

FTC Holds New Hearing on Merger Retrospectives

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On April 12, the Federal Trade Commission held a hearing to debate the extent to which the FTC should use retrospective reviews to strengthen merger enforcement. This was the latest in the series of hearings on *Competition and Consumer Privacy in the 21st Century*. The hearing included remarks from Republican FTC Chairman Joseph J. Simons, Democratic Commissioner Rebecca Kelly Slaughter, and panels with FTC economists, antitrust practitioners and academics. Panelists explored a range of options that the FTC might employ for carrying out retrospectives. All panelists, including Chairman Simons, favored, at least conceptually, some use of retrospectives. But the key takeaway is that the FTC still currently lacks the resources to implement a robust merger retrospective program. Without increased funding, the FTC likely will be able to conduct only a few merger retrospectives.

The Backdrop: Recent Divergence of Views Among Commissioners

The hearing occurred against a backdrop of recent division among commissioners on the broader question of how deals should be evaluated and whether the agency has been too lax on mergers in the past. The division among commissioners revealed itself in recent 3-2 decisions to close investigations of two vertical mergers that, even during the Obama administration, likely would have been unanimous.

Commissioner Slaughter had started the debate about whether and when to employ merger retrospectives in her written dissents earlier this year in Staples-Essendant and Fresenius-NxStage (both 3-2 votes along party lines). In Staples-Essendant, she wrote that the economic dominance of large firms and increase in vertical mergers was “pernicious” and responsible for “sapping the vitality of our nation’s economy.” In both dissents, she called for the FTC to commit to a regular post-merger retrospective analysis program for “close cases” when the Commission had imposed a remedy or identified “meaningful competitive concerns” but lacked the evidence to challenge the merger in court. If the analysis revealed harm to competition, she argued, the FTC should use that evidence to bring enforcement action against the consummated merger.

The three Republican commissioners voted to close both the Staples-Essendant and Fresenius-NxStage investigations, explaining that these vertical mergers likely would result in pro-competitive benefits and any competitive harms could be remedied. The approach of the majority likely would have won the day in the Obama FTC, where Commission votes more often than not were unanimous and decisions not to challenge vertical mergers were largely uncontroversial. Through their dissents, the two Democratic commissioners showed themselves to be even more aggressive enforcers than those in the prior administration, and their views portend difficulties for Chairman Simons in reaching consensus on matters going forward.

In Staples-Essendant, the Republican majority characterized Commissioner Slaughter’s call for regular merger retrospectives as impractical and idealistic. The “practical reality,” Chairman Simons said, “is that we do not have remotely enough resources” to review every merger that may or may not have competitive concerns. He noted further that the merit of the commissioner’s proposal was subject to debate and the topic would be addressed in an upcoming hearing.

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Chairman Simons' and Commissioner Slaughter's Views on Merger Retrospectives

In his opening remarks at the hearing, Chairman Simons acknowledged the usefulness of merger retrospectives. He said that appropriate retrospective analysis can play a role in safeguarding the strong bipartisan consensus that has led antitrust enforcement over the past two decades. He explained that such analysis should be used to help test and refine pre-merger economic tools and models, and even help to persuade courts to block anticompetitive mergers, as they have in the past. But he also emphasized that retrospectives pose difficult methodological issues and are resource intensive. Chairman Simons said repeatedly that, in light of the FTC's resource restraints, it is unclear what an agency retrospective program would look like.

In her remarks, Commissioner Slaughter reaffirmed her position in Staples-Essendant. She suggested that retrospectives should occur in the "normal course" and would sharpen the FTC's analytical tools. In her view, such analyses, conducted regularly, could deter merged entities from engaging in anticompetitive behavior and would allow the FTC to unwind mergers that harm competition.

Both Chairman Simons and Commissioner Slaughter raised the possibility of working with outside third parties to reduce some of the FTC's costs of conducting retrospectives. In his opening remarks, Chairman Simons said that the Commission should particularly consider "whether and how the Commission can work with outside researchers on retrospective studies." Commissioner Slaughter echoed this idea. (We note, however, that any such proposal would need to address the confidentiality of any sensitive data being shared with outside researchers who are not FTC personnel or paid by the agency.)

While it was not surprising that Chairman Simons acknowledged at the hearings the potential value of retrospectives in concept, it was notable that he did not repeat some of the pointed criticisms the Republican majority in Staples-Essendant directed at Commissioner Slaughter's retrospective proposals. Some may interpret this as a signal that he would like to achieve consensus on the Commission and is now more open to a robust retrospective program.

Not surprisingly, the other academic- and economist-heavy panels were largely supportive of merger retrospectives and proposed ways that the FTC would design and perform such studies. Some of the benefits included shedding more light on particular industries, highlighting the efficiencies and inefficiencies of FTC models, and demonstrating whether current policies are too relaxed or too stringent. Participants also highlighted some of the challenges of such studies, including, for example, identifying useful data. Whether market changes post-merger resulted from anticompetitive behavior or ordinary course behavior, and drawing general inferences when markets in each merger can be very different.

Potential Implications

Chairman Simons and Commissioner Slaughter may agree about the beneficial value of merger retrospectives, but it is unlikely post-merger reviews will become a regular exercise at the FTC anytime soon. The FTC's budget is currently unable to accommodate "normal course" retrospectives, even if limited to the largest deals, or those that were "close calls" for the FTC to decline to challenge. More likely, the FTC will conduct one or two merger retrospectives in-house sometime this year. If the FTC were to embark on a more ambitious retrospective program, we likely would see increased FTC appropriations or an announcement of a partnership with outside economists or researchers to do the work.