of more profitable products.
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> [T]he first transaction . . . "tend[ed] to create a monopoly" by enabling Ovation to exercise and maintain monopoly power that the prior owner of Indocin (Merck) could not profitably exercise . . . .[4]

Notice that, unlike most merger cases, the retrospective application of Section 7 to Ovation's second acquisition of Neoprofen would not depend on speculation about a likely price increase in the future; we *know* there has been an enor-

Thomas B. Leary is Of Counsel at Hogan & Hartson, Washington, D.C., and a former Federal Trade Commissioner. *He wishes to acknowledge the assistance of Logan M. Breed, a Hogan associate. The opinions expressed in this article are not necessarily shared by Hogan & Hartson or any of its clients.*

mous price increase.[5] On the other hand, a challenge to the initial acquisition of Indocin would plow new ground because it seems to involve only the transfer to a new owner of whatever market power Merck already had, and legal monopolists can charge whatever prices they choose.

Traditional Merger Analysis

It is well settled today that the broad language of the Clayton Act should be applied to those mergers that "create or enhance 'market power' or . . . facilitate its exercise."[6] The term "market power" is commonly defined as "the power to restrain output and raise prices above competitive levels for a significant time."[7] This standard is more difficult to apply in practice than would facially appear.[8]

The concept of an identifiable "competitive" price level is based on a model of perfect competition that scarcely exists anywhere in the modern world. Pre-merger price levels are therefore commonly assumed to be a close enough approximation,[9] and only predicted post-merger increases typically arouse concern.

The "power" to reduce output and raise prices also requires further amplification. The vast majority of enterprises in the United States can raise prices any time they please. There may well be immediate adverse financial consequences from the resulting decline in sales, but they have the "power" to do it (perhaps pursuant to some experiment with a long-term repositioning strategy). They are not like so-called "price takers" in a perfectly competitive market who theoretically can make no sales above the "market price."

"Power" is therefore really not the right word to use in most cases; a better one might be "incentive." So the standard test for determining adverse competitive effect really is whether the merger or acquisition seems likely to create a surviving entity with a greater economic *incentive* to restrict output and raise prices to a significant extent for a significant time. With its focus on horizontal effects, merger law today focuses on changed incentives that flow from changes in *industry* structure; the Rosch opinion suggests that adverse incentive effects can also flow from changes in the structure of the *surviving competitor*. (Merck's patent conferred some legal power over price, but the company's internal structure may have reduced its incentive to exercise the power; Ovation acquired the same legal power but had a different structure and different incentives.)

Under the traditional analysis, the focus on industry structure requires various simplifying assumptions. A "significant" price increase is arbitrarily defined at 5 percent, and a significant time is arbitrarily defined as two years.[10] The usual focus is on short-term "static" effects because long term consequences are so difficult to predict. The standard models assume that rivals will consistently adhere to particular strategies, even though a major acquisition is also likely to affect the way competitors behave. Attempts are made to quantify the offsetting effects of predicted efficiencies, even though seemingly rigorous internal projections often prove unreliable. These uncertainties are inherent under various methods of merger analysis.

If the merger analysis proceeds on a "coordinated effects" theory, it is necessary first to identify a "relevant market," which can be a controversial matter, and then to calculate the "shares" of sellers in the market and the merger's effect on levels of "concentration." The ultimate question is whether the higher level of concentration created by the merger will make it easier for participants to coordinate their pricing strategies, overtly or tacitly.

The standard models will always predict a price increase, as a matter of simple mathematics. It is necessary to go further and test whether it is feasible to maintain a consensus on a price that will satisfy at least all the major participants in the market. So it is necessary to consider whether there will be post-merger changes in the incentives of these participants.

Alternatively, if the acquirer is selling things that are highly differentiated or competitors are capacity constrained, the combined entity may have the incentive to increase prices following the merger without an overt or tacit agreement with any competitor to do so. A "unilateral effects" analysis superficially appears simpler because it does not necessarily depend on market definition. But predictions about the likelihood of a unilateral price increase still require estimates of the sales that will be lost, and to whom, and estimates of the resultant impact on short-term profitability. These "critical loss" estimates, which also depend on simplifying assumptions about what competitors will continue to do, are really inquiries into incentives rather than power. Obviously, most companies literally have the ability to raise prices even if the predicted losses exceed the predicted benefits.

The analysis of "vertical" mergers between suppliers and customers can be just as complex. Challenges to these transactions are rare because they require not only proof that the transaction is likely to "foreclose" access by competitors to a particular customer or source of supply, but also proof that this foreclosure is competitively significant. Initially, it is necessary to examine whether the merger will create not only the ability but the incentive to foreclose.[11] And, even if previous relationships are terminated, the resulting reshuffle of suppliers and customers is normally of no competitive consequence.

If changes in incentives are almost always the fundamental issues in the traditional economic approach to horizontal or vertical mergers—and if analysis of these changes underlies predictions about likely effects—an antitrust prosecutor may not think it is radical to consider these same factors in a conglomerate merger.

Issues Raised by the Rosch Concurrence

Immediate adverse reactions from economic commentators on the *Ovation* case highlight a number of critical issues.

Reliance on the Incentives of a New Owner. An anonymous comment on a blog hosted by Mary Coleman, a former senior economist at the Federal Trade Commission, raises the issue of whether a focus on the incentives of the new

owner will result in an over-broad application of Section 7: "Under Rosch's theory it seems that a transaction that means a new owner who has different pricing incentives, for whatever reason (reputation or otherwise) is actionable under Section 7."[12]

As discussed above, however, current mainstream analysis of horizontal (and vertical) transactions actually focuses to a large extent on changed management incentives after a merger. The purpose of the analysis is to predict the likelihood that prices will increase post-merger. And new owners can have different incentives based on the changed structure of the merged entity even if overall industry structure is unchanged.

It may, of course, be easier for economists to model the incentive effects of industry structural changes than it is to predict the incentive effects of more subtle changes like those that are assumed in Commissioner Rosch's *Ovation* opinion. But economists have made major contributions to the identification and analysis of incentives, even when they are hard to measure. One example is the articulation of economic incentives for resale price maintenance, which can reduce the threat of "free riding," even though the significance of free-riding is not easy to quantify. Another example is the universal recognition of the economic nexus between the protection of intellectual property and the incentives to innovate, although it is not possible to demonstrate statistically that the present time periods for patent and copyright protection—much less present case law—are optimal.

An overt preference for quantitative measures to predict changed incentives may not be the only factor that underlies some professional skepticism about the theory articulated in Commissioner Rosch's opinion. The handful of cases that have ventured into regulation of pure conglomerate transactions have not been overruled, but are no longer considered intellectually respectable.

The two landmark conglomerate merger cases, *Procter & Gamble*[13] and *Consolidated Foods*,[14] date from the 1960s. In *Procter & Gamble*, the Court held that an acquisition was illegal because the surviving entity would have an enhanced ability to advertise and engage in sales promotions, which would disadvantage smaller competitors. Today, these advantages would likely be cited as efficiencies and included among arguments *for* legality. In *Consolidated Foods*, a conglomerate merger was struck down because of enhanced potential for reciprocal sales and purchases between previously independent companies. Reciprocity is no longer viewed as a serious competitive concern.

The fact that old theories of conglomerate merger injury are no longer accepted, however, does not foreclose the possibility that antitrust prosecutors could revive challenges to conglomerate mergers, with a different rationale. Recall again that the focus of modern merger jurisprudence has been on likely price effects. The analysis of industry structure, replete with the calculations of market shares and concentration ratios, has been a useful tool for the prediction of likely price effects, but the analysis is not an end in itself.

Why Should Mergers Be Different? There may be even more fundamental issues raised by Commissioner Rosch's opinion in *Ovation*. First, how can Merck's sale of Indocin to Ovation be distinguished from alternative strategies with exactly the same effects, which are antitrust immune?

In one of his commentaries on Commissioner Rosch's opinion, Professor Joshua Wright, a former FTC Scholar in Residence, expressed concern that "[t]here is virtually no limit to this . . . theory," citing a number of different unilateral strategies that Merck could have undertaken to avoid a reputational constraint on its price decisions for Indocin.[15] This same question could be asked in many other contexts.

Why, for example, should the purchase of capacity from another company be subject to challenge under the merger law when internal capacity expansion is not? The standard response is that internal growth is likely to be driven by the expansion of demand for a superior product, and hence based on efficiency.[16] An acquisition may, depending on circumstances, simply be a way to "buy" market share rather than "earn" it. This is not necessarily true, however: it may be much more efficient to buy existing capacity than to build it, and the loss of competition may be trivial. The merger is likely to be cleared, but the transaction is still subject to review under Section 7.

Ultimately, the differential treatment of a merger or acquisition is a matter of law rather than economics. Mergers are different because Congress has said that they are different. Obviously, merger enforcement decisions should be informed by the best available economic learning, but the mere fact that companies could have accomplished similar results by different means without antitrust consequences does not necessarily mean that the merger is legal.

The special treatment of mergers can cut both ways. A merger of two companies is not per se illegal just because a different and facially less comprehensive price-fixing agreement would be per se illegal. And anomalies are not uniquely present in merger law. For example, vertical restraints are not antitrust immune simply because a seller could, without antitrust consequences, achieve the same outcome by forward vertical integration. And the language of Sherman Act Section 1 means that actions with similar economic effects may or may not be legal depending on nuances of communication that do or do not add up to an "agreement."

Effect of the Opinion on the Boundaries of Merger Law

Even those who believe that Commissioner Rosch's opinion is not necessarily inconsistent with antitrust law generally may still be concerned about its specific application. Many—perhaps the majority—of mergers result in the introduction of some new managers with different strategies that have different market effects. The present merger guidelines describe a methodology for predicting, however imperfectly, whether the effects of horizontal or vertical mergers are likely to be anticompetitive. Are there analogous limiting principles that

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could be applied to theories for challenging conglomerate transactions?[17]

The Importance of Specific Facts. The Rosch opinion, like every other opinion, is responsive to case-specific facts, which are not necessarily public. The facts that are disclosed describe a scenario that appears to be both unusual and compelling, and Commissioner Rosch may not have perceived a need to define the outer parameters of his theories. This article will not presume to do so either, but it is possible to postulate alternative scenarios that might yield a different result.

The Rosch opinion emphasizes Merck's large product portfolio and the adverse effects on sales of more profitable products if Merck attempted to sell Indocin at a monopoly price. Antitrust liability, under his theory, would not be triggered if new owners simply had a different business model; liability would depend on the fact that a new owner did not have the same internal structural constraints.

Suppose, alternatively, that Merck sold its Indocin product with full knowledge that Ovation intended to increase prices drastically, and in fact captured a share of the increased revenues in the price that Ovation paid. If a legal monopolist can charge whatever price it pleases for a product, arguably it should also be able to sell its product to an acquirer for the highest price it can command. Even if acquisitions are different, this hypothetical might suggest that Merck's incentives at the time of sale are really not all that different from Ovation's incentives.[18] It might be more difficult to claim that the change in ownership alone caused the price increase.

Suppose that the Ovation price increase was more modest and prompted by capital expenditures Ovation had to make when it installed its own manufacturing capacity. Cost increases are a familiar and benign explanation for price increases, but the cost increases associated with the merger may then appear to be "inefficient," unless they are offset by Merck savings from a pared-down portfolio. Although reliance on inefficient outcomes by a prosecutor may resemble reliance on efficiencies by a defendant, a merger challenge based solely on increased costs, would seem to allow prosecutors to equate legality with the government's views about the wisdom of a deal. This would appear to be a radical departure. Remember, however, that the impact of reduced costs is considered today only when the transaction would otherwise create an unacceptable risk of competitive injury; reciprocal consideration of increased costs would only be appropriate when they create, rather than mitigate the risk—presumably, a very rare occurrence.

The nature of the product is also likely to have influenced Commissioner Rosch's view. A dramatic increase in prices for a drug that treats gravely sick infants is a great deal more likely to stimulate agency attention than a similar increase in the price of, say, a purely cosmetic treatment. Prosecutors with finite resources tend to focus on the most serious offenses, measured qualitatively as well as quantitatively.[19]

When it comes to case selection, not all dollars are created equal. But, Commissioner Rosch did not rely on qualitative considerations or likely economic externalities in the *Ovation* case. He relied on more straightforward economic incentives, like the impact of lost sales, based on the fundamental assumption of so-called Chicago economics that companies behave rationally to maximize profit. Therefore, the Rosch opinion should not be read as an endorsement of so-called behavioral economics, which questions the assumption of economic rationality.[20]

Continued Reliance on Economic Principles. Professor Wright is concerned that Commissioner Rosch's opinion in *Ovation* reflects "his increasingly apparent view that economics and economists should play a minimal role in the shaping of antitrust enforcement decisions."[21] But Rosch's expressed willingness to take account of post-merger changes in economic incentives cannot fairly be characterized as a disregard for the economics profession.

The Rosch opinion is based on the assumption that Merck was reluctant to exploit its pricing power over a treatment for a hideous ailment because it feared an adverse effect on sales of other products with a much greater impact on earnings. That is an economic constraint, pure and simple.[22] He then suggests that an acquisition that removes the constraint is subject to review under Section 7. After all, it was economists who led the successful effort to define the words "substantially to lessen competition" in terms of likely price effects. As discussed above, the fact that Merck could have removed this economic constraint by various internal management strategies does not necessarily immunize the conduct. It is the change of ownership that can trigger the statute.

There are other similarities between traditional theories and those that Commissioner Rosch proposes. The most obvious is mentioned in his opinion, namely, the fact that the Horizontal Merger Guidelines express particular concern about the acquisition of a "maverick" firm which, prior to the acquisition had constrained price coordination.[23] It is true, of course, that today the elimination of a maverick, if it exists, is just one factor that increases the likelihood of coordinated effects in a horizontal merger.[24] But the weight of this factor is not keyed directly to the magnitude of an increase in concentration; it rather depends on the special competitive significance of the maverick that will be acquired.

Another analogy would be the competitive concerns that might arise from the acquisition of a minority interest in a competitor, even if the minority interest does not confer any

management control. Simple statistics suggest that a company may have an economic "incentive to pull its competitive punches" in head-to-head encounters with a partially owned rival.[25] This theory obviously applies only when there are horizontal overlaps.[26] But, once again, the theory does not depend on relevant market definition or changes in concentration (although obviously the concern would be far less in an unconcentrated market).[27]

Expanded Application of Economics Is Still Economics. If merger jurisprudence expands beyond the current focus on horizontal and vertical overlaps, it could open the door for merger challenges unlike any we have seen before. If this happens, it will likely increase the importance of economic analysis, not reduce it, because of a compelling need for limiting principles. It was economists who ultimately developed principles to narrow the earlier assumption that mergers with any substantial horizontal overlaps were presumptively illegal. Prosecutors and courts could similarly benefit from economic learning on when conglomerate mergers may or may not have likely anticompetitive effects.

One example of immediate relevance is identified in a recent comment on Professor Wright's blog. An anonymous correspondent speculated that the Rosch theory could be used to attack a leveraged buy-out (LBO): "[A]n LBO buyer may have an incentive to increase short-term profitability at the cost of long-run growth through more reasonable prices (presumably to allow a quick 'flip' or to generate cash flow to pay for financing . . .)."[28] The commentator is clearly dismayed by the prospect of such a challenge, and it may be difficult to accept the notion that price competition may be impaired if an LBO weakens the surviving entity. Recent economic developments all over the world, however, suggest that over-leveraged investments can indeed have adverse competitive consequences.

Financial strength is routinely considered today when the antitrust agencies examine the qualifications of a company proposed as a buyer for overlapping assets that must be divested in a merger-case settlement.[29] It is possible that agencies will now go further and conduct a similar inquiry into the financial capability of a buyer in the main transaction. A big challenge would be the development of limiting principles that will avoid a routine use of antitrust law to second-guess business decisions. And the real question may be whether concerns of this kind should or will be addressed by a competition agency, rather than some other government body.

There also may be a concern that a focus on the varied incentives of companies that care a lot, or very little, about their "reputation" will open the door to consideration of all kinds of social and political considerations, which were banished from antitrust inquiries—for good reason—about thirty years ago. This is a legitimate concern, but the troublesome consequences do not necessarily flow from the focused kind of inquiry that Commissioner Rosch suggests, which relies on traditional economic concepts.

Conclusion

The standard approach to merger analysis today, with its near-exclusive focus on overlaps, resembles a ritual dance. The steps are familiar and thus enhance predictability. But the performers can become so focused on the intricacies of the steps that they tend to forget why they are important in the first place.

There is near-universal agreement that a reduction in competition under Section 7 of the Clayton Act should be defined as an increase in prices over the levels that would have prevailed in the absence of the merger. In the vast majority of cases, this effect will flow from a merger-related change in the structure of an industry, and the standard analysis may continue as before.

Changes in industry structure are often a useful tool when predicting the likelihood of a price effect, but sound economics does not necessarily require that this structural change be an element of the offense. For the last twenty-five years, merger analysis has become progressively less reliant on this kind of evidence. Commissioner Rosch's opinion in *Ovation* signals that, in some very special situations, the antitrust agencies might dispense with it altogether. His opinion should also be read as an open invitation for debate on whether a conglomerate theory should be applied, and the appropriate parameters if it is applied. ■

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1 Clayton Act § 7, 15 U.S.C. § 18.

2 *See, e.g.*, Thomas B. Leary, *The Elusive Goal of Convergence and the Inevitability of Uncertainty*, ANTITRUST SOURCE, Dec. 2006, at 2, http://www.abanet.org/antitrust/at-source/06/12/Dec06-Leary12=19.pdf.

3 The author has in the past provided advice to a client with interests adverse to Ovation in a matter unrelated to this proceeding.

4 FTC v. Ovation Pharms. Inc., FTC File No. 0810156 (Dec. 16, 2008) (Concurring Statement of Commissioner Thomas Rosch), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf [hereinafter Rosch opinion].

5 *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957) (mergers can be attacked when adverse effects become apparent).

6 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, § 1.0, *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf [hereinafter Merger Guidelines].

7 *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 327 (6th ed. 2007). This is potentially a broader standard than the tendency "to create a monopoly" standard in the Rosch opinion—a standard obviously responsive to the particular *Ovation* facts.

8 *See* James Rill, *Practicing What They Preach: One Lawyer's View of Econometric Models in Differentiated Products Mergers*, 5 GEO. MASON L. REV. 393, 399 (1997) (models of competitive effects "cannot capture the full effect of market dynamics, and . . . they rely on assumptions that may not always reflect reality . . . .").

[9] An uncritical assumption of this kind has sometimes been called "the Cellophane Fallacy," referring to an apparently similar assumption in the Supreme Court's famous *Cellophane* opinion, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). It may also be an unstated premise of the controversial *Whole Foods* opinion in the district court. *See* FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008).

[10] Merger Guidelines, *supra* note 6, §§ 1.1, 3.3.

[11] *See* Synopsys Inc./Avant! Corp., FTC File No. 0210049 (July 26, 2002) (Statement of Commissioner Thomas B. Leary), *available at* http://www.ftc.gov/os/2002/07/avantlearystmnt.htm (if "present views about incentives and intentions prove to be [wrong,] it would be appropriate to apply the standards of Clayton Act merger law" retroactively).

[12] *Economic Issues in the Ovation Complaint*, http://www.truthonthemarket.com/2008/12/29/economic-issues-in-the-ovation-complaint/, at comment 2 (Dec. 30, 2008).

[13] FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967).

[14] FTC v. Consol. Foods Corp., 380 U.S. 592 (1965).

[15] Posting of Joshua Wright, *Economic Issues in the Ovation Complaint*, *supra* note 12, at comment 3 (Dec. 30, 2008).

[16] *See, e.g.*, Robert Bork, The Antitrust Paradox 192 (1978).

[17] Neither the Rosch opinion nor this discussion is predicated on the assumption that the Federal Trade Commission Act would be applied more broadly than the antitrust statutes in this area.

[18] It is also possible, of course, that capture of a monopoly reward this way might have a smaller impact on Merck's reputation.

[19] For example, on the consumer protection side, compare the priority given to the deceptive promotion of worthless AIDS test kits, a fraud with potentially lethal consequences. *See, e.g.*, FTC v. Sovo Tec Diagnostics, FTC File No. 992 3252 (N.D. Cal. Sept. 18, 2000), *available at* http://www.ftc.gov/os/2000/09/sovotteccmp.htm.

[20] *But see* J. Thomas Rosch, Implications of the Financial Meltdown for the FTC, Remarks at New York Bar Ass'n Annual Dinner 8 (Jan. 29, 2009), *available at* http://www.ftc.gov/speeches/rosch.shtm ("We may need to move more towards what has been called 'behavioral economics."). Commissioner Rosch made this remark without reference to the *Ovation* decision.

[21] Posting of Joshua Wright, *No* Ovation *for FTC's Latest Enforcement Theory*, to http://www.truthonthemarket.com/2008/12/17/no-ovation-for-ftcs-latest-enforcement-theory/ (Dec. 17, 2008).

[22] It is not unusual for companies to make an "investment" in their reputation. Consider the common promotion of "green" products, so widespread that the FTC has issued guides to help ensure that it is done honestly. *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Pt. 260. It is possible that some of these companies (or Merck) also have non-economic motives. The Rosch opinion does not suggest, however, that merger law should be concerned with degrees of benevolence.

[23] *See* Rosch opinion, *supra* note 4, at 2 (citing Merger Guidelines § 2.12 & n.20).

[24] *See, e.g.*, United States v. Premdor, Inc., No. 1:01-CV-01696 (D.D.C. 2002) (challenging a primarily vertical merger because Premdor was in a strong position to behave as a maverick to constrain a coordinated increase in upstream prices); United States v. Alcoa, Inc., 152 F. Supp. 2d 37 (D.D.C. 2001) (DOJ challenge in 6–5 and 5–4 markets based on, inter alia, the fact that the acquired company was a potential maverick because it had more excess capacity than other smaller producers).

[25] *See* Comment of the FTC, FERC Docket No. PL09-3-000 (Apr. 28, 2009), http://www.ftc.gov/os/2009/05/v090008ferccomment.pdf; Daniel P. O'Brien & Steven C. Salop, *The Competitive Effects of Passive Minority Equity Interests: Reply*, 69 Antitrust L.J. 611, 614 (2001); *see also* Jon B. Dubrow, *Challenging the Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests*, 69 Antitrust L.J. 113 (2001) (arguing for a limited application of the theory).

[26] *See, e.g.*, United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 862 (6th Cir. 2005) (acquisition by school milk provider of 50 percent interest in only competitor was anticompetitive because it "closely aligned [the parties'] interests to maximize profits via anticompetitive behavior"); United States v. Northwest Airlines Corp., No. 98-74611 (E.D. Mich. Dec. 18, 1998) (amended complaint) (challenge to acquisition by Northwest Airlines of a 15 percent financial interest in Continental Airlines because, inter alia, Northwest would be dissuaded from competing aggressively on routes between the two carriers' hubs where the parties had a substantial combined market share); *see also* 5 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1203c (3d ed. 2007) ("An acquisition of part of the stock of a competitor may affect the situation and competitive decisions of either company. The acquired firm might be prejudiced, or the competitive zeal of each firm might be reduced.").

[27] Of course, Clayton Act Section 7 includes an exception for true "passive investment," presumably because no consideration was given to a possible impact on the conduct of the acquiring firm.

[28] *See Economic Issues in the Ovation Complaint*, *supra* note 12, at comment 2 (Dec. 30, 2008).

[29] These financial discussions take place in non-public settlement negotiations.