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Reciprocity, Purchasing Power and Competition

The sales policy of reciprocal purchasing has become increasingly popular in the last five to ten years, attracting much attention from business commentators. In its barest form, reciprocity means the use of purchasing power to coerce suppliers into becoming customers as well; the anticompetitive effects of bare reciprocity are self-evident. Yet, as Professor Asper indicates, reciprocity might not restrain competition. The position of the Federal Trade Commission and the Department of Justice, however, seems to be that an accumulation of purchasing power presenting an increased opportunity for reciprocal purchasing is violative of section 7 of the Clayton Act. In this Article, Professor Asper considers the various aspects of reciprocity in light of the antitrust laws, focusing on the FTC's 1962 decision in Consolidated Foods. He concludes that, standing alone, the mere accumulation of purchasing power and the resultant opportunity for reciprocity should not be considered a per se violation of the antitrust laws.

Lewis D. Asper*

In November, 1962, the Federal Trade Commission determined that section 7 of the Clayton Act required that Consolidated Foods Corporation, an integrated food concern, be divested of Gentry, a small processor of dried onions and garlic, which it had acquired in 1951. Of this decision Professor Milton Handler observed that while the narrow issue before the Commission was the legitimacy of a particular conglomerate merger,

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"the radiations in Commissioner Elman's provocative opinion" were a source of major interest to businessmen and members of the bar. Subsequent events testify to Professor Handler's extraordinary capacity for analyzing antitrust developments and forecasting their progress.

The vice of this acquisition, according to the Commission, was that it put Consolidated in a position to engage in the particular employment of purchasing power known as "reciprocity." In its bluntest form, reciprocity involves the use of purchasing power to coerce suppliers and potential suppliers into becoming customers. The practice was challenged before the Commission as early as 1931, and Commissioner Elman referred to three prior decisions in which such activities by large, diversified business organizations were held to violate section 5 of the Federal Trade Commission Act. From the Commission's reports of these cases there is little question that the respondents engaged in unabashed strong-arm methods. Their purchases were of critical importance to the unhappy suppliers, and threats to withdraw such purchases were sufficient to induce the suppliers to purchase inferior, even unwanted, goods and services. Quite plainly, these respondents had been able to prevail over their competitors only because their "sales talks" included a threat to withdraw business from the uncooperative. In Consolidated Foods Corp. the Commission found that the respondent similarly had used its purchasing

5. For example, in Waugh Equip. Co., 15 F.T.C. 232 (1931), high officials of a large meat packing company acquired an interest in a small company manufacturing draft gears for railroad equipment. The enormous shipping requirements of the packing company were used to coerce railroads into buying draft gears from Waugh. In an apparently corresponding proceeding before the Interstate Commerce Commission it was found that the inducement held out to the carriers for the purchase of these draft gears was the traffic of the packers. Threatened or actual withdrawal of such traffic served in most cases as sufficient reason for the purchase of these draft gears, although in numerous instances the operating department hesitated to recommend their purchase. In several instances where the purchase of draft gears was forced upon carriers no tests were made and the equipment so purchased was disposed of in repairs to foreign cars.

Reciprocity in Purchasing and Routing, 188 I.C.C. 417, 432 (1932).
power as a lever to procure sales and customers for its Gentry Division after the acquisition, but this finding was not crucial. The decision rested on the proposition that the acquisition put Consolidated in a position where it could exercise such power over hopeful suppliers and foreclose a substantial share of the market. Therein lay the violation of section 7: "The thrust of the ruling is that diversification by acquisition is unlawful wherever the potential for substantial reciprocity exists, whether or not it is exercised, and regardless of the reasons for reciprocal dealings."

The "radiations" identified by Professor Handler are approaching the pervasiveness of fall-out. The opportunity for reciprocity was one of the principal reasons offered by the Department of Justice in support of its position that the Penn-Olin joint venture should be prohibited. The opportunity for "reciprocity once removed" was urged as a reason for prohibiting the acquisition by Ingersoll-Rand Company, a large manufacturer of industrial machinery, of three small manufacturers of coal mining machinery. Most recently, in United States v. FMC Corp., the Department of Justice supported its request for a preliminary injunction against the acquisition by FMC Corporation of assets of American Viscose Corporation with an assertion, among other things, that by the acquisition "FMC will acquire the opportunity to engage in coercive buying and selling techniques by the addition of American Viscose Corporation's purchasing power . . . ."

These three proceedings all involved conglomerate mergers in

7. The Commission found that 25% of the dried onion and garlic market "stands to be influenced" by the fact that Consolidated owned Gentry and "many other prospective purchasers could be influenced by the expectation or promise of reciprocal purchases of their products by Consolidated." That being the case, the fact that Consolidated's use of reciprocity had been sporadic and of limited success was irrelevant. Id. at 20980.

8. Handler, supra note 3, at 434.


10. United States v. Ingersoll-Rand Co., 218 F. Supp. 550 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3d Cir. 1963). The argument was that Ingersoll-Rand (a large steel purchaser) could use its steel purchasing power as a means of forcing steel companies (large coal purchasers) to use their coal purchasing power as a means of forcing coal companies to purchase their coal mining machinery from Ingersoll-Rand.


In contrast to the findings in Consolidated Foods, there had not been, nor could there have been, any actual employment of reciprocity by any of them. The position of the Government in each case was that the proposed acquisition would produce an accumulation of purchasing power which could be used to foreclose a substantial share of the market. Therefore, the result in each case was a situation which might produce a substantial lessening of competition. The Government position has "radiated" precisely as prophesied by Professor Handler when he observed about Consolidated Foods that "it articulates a new rule of virtual per se illegality applicable to conglomerate acquisitions where there is an opportunity for reciprocal purchasing."\(^{14}\)

Consolidated Foods is even more pervasive than Professor Handler's comment might seem to indicate, for that case reiterates the position that "coercive exercise and reliance on business reciprocity is an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act."\(^{16}\) Moreover, in proceedings in progress against General Dynamics Corporation it is alleged that defendant's "so-called reciprocity program" is a violation of section 1 of the Sherman Act.\(^{16}\) Reciprocity practices also comprise a major part of the offenses charged against General Motors Corporation in proceedings alleging violation of section 2 of the Sherman Act by GM's diesel locomotive division.\(^{17}\) The total effect is one of increased concern on the part of enforcement agencies with purchasing practices as possible

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13. Classification of the combination involved in Penn-Olin Chem. Co. as a "conglomerate merger" requires a measure of poetic license. The challenged arrangement is a joint venture rather than an acquisition or merger. The district court found it unnecessary to consider the question whether § 7 of the Clayton Act applies to joint ventures as well as to acquisitions, so that question is at the moment unresolved. 217 F. Supp. at 115. This case is included here, because, for purposes of the questions to be examined, it has the same functional characteristics as a conglomerate merger.


16. Complaint, United States v. General Dynamics Corp., Civil No. 62, Civ. 3986, S.D.N.Y., Nov. 8, 1962, charging that contracts, agreements, and understandings entered into pursuant to a reciprocity program are unreasonable restraints on trade in violation of § 1 of the Sherman Act.

restraints of trade and an apparent determination to urge that such practices be regulated by inflexible and enormously comprehensive rules and standards. In section 7 cases the approach of the Department of Justice in United States v. Penn-Olin Chem. Co.,18 United States v. Ingersoll-Rand Co.,19 and United States v. FMC Corp.20 is indistinguishable from that of the Federal Trade Commission in Consolidated Foods: The simple fact that an acquisition (or arrangement such as a joint venture) represents an accumulation of purchasing power presenting increased opportunities for reciprocal purchasing is sufficient to condemn the arrangement as one that may produce a substantial lessening of competition (foreclose a substantial share of the market). In the district courts this position has thus far been accepted only in the Ingersoll-Rand case, but the Justice Department remains unrepentant.21 That Justice Department attitude is important is a proposition requiring little elaboration for anyone who has ever looked down the muzzle of an Antitrust Division subpoena duces tecum.

It would be improper to suggest that recent attention to reciprocity results from some kind of spontaneous combustion within the enforcement agencies. There is substantial authority indicating that reciprocal purchasing as a sales policy has gained currency in the last five to ten years.22 Among business commentators it has attracted much attention and few defenders;23 but however slack and spongy the practice may be as a matter of sales policy, it violates the law only if and to the extent it constitutes a demonstrable restraint on competition. There is little disposition to quarrel with the conclusion reached in the Waugh Equip. Co.,24 Mechanical Mfg. Co.,25 and California Pack-

21. See, e.g., Address by George Miron (Assistant Chief, General Litigation Section, Antitrust Division, Department of Justice), Trade Relations Association, September 18, 1963, in Trade Rev. Rev. § 50206 (1963), in which Consolidated Foods Corp. was hailed as a "landmark case," the principle of which would be employed and enlarged by the Department of Justice.
22. Handler, supra note 3, at 485.
24. 15 F.T.C. 232 (1931).
25. 16 F.T.C. 67 (1932).
ing Corp.\textsuperscript{26} proceedings that the practices there described amounted to unfair methods of competition under the Federal Trade Commission Act,\textsuperscript{27} and there is probably general agreement that restraints produced by such flagrant abuses of purchasing power should be treated as violations of section 1 of the Sherman Act if the anticompetitive consequences are proved to be severe. Reciprocity as defined in \textit{Consolidated Foods}, however, includes more, much more.\textsuperscript{28} To the extent it includes business concerns "overtly or tacitly" making concessions to one another and the state of mind represented by "the unspoken 'If I buy from him, he will buy from me,'" it reaches unilateral action taken by concerns acting in what they believe to be their individual best interests. To the extent it includes the simple, "I will buy from you if you will buy from me," it reaches or may reach business arrangements which are entirely free of coercion. The balance of the opinion confirms that this definition is intended to be just as comprehensive as it sounds. Proceedings permitting divestiture rather than a cease-and-desist order were considered necessary because the effect of the acquisition was to give Consolidated the power "to extort or \textit{simply attract} reciprocal purchases from suppliers"\textsuperscript{29} and because,

\begin{quote}

a cease and desist order would prevent further overt effort by respondent to obtain business for Gentry through reciprocity, but \textit{it could not remove the attraction}, implicit in the Consolidated-Gentry relationship, for suppliers or prospective suppliers of Consolidated to purchase from Gentry solely or principally in the hope of maintaining or enhancing their sales position with Consolidated.\textsuperscript{30}
\end{quote}

Judge Rosenberg in \textit{United States v. Ingersoll-Rand Co.} quoted extensively from \textit{Consolidated Foods} and added:

Moreover, the mere existence of this purchasing power might make

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{26} 25 F.T.C. 379 (1937).
\item \textsuperscript{27} See note 5 \textit{supra} and accompanying text.
\item \textsuperscript{28} Commissioner Elman's opinion said:
\begin{quote}
As generally understood, reciprocity describes the practice whereby firms, overtly or tacitly, make concessions to one another in order to promote their own business interests. Perhaps the most common form of reciprocity is the type involved in this case—reciprocal buying. In this context it involves nothing more than the simple idea that "I will buy from you if you will buy from me," or the unspoken "If I buy from him, he will buy from me."
\end{quote}
\end{itemize}

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} at 20978. (Emphasis added.)
\item \textsuperscript{30} \textit{Id.} at 20982. (Emphasis added.)
\end{itemize}
its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the goodwill of the possessor.\footnote{31}

Not only may a proposed acquisition be prohibited if it results in an accumulation of purchasing power accompanied by a demonstrable danger that it will be abused; it may also be prohibited solely and simply because the resulting accumulation of purchasing power is so tempting that potential suppliers may favor the merged unit with their own purchases in the hope of earning reciprocal favors.

One defends the practice of reciprocity only with some feelings of discomfort. It is noncreative, generates no new demand, and unquestionably lends itself to abuse. The question remains, however, whether the practice is as dangerously anticompetitive as Consolidated Foods and Ingersoll-Rand find it to be. At the base of these opinions is the flat-footed proposition that reciprocity is always anticompetitive in effect. Therefore, any acquisition or merger resulting in a market structure conducive to reciprocity and affecting a substantial amount of commerce comes under the prohibition of section 7. Formal authority for this position is found in a quote from United States v. Griffith\footnote{32} plus the prior Commission rulings in Waugh Equip., Mechanical Mfg., and California Packing, with an assist from an analogy to tie-ins. The quotation from the Griffith case has undergone an interesting metamorphosis. In its original form it appeared in a paragraph in which Justice Douglas was discussing that particular employment of monopoly power common to the motion picture theater cases\footnote{33} — the use by theater chains of the monopoly held in single-theater towns ("closed towns") as a means of procuring advantages in towns in which there were competing theaters ("competitive towns"). The entire discussion centers on misuse of monopoly power and the use of monopoly to "beget monopoly."\footnote{34} The quotation, as it appeared in Consolidated Foods, states:

Large-scale buying is not, of course, unlawful per se. It may yield price and other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or

\footnote{32. 334 U.S. 100 (1948).}
\footnote{34. United States v. Griffith, 334 U.S. 100, 108 (1948).}
commerce. Nor . . . may it be used to stifle competition by denying competitors less favorably situated access to the market.35

By the time it appeared in Ingersoll-Rand, the quotation read:

What may here be involved is the trade practice known as “Reciprocity.” This is particularly destructive of competition because it transforms substantial buying power into a weapon for “denying competitors less favorably situated access to the market.” United States v. Griffith . . . 36

To the extent this treatment suggests that substantial purchasing power is to be treated as a species of monopoly power or that every purchaser is to be regarded as possessing “monopoly power” over his own purchase requirements, it threatens to render the terms almost meaningless. Monopoly power has a strategic quality producing market leverage. Large purchase requirements may produce such leverage, as witness the Waugh Equip., Mechanical Mfg., and California Packing proceedings, but not necessarily. Large purchasing power does not always produce an opportunity for reciprocity, and an opportunity for reciprocity does not always result in a substantial lessening of competition. Section 7 proceedings, of course, deal in probabilities.37 If a specified business practice in a given context may result in a substantial lessening of competition, may result in closing off a substantial segment of the market to other competitors, the statute may be invoked. But such probabilities cannot be constructed on assumptions alone. The essential propositions of fact upon which such probabilities are determined must be proved.38

37. The Supreme Court has said:
Congress used the words “may be substantially to lessen competition” . . . to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.
Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). (Emphasis added by Court.)
38. Reasonable probability of the lessening of competition in the future is just as much subject to evidentiary proof as is actual lessening of competition. Mere speculation or conjecture cannot be substituted for proof of reasonable probability. Nor are mere possibilities that compe-
RECIPROCAL PURCHASING AS A RESTRAINT OF TRADE

If it is alleged that a particular acquisition or merger will probably produce an accumulation of purchasing power which threatens to substantially lessen competition by providing an unacceptable opportunity for reciprocity, that ultimate proposition must rest upon proof of three intermediate propositions:

1. The proposed acquisition or merger will probably generate reciprocal purchasing power in the acquiring or resulting unit.
2. Such power, if generated, will probably be used.
3. Such power, if generated and used, will probably result in foreclosing to competition a substantial share of the market.

In Consolidated Foods the first intermediate proposition was proved to the satisfaction of the Commission. Many of the businesses hoping to sell products to the wholesale and retail grocery divisions of Consolidated were among those to whom Consolidated hoped to sell dried onions and garlic through Gentry.39 This, however, is not always the case, no matter how large the resulting accumulation of purchasing power may be. By way of comparison, in the careful examination the Commission has given the acquisition by Procter & Gamble of Clorox Chemical Co.,40

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Editor’s note: The FTC recently reconsidered Procter & Gamble’s acquisition of Clorox. Clorox occupied a position of major dominance in an oligopolistic industry; its sales comprised 50% of the national total and were directly proportional to its volume of advertising, as were the sales of the other members of the industry. In an exhaustive opinion, Commissioner Elman noted that the imposition of P & G’s overwhelming advertising power would substantially reduce competition in the industry and fortify the extremely prohibitive pre-merger barriers to entry. Concurrently, P & G’s competitive position in its aggregate market would be greatly enhanced by the profits that would necessarily flow from its success in the liquid household bleach market. Finally, Commissioner Elman pointed out that the merger would eliminate P & G as a potential competitor in the liquid household bleach industry. Refusing to consider any post-acquisition evidence, the FTC ordered P & G to divest itself of Clorox, or to spin Clorox off to another corporation and distribute the shares of that corporation to Procter & Gamble shareholders. Procter & Gamble Co., Trade Rep. Rep. (FTC Complaints, Orders, Stipulations) ¶ 16673 (Dec. 23, 1963).
another conglomerate acquisition, no weight or attention has been
given to the resulting increase in P & G's purchasing power. The
reason is plain. P & G sells its products to wholesale and retail
outlets (grocery stores and supermarkets and their suppliers),
and in all probability these organizations sell almost nothing to
it. P & G has no reciprocal favors to grant or withhold. This
first step of determining actual reciprocity potential, however,
may not always be taken. *Penn-Olin*\(^4\) may be a case in point.
The product involved in this "conglomerate joint venture" is
the chemical sodium chlorate. The great bulk of this product
(in 1960, 84 percent in what was determined to be the relevant
market) is sold to pulp and paper mills, and a large part of the
balance goes into the manufacture of herbicides.\(^4\) How substan-
tial are the purchases made by chemical companies from paper
companies, and absent any such substantial purchases, where is
the power to enforce reciprocity? The same situation would likely
prevail among herbicide manufacturers with the possible excep-
tion of those who are diversified chemical producers and thus
have other products that could be sold to Penn-Olin or its par-
ents. It is enough to note that, as far as is revealed by Judge
Steel's comprehensive opinion, no proof was offered by the Gov-
ernment of what it was Penn-Olin could promise to buy or
threaten not to buy, and from whom, to get the reciprocity ball
rolling. Similarly, in the *FMC Corp.*\(^3\) case the Government con-
ceded it had nothing significant to offer at trial that it had not
already offered in the affidavits supporting its request for a pre-
liminary injunction, yet the record appears to be innocent of
any indication of the parties who allegedly occupied the posi-
tion of potential supplier on one hand and potential customer
on the other — the parties who must be identified with FMC's
newly acquired "opportunity to engage in coercive buying and
selling techniques by the addition of American Viscose Corpora-
tion's purchasing power."\(^4\) If there are no such parties, the "op-
portunity for reciprocity" is illusory.

With regard to the second intermediate proposition, the en-
forcement agencies appear prepared simply to assume that if re-

1963).

\(^{42}\) Id. at 115–18.

\(^{43}\) United States v. FMC Corp., TRADE REG. REP. ¶ 70826 (1963
Trade Cas.) (N.D. Cal. June 27, 1963) (Findings of Fact, Conclusions of
Law and Order).

\(^{44}\) Id. at 78366.
ciprocal purchasing power is generated, it will be used. More than that, they are prepared to assume that an accumulation of reciprocal purchasing power will significantly affect a market whether or not it is overtly used by the possessor. In Consolidated Foods there was evidence that reciprocity had been used on some occasions in an effort to procure sales for Gentry Division.\(^45\) In Penn-Olin there was evidence only that one of the prospective joint venturers was an “acknowledged practitioner” of reciprocity.\(^46\) In Ingersoll-Rand and FMC Corp. there appears to be nothing in the record addressed to past practices of the affected parties. On the theory offered by the Federal Trade Commission and the Department of Justice and adopted by the courts in Ingersoll-Rand, the history of use or failure to use reciprocal purchasing power is of minimal importance. On this theory, an accumulation of reciprocal purchasing power is accorded treatment usually reserved for an attractive nuisance: It is a threat to competition simply because it is there.\(^47\)

Judge Rosenberg’s opinion in Ingersoll-Rand is revealing. Confronted with the job of prophesying the effect of the proposed acquisitions on a request for a preliminary injunction, he had nothing before him on actual effect. He could only surmise that by “judicious” use of its increased purchasing power Ingersoll-Rand “could” increase its sales to coal companies “immeasurably.” Thus, “what may here be involved is the trade practice known as ‘Reciprocity.’”\(^48\) The fact that the evidence before him indicated nothing about Ingersoll-Rand’s inclinations in this direction was not really significant. “Sophisticated businessmen”\(^49\) would see the advantage of directing their business to Ingersoll-Rand in such numbers and in such quantities that a substantial share of the market probably would be foreclosed without Ingersoll-Rand ever making a promise or uttering an admonitory


\(^{46}\) Pennsalt is an acknowledged practitioner of reciprocity and uses purchasing-marketing coordination to further its sales efforts. Whether this is also the policy of Olin is more questionable. United States v. Penn-Olin Chem. Co., 217 F. Supp. 110, 126 (D. Del. 1963).

\(^{47}\) See note 25 supra and accompanying text.


word. Moreover, all of this is to be accomplished by indirection, because it has to be channeled through third parties: Without any threats, urging, withdrawal of custom, or other overt action by Ingersoll-Rand, steel companies will probably use their coal purchasing power to persuade coal companies to purchase mining machinery from Ingersoll-Rand; and coal companies will probably capitulate to such a degree that competitors will be foreclosed from a substantial share of the market in mining machinery.

Judge Rosenberg had other reasons for enjoining the acquisition and was careful to point out that all matters in the case ultimately would have to be proved at a trial. But given the strong characterization of "unspoken" reciprocity in his opinion, it is difficult to see what Ingersoll-Rand could prove to win the point. Protestations of good intentions are of no help when the conclusion as to anticompetitive effect is based on an assumption of overpowering magnetism contained in an accumulation of purchasing power. The question persists whether an estimate of market effect that must rest on such an extended chain of assumptions rises to the level of "probable" effect on competition.

Finally, if it is established that the accused acquisition will create an opportunity for reciprocity and that the possessor probably will try to take advantage of it, the third intermediate proposition remains to be proved: Is it probable that such efforts will be so effective that a substantial share of the market will be closed to competition? In its proceedings against Procter and Gamble in connection with the Clorox acquisition, the Federal Trade Commission acknowledged that conglomerates present extremely difficult questions of proof and evaluation of proof.

The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the . . . "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to

50. Judge Rosenberg pointed out, for example, that in an industry characterized by relatively small participants, the acquisitions here proposed would bring into the control of a very large organization three companies accounting for about 30% of total industry sales. United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 551 (W.D. Pa. 1963).

51. Id. at 554.
the pre-merger status of the acquired and acquiring corporations. Consequently a consideration of post-acquisition factors is appropriate.52

Less than two years later, in Consolidated Foods, the Commission dug in behind the proposition that “approximately one-fourth of the available market stands to be influenced by the possibility that Consolidated will withdraw patronage unless Gentry is in turn patronized,” disregarding or dismissing as irrelevant substantial evidence that this “possibility” had not materialized in the eight years following the acquisition. The record showed that Consolidated’s active efforts to promote reciprocal purchasing had been sporadic and of limited success;54 that the number of participants in the market had remained constant;55 that Gentry’s market shares of the products involved had increased by 7 percent (from 28 percent to 35 percent) for one and had decreased by 12 percent (from 51 percent to 39 percent) for the other;56 that although Gentry and its principal competitor still accounted for a very large share of the market, a third firm was holding its position even though it was “considered by many buyers to offer an inferior product and inferior service.”57 The Commission attributes the limited success of Consolidated’s reciprocity program to the fact that the efforts were sporadic.58 On the record as revealed by the opinion, it might have just as easily been true that the efforts were sporadic because they were meeting with


54. Id. at 20973, 20978.

55. Id. at 20981.

56. Id. at 20974.

57. In this connection the Commission saw in the reciprocity potential a threat, at the least, of strengthening the “two-firm oligopoly structure” of the market. Since many buyers chose regularly to buy from two suppliers, the reciprocity appeal would encourage them to choose Consolidated as a second source; even though that choice would usually be over the third competitor, the one offering “inferior product and inferior service.” Id. at 20981.

58. That respondent has not chosen to systematize and vigorously enforce its reciprocal buying policy is of far less significance than that it obtained the power to do so by merger, and that by actually using its power on occasion to disadvantage competitors unfairly, respondent demonstrated that its possession of such power posed a real and substantial, and not merely abstract or theoretical, threat to competition. Id. at 20980.
only limited success. In any event, the post-acquisition history offers little support for the Commission's thesis that a large, diversified business organization will automatically attract patronage to such an extent that competitors will be "denied access" to a substantial share of the market. In a market that the Commission found to be peculiarly susceptible to reciprocity pressures, Gentry Division of Consolidated Foods in 1958 was not a significantly larger or stronger market factor than independent Gentry, Inc. had been in 1950. Yet Gentry of 1958 was a part of the only large diversified organization in the market and presumably packed all the purchasing power of $99,000,000 dollars in assets and more than $268,000,000 dollars in annual sales.\(^5\)

Where an action is brought to bar the consummation of a conglomerate acquisition, as the Commission recognized in Procter & Gamble, the probable success of a reciprocal purchasing program can only be estimated,\(^6\) and even this estimate must be based on proof of all material propositions. In Ingersoll-Rand, for example, the dirty work would have to be done by third parties, the steel companies. This is an activity undertaken on someone else's behalf only with the greatest reluctance. Is it probable that the hold of one machinery manufacturer over a number of rather substantial steel companies would be so great that the steel companies would do its bidding to the extent that a substantial share of the machinery market would be adversely affected? Probability of such a consequence there may be, but the position of Judge Steel in Penn-Olin and Judge Harris in FMC Corp. is that it must rest upon proof, not speculation. In Penn-Olin the Government stated its case in the strongest terms, suggesting "market domination" as the probable consequence of this alleged accumulation of purchasing power.\(^6\) Judge Steel was not prepared to assume that "market domination" would be so easily accomplished against formidable competition present and in position

\(^{59}\) Id. at 20974.

\(^{60}\) See note 52 supra and accompanying text.

\(^{61}\) The Government argues that the financial resources of defendants, as compared with those of Hooker and AmPot, are so great as to give Penn-Olin competitive advantages that will ultimately lead to market domination by it. This contention is based largely upon the proposition that the defendants, because of their size, will be able to use their combined buying power as a basis for making reciprocal arrangements with vendors who are sodium chlorate buyers, which will give Penn-Olin an undue sales advantage over its competitors.

in the sodium chlorate market. He suggests that it might be material to determine whether competitors were ready and able to counter such moves by employing the same tactics and is at pains to point out that there may be a considerable distance between sales advantage and market domination.  

In the FMC Corp. case the Government supported its motion for a preliminary injunction barring the acquisition with the argument that nothing would be brought out by a trial which was not apparent from the affidavits already submitted. The court found that on these affidavits the Government had failed to discharge its burden of proving that the proposed acquisition came within the class of "clear-cut menaces" to competition as opposed to "ephemeral possibilities." On the basis of factual inquiries relating to the relevant market and its composition, the character of the competition in that market and the particular competitive effect to be anticipated, and on the "questions of law with respect to the effect on competition of the acquiring of competitive advantages and the effect on competition of reciprocal purchases and sales," there was no showing that the Government had the clear or probable right to relief that would justify a preliminary injunction; "nor do they show that there is a reasonable probability that the government will prevail upon the trial."  

THE "TIE-IN" ANALOGY  

Support for the proposition that the opportunity for reciprocal purchasing threatens anticompetitive effects has been  

62. But in any event, whatever advantage Penn-Olin might be able to obtain through reciprocal arrangements because of the combined size of the defendants scarcely warrants the conclusion that as a matter of reasonable probability Penn-Olin will ultimately dominate the sodium chlorate market.

Ibid.


64. As interpreted by the Supreme Court, Section 7 of the Clayton Act does not condemn all mergers but only those having demonstrable anti-competitive effects. Brown Shoe Co. v. United States . . . . The Statute deals with clear-cut menaces to competition and not with ephemeral possibilities.

Ibid.

found in an analogy to tie-ins. The analogy has considerable force when the party indulging in the “tying” has “sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . .” Where, as in the earlier FTC cases cited in Consolidated Foods, a party’s purchasing power is so large and so strategically deployed that it can be and is used to force purchases of significant quantities of products that would otherwise go to competitors, “sufficient economic power” is evident and proceedings to curb abuse of purchasing power are in order.

The difficulty comes where the presence of such power is assumed from the mere existence of an accumulation of purchase requirements — the assumption that any such accumulation containing a reciprocity potential will produce the market leverage necessary to restrain competition in the product the “tying” party wishes to sell. The test of “sufficient economic power” contemplates economic power of a particular character. In a conventional tie-in the lever, the real market power, is in the hands of the seller alone and results from his control over something the buyer needs or wants and can get from no other source. Indeed, in applying “sufficient economic power” rather than the more demanding “market dominance” as the test of a seller’s capacity to impose tying arrangements, the Supreme Court continues to recognize the special character of the market power being used.

Market dominance — some power to control price and to exclude competition — is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dom-

66. In many respects, reciprocal buying bears a close resemblance to the unlawful business practice of entering into tying arrangements, i.e., agreements by one party to sell one product only on condition that buyer also purchase a different product . . . . The prospective customer “ties” the sale of his product to his purchases from his supplier and “competition on the merits with respect to the tied product is inevitably curbed.” Consolidated Foods Corp., 1961–1963 FTC Complaints, Orders, Stipulations ¶ 16182, at 20977 (1962).
68. See note 5 supra.
69. It may be noted that the great majority of tie-in cases have revolved around the use of tying products that were patented or copyrighted. See, e.g., United States v. Loew’s Inc., 371 U.S. 38 (1962); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947). Indeed, in the leading tie-in case involving a non-patented tying product, Northern Pac. Ry. v. United States, 356 U.S. 1
RECIPROCITY

In many reciprocity situations no such one-sidedness is present. Again, Penn-Olin may be an illustration. Applying the tie-in analogy here, the argument would run that Penn-Olin and its parent companies could enter the market and effectively “tie” their purchases of a variety of products to reciprocal purchases from the joint venture; that the combined purchasing power of Olin-Mathieson, Pennsalt, and Penn-Olin is so great that a substantial share of the market would unquestionably be “tied” by these reciprocal deals. The facts of the matter are, however, that Penn-Olin is to be a new-comer in a market already occupied by husky competitors with substantial purchase requirements of their own and that Penn-Olin is faced with the necessity of getting and keeping some customers if this multi-million dollar facility is to produce a return. The facts of market life appear to make it highly unlikely that Penn-Olin is going to be in a position to push anyone around. In this market the lever has two handles. Potential suppliers can do at least as much damage by withholding sodium chlorate purchases from Penn-Olin as Penn-Olin can do by withholding its purchases from them. The Supreme Court has indicated it is not concerned with attempts at tie-ins where real market power or leverage is absent:

Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most [citing the example of one of a dozen food stores attempting to tie

(1958), the burden of Mr. Justice Harlan’s dissent was not that the verbal formulation of the test had been changed from “market dominance” to “sufficient economic power to impose an appreciable restraint” but rather that the particular application obscured the kind of power to which the test had reference:

I should think that a showing of “sufficient economic power” in cases of this kind could be based upon a variety of factors, such as significant percentage control of the relevant market, desirability of the product to the purchaser, use of tying clauses which would be likely to result in economic detriment to vendees or lessees, and such uniqueness of the tying product as to suggest comparison with a monopoly by patent. But I venture to predict that the language of the Court, taken in conjunction with its approval of the summary disposition of this case, will leave courts and lawyers in confusion as to what the proper standards now are for judging tying clauses under the Sherman Act. Id. at 19. (Emphasis added.)

70. United States v. Loew’s, Inc., 371 U.S. 88, 45 (1962). (Footnote omitted; emphasis added.)
sales of flour to those of sugar when competing stores were prepared to sell either product separately].

Perhaps the tie-in analogy should receive similar treatment in its application to reciprocal purchasing: Where those upon whom a buyer would impose reciprocal purchase obligations have other places to buy what he sells as well as other places to sell what he threatens not to buy, the restraint of trade attributable to his efforts to impose reciprocity will probably be insignificant, and he should be left to antagonize his customers entirely on his own.

"COMPETITIVE ADVANTAGE" AND "ANTICOMPETITIVE EFFECT"

There appears to be an inclination on the part of the enforcement agencies in section 7 cases to pay only a minimum of attention to the Supreme Court's reminder that it is competition, not competitors, which the act protects and to treat "competitive advantage" and "anticompetitive effect" as equivalents. Judge Harris took note of this in the FMC Corp. case and incorporated into his opinion a significant passage from United States v. Continental Can Co.

The Government views with alarm every advantage which Continental or Hazel-Atlas might gain as a result of the merger and sees in each the spectre of anti-competitive effects. But the mere fact that the competitive position of acquiring or acquired companies may be improved by a merger does not establish that the merger is harmful or has any of the proscribed anti-competitive effects.

The Federal Trade Commission in its analysis of the "vice of reciprocity" in Consolidated Foods placed particular emphasis on the fact that it "distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality and service an irrelevant and alien factor... destructive of fair and free competition" and threatens to make growth and success dependent upon "size and conglomeration of business

72. Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.
rivals” rather than economic efficiency.75 This “alien factor” contributed to the Commission’s conviction that it would be warranted in finding a violation even in the absence of any finding that Consolidated had actively promoted reciprocity: All that purchasing power stacked up in Consolidated might be too much of a temptation for suppliers who hoped to sell to Consolidated, and Consolidated’s business rivals would find themselves defeated by something unconnected with “price, quality and service.”

Perhaps in the best of all possible worlds, competitors would compete free of all alien and irrelevant factors. Although Congress may some day create such a legislative scheme, none of the present laws give enforcement agencies the power, usually reserved for handicappers of horse races, to neutralize natural advantages and force all competitors to start dead even. That quotation from the Griffith case does, after all, commence, “Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer.”76 Food processor X may decide to buy his dried onions from Gentry, and the factor that persuades him may be his desire, in the Commission’s phrase, “to curry Consolidated’s business.”77 If such a decision is the product of coercive action on the part of Consolidated, or if a tendency toward monopoly is discernible, Commission action is in order. It is quite another thing for the Commission to assume the position of equalizer of competitive opportunity and take steps to interdict such market behavior simply because it involves factors other than price, quality and service.

This, of course, is not the first move in the direction of holding that an acquisition or merger giving the acquiring organization an extraordinary competitive advantage produces a violation of section 7 if competition could be substantially lessened by vigorous employment of that advantage. Divestiture was ordered where an acquisition provided the acquiring organization with a “deep pocket” of financial resources placing it in a position to engage in competitive activities far beyond the capacity of its competitors.78 On similar reasoning acquisitions have been barred because they provided the acquiring organiza-

tion with a reservoir of advertising and marketing skill greatly in excess of that of its competitors,\textsuperscript{79} or with enlarged ability to command retail shelf space,\textsuperscript{80} or with new flexibility to concentrate sales efforts in certain areas if competition so demands.\textsuperscript{81} These cases shared certain characteristics. With one possible exception they were conglomerates.\textsuperscript{82} In each case the acquisition resulted in the introduction of a very large concern into a market previously occupied by moderate sized ones.\textsuperscript{83} In each case there was evidence that the newcomer had enlarged his market share rather quickly,\textsuperscript{84} and in some cases it was apparent that growth had accompanied exploitation of the advantages


\textsuperscript{82} The Procter & Gamble case involved acquisition by a large soap manufacturer of Clorox Chemical Co., a leading bleach manufacturer. General Foods involved the acquisition by a large food manufacturer of the S.O.S. Co., a manufacturer of household steel wool. Reynolds Metals involved the probable exception: Reynolds acquired Arrow Brands, Inc. a company converting aluminum foil into florist foil. Reynolds had not previously been in this particular line, but it had engaged in marketing of closely allied aluminum products. Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

\textsuperscript{83} The Commission, in General Foods, noted that the respondent with annual sales in excess of $1 billion had entered a market composed of five relatively small companies, the largest of which had annual sales of $17 million. General Foods Corp., Trade Reg. Rep. (FTC Complaints, Orders, Stipulations) ¶ 16612 (Oct. 10, 1963). In Procter & Gamble not only was the fact of annual sales in excess of $1.5 billion emphasized, but also the fact that P & G was perhaps the nation's largest advertiser, Procter & Gamble Co., 1961-1963 FTC Complaints, Orders, Stipulations ¶ 15773 (1962), and before Reynolds entered the florists foil market, "no company was very large and all were relatively small . . . ." Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962).

\textsuperscript{84} General Foods increased the S.O.S. share of the market from 51% to 57% in four years. Trade Reg. Rep. (FTC Complaints, Orders, Stipulations) ¶ 16812 (Oct. 10, 1963). P & G increased the Clorox market share from 48.8% to 51.5% in four years with more marked increases in certain areas; all increases were at the expense of competitors. Procter & Gamble Co., 1961-1963 FTC Complaints, Orders, Stipulations ¶ 15773, at 20694. After acquisition by Reynolds, Arrow's sales had increased by 18.9% in only about two years while sales of five of seven competitors had dropped by 14% to 47%. Reynolds Metals Co. v. FTC, 309 F.2d 223, 230 (1962).
gained through the acquisition.\textsuperscript{85} On the record made in each case there was no occasion to announce a per se rule under which a violation would appear any time a big firm moved, by merger, into a competitive community previously peopled entirely by "pygmies." In fact, one of the opinions included an express disclaimer of any such intention.\textsuperscript{86} Primarily, however, the emphasis is on capacity of the merged organization to lessen competition.\textsuperscript{87} What is merely suggested in these previous cases is made plain in Consolidated Foods: An acquisition providing a significant competitive advantage that, if used, might substantially lessen competition is in violation of section 7.\textsuperscript{88}

**REGULATION OF COMPETITION BY REGULATION OF MARKET STRUCTURE**

Increasingly, and with some success, enforcement agencies are urging that competition is best protected by a market structure and market conditions that make it more difficult for anticompetitive acts to occur. The most effective device for market regulation, obviously, is a comprehensive scheme of per se rules aimed at certain kinds of changes in market structure. If any merger (or joint venture) can be barred on the ground that it appears to provide an opportunity for reciprocal purchasing, for tie-ins, or for use of financial and marketing


\textsuperscript{86} Reynolds Metals Co. v. FTC, 309 F.2d 223, 230 (D.C. Cir. 1962).

\textsuperscript{87} It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination . . . was enough to bring it within Sec. 7.

\textit{Ibid.}

\textsuperscript{88} Handler, \textit{Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures}, 49 Va. L. Rev. 483, 489 (1963). See also Address by George Miron (Assistant Chief, General Litigation Section, Antitrust Division, Department of Justice), Trade Relations Association, Sept. 18, 1963, in \textit{Trade Reg. Rev.} \textsection 50206 (1963):

A second question the consummated merger raises is whether it is a defense to a Section 7 charge that, although a merger has created the power to foreclose competition substantially, the power has not been exercised. Consolidated Foods has the answer: . . . In short, where the power is shown to exist, evidence that it may not be or has not been exercised is irrelevant.
resources against less well-heeled competitors, the chances of competition being substantially affected by such practices are reduced. If any organization possessing substantial purchasing power will commit an act of unfair competition by favoring its customers in the selection of its suppliers, then any market advantage enjoyed in the possession of such power is largely dissipated. But is market regulation a function properly to be undertaken under existing statutes?

There is no doubt about the strong congressional conviction that section 7 should be used to forestall "incipient" threats to competition or tendencies to monopoly. But does the power to arrest anticompetitive acts in their incipiency include the power to regulate market structure so as to make such acts less likely? In some circumstances a need for such regulation has been found. Increasing concern with the level of economic concentration persuaded the Supreme Court in United States v. Philadelphia Nat'l Bank that the problem was critical enough to warrant a presumption of anticompetitive effect where a significant increase in concentration is shown.91 Where a merger brings control of an undue percentage of the market into a single organization, or significantly reduces the number of competitors in a market, lessening of competition is so highly probable that the burden of proving the contrary is thrown upon the parties proposing such a change in market structure. While concentration of this character is typically the product of a horizontal merger, as it was in the Philadelphia Nat'l Bank case, it is not necessarily, nor even usually, a result of a conglomerate merger, nor are the same effects upon competition to be antici-

91. We noted in Brown Shoe Co. . . . that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Neither the opinion in the *Philadelphia Nat'l Bank* case nor the simplified test of illegality there applied can properly be construed as a license to create a scheme of per se rules for application to the widely diverse fact situations presented by conglomerate mergers. Moreover, the effect of that decision is simply to create a *presumption* of illegality. It remains open to the accused organization to meet the presumption with evidence “clearly showing that the merger is not likely to have such anticompetitive effects.”

That the rules and principles which the enforcement agencies would apply to conglomerate mergers are stricter and more inflexible in operation than what the Supreme Court has established for horizontal mergers is a curious development indeed. Once again, examination of the Government’s approach to the Penn-Olin “conglomerate joint venture” is instructive. Neither of the participants in the proposed venture had ever been a consistent or effective competitor in the relevant market. The joint venture proposed to enter the market as a new unit, not as a combination of existing units. In a market heretofore dominated by two enormously strong competitors, there would now be three strong competitors. The Government’s position is that but for the joint venture, there might be four strong competitors. Therefore, permitting the joint venture would produce a foreclosure of *potential* competition amounting to a violation of section 7. The applicable rule as proposed by the Government was characterized by Judge Steel as “a conclusive presumption that any combination specified in Section 7 between companies having the overall capability to go into business alone has a pernicious effect on competition and lacks any redeeming virtue; it would make any such combination illegal *per se.*”

No opportunity is to be offered to meet the presumption by evi-

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92. It is possible, of course, that a series of acquisitions, simultaneous or progressive, by which a large outsider took over a number of small units in a market would produce a “concentration.” *Ingersoll-Rand* might present such a possibility. In such a case, however, the acquisitions would lose the character of a conglomerate and would assume that of a horizontal acquisition.


94. The creation of Penn-Olin did not represent a combination of companies which were competing in the manufacture and sale of sodium chlorate in the southeastern market or elsewhere. Nor did it represent a combination of companies standing in the relationship of supplier and customer in the southeastern market or elsewhere.


dence "clearly showing that the merger is not likely to have such anticompetitive effects." Since each of the participants has sufficient financial and technical resources to undertake this project alone, the antitrust laws require them "to compete individually or to stay out of business." 98

Judge Steel declined to accept proof that both parties were capable of individual entry into the market as proof that both probably would come in individually if the opportunity for joint participation were not available to them. He suggests, however, that upon proof of the latter proposition section 7 could be invoked. 97 Even with this modification, the rule to be applied rests on the assumption that any four makes a more competitive market than any three. If this is to be applied as a per se proposition, then no evidence can be heard with regard to the relative strength, flexibility, and capacity to survive of a Penn-Olin as compared to a Pennsalt facility and an Olin facility individually.

Such an approach is based upon a firm commitment to the nose-count as the only true and reliable test of market well-being. In a recent address to a group of attorneys, Mr. Crawford H. Greenewalt, Chairman of the Board of E. I. duPont de Nemours & Company, urged greater attention to changes that have appeared in the character of competition. 98 From the 19th century situation wherein competition was largely a matter of "like versus like" we have moved into a period of intense functional competition. New materials and technological changes may produce new sources of competitive pressure for any competitor in any field at any time. One of the most important consequences of this change, as Mr. Greenewalt pointed out, is that "it is inevitable, in the competitive race as we know it today, that some portion of our industrial establishment will be superseded almost as a matter of yearly routine."

Plainly, any responsible business organization aware of the pattern Mr. Greenewalt describes must take all possible measures to minimize its vulnerability to technological "superseding." This

96. Id. at 123.
97. The fact that Olin and Pennsalt each had the capability of building a plant and competing individually is of no controlling significance. It is important only as a factor in determining whether as a matter of probability both companies would have entered the market as individual competitors if Penn-Olin had not been formed.
Id. at 130.
98. Address by Crawford H. Greenewalt, Section of Antitrust Law, American Bar Association, Aug. 11, 1963.
is one of the drives behind the accelerated movement toward diversification and may be a prime reason for a company's decision to proceed in some directions by way of merger or joint venture. Penn-Olin, in fact, appears to offer a good illustration of the kind of risk described. The plant contemplated by the joint venture would cost about six and one-half million dollars. An extraordinary percentage of the product is devoted to a single use—bleaching pulp and paper. A single technological development, an improved method of bleaching pulp and paper using some other material, and as much as 80 percent of the market for this expensive facility could be lost. It may be that in such a situation a combination of resources will permit construction of a unit better able to adjust to abrupt changes in the market than two smaller units would be. It may be that a smaller commitment of capital would leave each of the participants in a more flexible position to withstand similar technological assaults in other markets. It may be that the economics of plant construction taken together with the actual or predictable requirements of the market will indicate that individual entry will present a choice between two plants, each too small to be truly efficient or both so large as to produce an over supply. In Penn-Olin all of these propositions or none of them may be provable. The argument of the Government in the district court was that none of them is material: Section 7 bars the venture on proof alone that each of the participants had sufficient overall resources to come into the market alone.

There are some indications that the Government is preparing a modest retreat from this per se approach. The jurisdictional statement to the Supreme Court accompanying the appeal from the district court decision in Penn-Olin reportedly concedes that difficult cases for application of the proposed rule will exist in those instances where the combined effort is calculated to overcome substantial barriers to entry into the market or to share risks and expenses too great to be borne by a single party. It is further suggested, however, that these considerations are clearly material only when the joint venture proposes to embark upon "bold innovation" or "pioneering research." Penn-Olin, it is said, is not such a case. Putting aside the question whether section 7 includes a power to sanction "pioneering" joint ven-

100. See note 42 supra and accompanying text.
102. Id. at A-18.
tures and prohibits those that are only natural extensions of present business, the major inquiry is, how are questions of this kind to be decided, and by whom? Who has the power to decide whether a joint venture is calculated to overcome substantial barriers to entry into the market and share risks and expenses too great for a single party, or whether the parties are combining simply to avoid the inconvenience of competing with each other? It follows as a necessary consequence of the Government's Penn-Olin approach that such determinations will be made by the Government — by the enforcement agencies.

The first and major step in the case against Penn-Olin is the assertion that each of the parties is capable of entering the market alone — an assertion apparently supported simply by evidence of total assets and technological resources. Pennsalt and Olin, however, are large, diversified producers of hundreds of chemical products. The assertion of “capability” necessarily includes a judgment as to how much these parties can afford to devote to just one product — sodium chlorate. Given the opportunity, these parties might prove that they are faced with problems of extraordinary risk and expense; that neither of them has sufficient capital available for allocation to sodium chlorate to permit construction of individual installations with the competitive potential of one they could produce together; that individually they would be compelled to enter the market as two small comparatively weak units, each less capable of vigorous and effective competition with the giants already resident in the market and each more vulnerable to potential competitive pressures from within and without the sodium chlorate market. The “capability” test proposed makes all such factors irrelevant. Once the Department of Justice decides, by whatever process of evaluation or selection it uses, that a combination is not required to overcome barriers to entry or to share risks, it is seized with an access of restraint (which it asks the courts to share) and disclaims any intention or ability to evaluate competitive impact. In Penn-Olin, in response to a direct question from the court whether the court should not consider whether some arrangement other than individual entry might not in fact result in a more competitive situation, the Government replied that it was not proper for the Government or the court “to weigh the advantages of combinations of competitors and what they give to the economy and what individual companies give
to the economy.”103 Under such an approach no company owning substantial resources can undertake a joint venture unless the Department of Justice decides to leave it alone because it is sufficiently “pioneering” or “innovating.” If the Department decides the venture is not a pioneer, the inquiry, for all practical purposes, is closed, because it is not proper for a court to “weigh the advantages” or estimate probable competitive impact of the combination as opposed to individual participation.104 To the extent this approach bars even evidence “clearly showing that the merger is not likely to have anticompetitive effects,”105 this rule, tailored for application to conglomerates, is stricter than the one announced by the Supreme Court for horizontal mergers.

Any decision that requires a prediction of probable competi-

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103. In a footnote to his opinion Judge Steel quotes the Transcript of Argument:

THE COURT: Let me ask you: If I should come to the conclusion that as a matter of reasonable probability, absent the joint venture, Olin would have constructed a factory and sold its products in the southeast, . . . does the Government contend that from that the Government must . . . win?”

MR. FREED: Yes.

THE COURT: . . . Isn’t there a further question as to whether or not the construction of a plant by Olin, sales of products by Olin in the southeast, would have produced a more competitive situation than did the joint venture?

MR. FREED: No, Your Honor, that would not be a legitimate question. It is not for the Government and it is not for the courts to weigh the advantages of combinations of competitors and what they give to the economy, and what individual companies give to the economy.

104. Some interesting comparisons appear between Mr. Freed’s colloquy with the court in Penn-Olin, quoted supra note 103 and his remarks to the Section of Antitrust Law, American Bar Association, Aug. 11, 1963, where he was, of course, expressing only his personal views. On that occasion he observed that the Department did not ignore the innovating aspect of joint ventures, “We simply took the position that Penn-Olin was no pioneer.” He advised antitrust counsel confronted with the job of advising on a joint venture proposal to examine carefully the present position of the parties vis-a-vis potential future relationships, the character of the market, and plans prior to the joint venture scheme. From the answers to these questions, “You’ll know whether the companies are taking the easy way out of a situation where they might otherwise have been competing against each other or whether they are teaming up to do something neither could have done alone.” The objectives of the Department of Justice were simply stated, “Through enforcement in this area, we simply seek to place limits on the joint venture craze.”

tive effect presents difficult problems of proof and evaluation of proof. These problems are magnified in cases where proof must be directed to "incipient" threats embodied in mergers or other similar combinations. The Supreme Court, conscious of the danger of "subverting congressional intent by permitting a too-broad economic investigation," undertook in the Philadelphia Nat'l Bank case to simplify the test of illegality in the single instance of mergers producing undue concentration.\textsuperscript{106} Section 7 is to be used to regulate market structure to prevent this specified occurrence, without the need for proof of particular economic consequences. Unless, however, "concentration" means any large accumulation of assets, know-how, or purchasing power, the enforcement agencies, in cases such as Consolidated Foods and Penn-Olin, are urging the extension of this per se approach to a point where section 7 could be used to regulate market structure by preventing any combination large enough to create an opportunity for anticompetitive behavior. Conceding that an undifferentiated accumulation of assets, know-how, or purchasing power may prove to have the anticompetitive characteristics or potential of a concentration, is it possible, always, to prophesy that such characteristics will appear simply because the accumulation is large? It may be that there are some rearrangements of market structure, even some competitive practices, the consequences of which are nearly impossible to anticipate. It may be that some operations, some corporate changes, some competitive practices will not yield to "incipiency" treatment and must be left for other kinds of handling under the antitrust laws—including section 7. The fact that existing tests and measures of illegality make difficult the prosecutor's job of proof is not alone sufficient reason for changing the tests. Difficulties of proof may in some cases indicate that a simpler test must be used if congressional intent is to be carried out, and in others

\begin{footnote}{106. The Court in this case acknowledged that here § 7 required it to make a prediction of competitive impact and added:}{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.}{Id. at 862.}\end{footnote}
only that an action to prohibit has been brought at a stage when no one can predict with any accuracy what the effect of the new arrangement is going to be. Section 7's power is not exhausted once a merger is consummated. The reach of section 5 of the Federal Trade Commission Act surely has not been diminished since the time of the Waugh Equip. case. If a Penn-Olin, by shrewd employment of its accumulation of purchasing power, grabs or even just attracts a dangerously large part of the market in which it operates, section 7 is still available, as is the Sherman Act in appropriate cases.

Manifestly, there are hazards in waiting until damage has been done or has become imminent. There are also hazards in the other direction in concluding, first, that every business arrangement which might produce anticompetitive effects must be attacked in its incipiency and, second, that tests of illegality must be simplified to a point where probable anticompetitive effect can be proved without too much difficulty.

If an acquisition or joint venture can be barred solely on proof that it may present an “opportunity” for reciprocal purchasing or that it may foreclose some undetermined “potential” competition or that the participants are “capable” of competing individually or that it may permit the introduction of an “alien” factor into competitive considerations, then the FTC will have power to order divestiture because the combination creates a situation that it regards as unfair, and the Department of Justice will have power to prevent a combination because it believes some other arrangement would be more competitive. The end result may be an undue accumulation of power in the enforcement agencies—power to regulate market structure and market conditions; power to equalize competitive opportunities and

107. See United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957); Note, 49 Va. L. Rev. 852, 859 (1963). George Miron, Assistant Chief, General Litigation Section, Antitrust Division, Department of Justice in a speech before the Trade Relations Association, Sept. 18, 1963, made it plain that the principles expressed in Consolidated Foods could and would be applied to consummated mergers as well as to those merely proposed; and that mergers shown to have enhanced reciprocal power were as liable to attack as those which have created such power. Trade Reg. Rep. ¶ 50206, at 55250.


109. See, e.g., Address by Daniel J. Freed (Department of Justice), Section of Antitrust Law, American Bar Association, Aug. 11, 1963, note 104 supra.
neutralize competitive advantages. If these are among the functions of the antitrust laws, the courts and, no less, the enforcement agencies have an awesome responsibility, one providing extraordinary opportunities for costly miscalculation.

**RECIPROCITY UNDER THE SHERMAN AND FEDERAL TRADE COMMISSION ACTS**

A final reminder is in order that the offense of reciprocity is not confined to section 7 situations. In *Consolidated Foods* the FTC concluded that since Consolidated had engaged in a practice found to be an unfair method of competition, divestiture of Gentry Division was not remedy enough: “protection of the public interest requires that it be specifically ordered to desist from any future resumption of that practice.” This order is directed to all of Consolidated’s operations and is directed at reciprocal buying as such: “In this context it involves nothing more than the simple idea that ‘I will buy from you if you will buy from me’ or the unspoken ‘If I buy from him, he will buy from me.’” An examination of this order is important, not only to determine what is required for compliance but also for what it implies about the character of the offense.

What will be expected of Consolidated in compliance with this order? In pending proceedings against General Dynamics Corporation and General Motors Corporation, the Department of Justice proposes that severe positive restrictions be imposed as a remedy for abuses of reciprocal buying allegedly amounting to Sherman Act violations. In such cases there is, of course,

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112. Id. at 20975.

113. Complaint, United States v. General Dynamics Corp., Civil No. 62, Civ. 3886, S.D.N.Y., Nov. 8, 1962. The prayer specifically asks, *inter alia*, that purchase contracts conditioned on reciprocal purchases of industrial gases be declared void; that notice of that fact be given to all purchasers of industrial gases; and that General Dynamics be enjoined from entering into such contracts in the future.

Complaint, United States v. General Motors Corp., Civil No. 63C 80, N.D. Ill., Jan. 18, 1963. The prayer specifically asks, *inter alia*, that pending divestiture, General Motors be enjoined from favoring purchasers of its loco-
ample precedent for relief comprehensive enough to eliminate lingering effects of the offense.\textsuperscript{114} It seems less certain that similar broad relief is necessary or appropriate to neutralize the effects of an unfair method of competition that may involve nothing more reprehensible than favoring one’s customers with one’s own purchases.

In contrast to the detailed prayers submitted by the Department of Justice in the pending \textit{General Dynamics} and \textit{General Motors} cases, the Commission’s order to Consolidated Foods is a model of economy: Consolidated is simply enjoined from “any future resumption of that practice.”\textsuperscript{115} In the first place the Commission does not specify the substance of Consolidated’s “overt exercise” of its reciprocity power beyond stating that Consolidated admitted “expressly conditioning purchases from processors on their purchase from Gentry.”\textsuperscript{116} But antitrust counsel must decide whether compliance procedures designed solely to eliminate actual coercion from Consolidated’s practices will be sufficient, or whether the order imposes the larger obligation to avoid patronizing customers, or perhaps even to publish the kind of disclaimer the Department of Justice would require of General Motors.\textsuperscript{117} The practical problems could be enormous. Among purchasing men it is instinctive behavior to favor customers and to attempt to place purchases where they will do the purchasing company the most good. Where price, quality and service are not equal, favoring a supplier because he may also be a potential customer may be bad purchasing and may support an inference that purchasing power is being used coercively. But where price, quality and service are equal, a purchasing man will consider collateral advantages that may accrue to his company from the selection of certain suppliers over others. He will not believe he is doing his job if he does not. With its emphasis on reciprocity as an “alien and irrelevant” factor, \textit{Consolidated Foods} comes close to stating that strategic placement of purchase orders to gain collateral advantages for the purchaser is an unfair method of competition. If that is or even may be true,

\begin{itemize}
  \item motives by preferences in routing freight, location of plants etc., removing business from non-customers; and further that G.M. be required to give written notice to all railroads that locomotive purchases will not influence its routing of freight traffic or location of plants etc.
  
  \textsuperscript{114} See, \textit{e.g.}, United States v. Loew’s Inc., 371 U.S. 38, 53 (1962).
  
  
  \textsuperscript{116} \textit{Id.} at 20979.
  
  \textsuperscript{117} See note 113 \textit{supra}.
\end{itemize}
the order directed against Consolidated imposes an obligation on that company to abjure indirect advantages that might be gained from strategic placement of purchases. An apparently simple order may in fact contain a very severe restriction.

A member of the Department of Justice has represented informally that, as far as the Department is presently concerned, no effort will be made to move under the Sherman Act against a "purely unilateral decision by one firm to purchase from its customers." Such representation, of course, says nothing about how the FTC may choose to proceed. The quoted statement is sufficiently qualified, even tentative, so that it offers only a minimum of comfort and guidance to antitrust counsel charged with advising clients on avoiding the restraint of trade named reciprocity. What must any company possessing substantial purchasing power do to avoid the appearance of trading upon that power if the enforcement agencies are correct in their assertion that a large reservoir of purchase requirements constitutes an irresistible anticompetitive attraction? If the marketing history of a Consolidated Foods or a General Dynamics or an Ingersoll-Rand over a ten or fifteen year period shows a substantial identity between suppliers and customers, is that presumptive evidence that reciprocal purchasing has been indulged? Must the big buyer try to discourage those "sophisticated businessmen" who would ingratiate themselves by proper placement of their own orders if he is to avoid the appearance of the "unspoken, 'If I buy from him, he will buy from me.'" Since reciprocal purchasing is necessarily a two-way proposition, will it always be possible to tell who is pressuring whom or who is trying to curry whose favor? As indicated previously, Penn-Olin is an example of a company entering a market already powerfully manned, one in which they must make themselves attractive to buyers who presently have regular sources of supply. Would a history of reciprocal dealings, absent

It should be stated that reciprocity, in the present context, will not refer to a purely unilateral decision by one firm to purchase from its customers, . . . but will refer to arrangements, agreements or understandings between separate firms to exchange purchases. The notion of exchange of purchases, however, does not necessarily imply contemporaneous exchange, or exchange of equal value. Nor does it imply that either firm is committed to make all its purchases from one, or even a number, of its reciprocals.

Address by George Miron, Trade Relations Association, Sept. 18, 1963, in TRADE REG. REP. ¶ 50206, at 50251 (1962).

119. See note 70 supra and accompanying text.
active coercion, show that Penn-Olin was pressuring its suppliers or attempting to curry favor with its customers? The disposition of the Government in the present proceeding to disregard the amount of market leverage actually possessed by Penn-Olin customers encourages the suspicion that where a big fellow is in a reciprocal posture with a group of smaller fellows, the presumption that the big fellow is wielding the stick is almost irrebuttable.

Anticompetitive reciprocal purchasing has its origins in essentially neutral business behavior. Like almost any other competitive power, purchasing power may be abused. When it is, abuse should be corrected. But violations of law that must be postulated upon “probabilities” are hard enough to handle. If we add violations built upon “opportunities for abuse” and “probabilities of opportunity for abuse,” two results follow: It is increasingly difficult for one to know what he must do to comply with the law, and the power of enforcement agencies to rearrange rather than merely to correct is “probably” greatly enlarged.