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Partial Acquisitions After *Dairy Farmers*: Got Answers?

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THE SIXTH CIRCUIT'S RECENT decision in *United States v. Dairy Farmers of America*, 426 F.3d 850 (6th Cir. 2005), has focused considerable attention on minority acquisitions and how they should be treated under the antitrust laws. The Sixth Circuit's opinion, and the opinion of the Eastern District of Kentucky that it reversed, provide widely divergent answers to that question. Although these opinions have not answered all questions on how partial acquisitions should be analyzed, they do provide a useful starting point to address the legal and economic issues facing minority acquisitions, how the courts and the agencies have attempted to deal with them, and what guidance antitrust practitioners and potential acquirers can take from those attempts.

Law and Economics of Minority Acquisitions

Minority acquisitions are almost always challenged under Section 7 of the Clayton Act, which prohibits the acquisition of "the whole or any part of" the stock of another where the likely effect may be substantially to lessen competition. 15 U.S.C. § 18. Section 7 expressly exempts, however, "persons purchasing such stock [1] solely for investment and [2] not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." *Id.*

Analysis of the potential competitive effects resulting from a minority acquisition can differ from the analysis of a majority acquisition. In the typical majority acquisition, only one entity survives the merger. The task is then to determine whether that single firm will itself have the power to injure consumers (unilateral effects), and/or whether the acquisition will result in a market structure that will be significantly more conducive to coordinated action among the remaining firms (coordinated effects).

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In partial acquisitions, however, both entities continue to exist after the acquisition and continue to operate as separate companies. Commentators still have recognized two potential anticompetitive effects that may arise from a minority acquisition.[1] One effect depends on whether the ownership (by A) of a partial interest in another firm (B) will give A sufficient control or influence over B to allow it to affect B's conduct with respect to its competitors. Because it involves the participation of both firms, this is essentially a coordinated effects theory. Another potential effect depends on whether the partial ownership will affect either firm's incentives in the operation of its own business such that it will compete less aggressively with the other. Because the effect involves the conduct of only one of the firms, this is essentially a unilateral effects theory.

With respect to unilateral effects, the potential concern is that once a firm acquires a significant financial stake in a competitor, it will have incentives to compete less vigorously with the acquired firm because it will reap residual benefit from any reduction in competition. For example, under normal competitive conditions, a firm will be deterred from raising prices because doing so will cause it to lose customers to other firms that continue to price at competitive levels. But when that firm acquires a financial interest in one of those competitors, it may find the price increase profitable because it will be able to recoup some of the losses through the increased sales of the other firm. A central question, and one that is often a matter of dispute, is how much of any price increase actually will be recouped by a minority investor. In a minority acquisition unilateral effects case, the changed incentives of the acquired firm also must be considered.[2]

With respect to coordinated effects, the potential concern is that the acquired firm will be actively directed or more subtly pressured to decrease competition with the acquiring firm. For example, active direction could occur through the exercise of controlling voting rights or board seats. Subtle pressure could occur through effective control of, for example, management compensation. Moreover, the simple fact of a business relationship between the parties may provide opportunities for information exchanges that can facilitate coordination between the competitors.

Under either theory, competitive effects are difficult to analyze and prove in the case of a partial acquisition. Ordinarily, unilateral effects are proven by showing that a firm controls an undue percentage of a market. But minority acquisitions often involve something less than control. And coordinated effects ordinarily are proven by showing that a market's post-acquisition structure will be more conducive to collusion. But minority acquisitions do not result in a change in the number of market participants, and therefore have less obvious effects on market structure.

The *Dairy Farmers* Case

While not many minority acquisition cases have been litigated, those that have were focused principally on the issue

of control or influence. The dairy case provides a recent example.

Dairy Farmers of America (DFA) is the largest dairy farmer cooperative in the country. DFA markets its members' raw milk to milk processors and also invests in those processors so that DFA members can participate in the processors' profits and secure an outlet for the farmers' product. In 2001, DFA and others formed National Dairy Holdings, LP, which operates a milk processing plant in London, Kentucky, under the Flav-O-Rich name. DFA owns 50 percent of the voting interest in National Dairy, but is not involved in its daily operations.

In 2002, DFA and a separate set of investors formed Southern Belle Dairy Co., LLC, to acquire a milk processing plant in Somerset, Kentucky, that operates under the Southern Belle name. DFA contributed the majority of the purchase price for the dairy and guaranteed the remaining contribution by its partner in the venture, The Allen Family Limited Partnership (AFLP). DFA ended up owning 50 percent of the equity in Southern Belle but ceded operational control of the dairy to AFLP. The original acquisition agreement provided DFA with some management rights, such as approval rights for contracting and expenditures exceeding $150,000, and hiring and compensation decisions. But the agreement was later amended (in 2004, after the DOJ complaint was filed and before DFA filed a motion for summary judgment) to require DFA to exchange its common interests for non-voting preferred capital interests, which eliminated its voting and board representation rights.

The DOJ and the Commonwealth of Kentucky brought suit in 2003 claiming that DFA's investment in Southern Belle violated Section 7 and seeking DFA's divestiture of its interest in Southern Belle. The DOJ claimed that DFA's interests in National Dairy and Southern Belle would reduce competition in the sale of milk to Kentucky and Tennessee schools. The DOJ's complaint alleged that National Dairy and Southern Belle were the only bidders for school milk contracts in 42 school districts, and were two of only three bidders in 49 other districts. The DOJ alleged that DFA's interests in both dairies provided the dairies with incentive and opportunity to diminish competition among themselves.

The DOJ argued that "[by] giving the three plenty of legitimate reasons to talk to one another, greater incentives for cooperating, and grounds for trusting each other more than independent firms in a marketplace," the acquisition made it easier for the firms to lessen competition "either through tacit means or otherwise." *United States v. Dairy Farmers of America*, 2004 WL 2186215 at *6 (E.D. Ky. 2004) (citing DOJ summary judgment brief). The DOJ thus offered both coordinated and unilateral effects theories. Coordinated effects could occur through communications between the dairies or overt pressure from DFA not to compete. Unilateral effects could occur as a simple function of newly aligned incentives not to compete. As the DOJ stated, "the financial incentives of all three are the same—all want to be more profitable and all benefit from reduced competition. And the deal changes their incentives and ability to do so."[3]

The DOJ's complaint also noted several significant facts surrounding the relations between Southern Belle and National Dairy. First, both dairies had pleaded guilty in 1992 to rigging bids in school milk contracts through the 1970s and 1980s. Second, the DOJ successfully challenged a merger of the two dairies (under different ownership) in 1998 because the merger would have substantially lessened competition in violation of Section 7. Finally, and perhaps most importantly, the markets in which Southern Bell and National Dairy were highly concentrated—in many these were the only two dairies in operation while in others there was only one other competitor.

The District Court's Opinion. The District Court for the Eastern District of Kentucky granted defendants' motion for summary judgment. The court considered only the amended agreement, which removed DFA's ability to control Southern Belle. The court first addressed and rejected the DOJ's argument that the court should apply the presumption, established in the Supreme Court's decision in *United States v. Philadelphia National Bank*,[4] that acquisitions that significantly increase concentration in already concentrated markets are illegal absent clear evidence to the contrary. Application of the presumption would have compelled denial of the defendants' motion.

The court reasoned that the transaction did not "increase the percentage of the market that DFA 'controls' or even enhance DFA's ability to influence the market because DFA's non-voting interest in Southern Belle does not give it any control over the business decisions made by Southern Belle." *Dairy Farmers*, 2004 WL 2186215 at *3. The court then considered whether anticompetitive effects were likely, and again found that DFA's lack of control meant that they were not. As the court stated, anticompetitive effects are "less likely when the company who has acquired stock in both subject companies does not have the ability to be at all involved in the decision-making that forms the basis of the alleged anticompetitive effects." *Id.* at *4.

The court noted several cases, including *United States v. E.I. du Pont de Nemours & Co.*,[5] in which courts found partial acquisitions to violate Section 7 due to the acquiring firm's ability to "influence competitive behavior." *Dairy Farmers*, 2004 WL 2186215 at *5. But the court principally focused on two cases, *United States v. Tracinda Investment Corp.*,[6] and *United States v. International Harvester Co.*,[7] in which the acquiring party was contractually prohibited from exercising control or influence.

In *Tracinda*, the acquirer, Kirk Kerkorian, owned a controlling 48 percent interest in MGM and sought to acquire a 25 percent non-controlling interest in Columbia Pictures and had entered into a Stockholders' Agreement (with a term of three years) that limited his ability to control or influence Columbia. The Central District of California

District Court held that the Stockholders' Agreement and Kerkorian's representations that he had no intention to control Columbia exempted his acquisition from Section 7 as one made solely for purposes of investment. In reaching that conclusion, the court also considered and rejected the DOJ's arguments that Kerkorian would be able to influence Columbia through his relationships with management and his power, reserved in the Stockholder Agreement, to consult with management on certain issues, because those arguments were not inconsistent with an intention solely to invest.

In *International Harvester*, the acquirer had already purchased a 39 percent share in and had entered into a manufacturing agreement with Steiger, a supplier and competitor. The shareholder agreement granted International Harvester the right to three of nine board seats (which it had already filled), and provided that certain key board decisions required seven votes. The Seventh Circuit affirmed the district court's post-trial judgment for the defendants. While it did not address whether International Harvester could in fact control the acquired company, the Seventh Circuit noted the district court's findings that the parties had a "clear understanding between the two corporations that Harvester had no intent nor was it to seek control of Steiger through the stock acquisition," and that Harvester had not in fact obtained control.[8]

In light of this precedent, the district court in *Dairy Farmers* concluded that the DOJ had not sufficiently shown how or that its theoretical incentives and opportunities would harm competition in practice since DFA did not have operational control over Southern Belle. "There must be some mechanism by which the alleged adverse effects in the sale of milk are likely to be brought about by DFA's acquisition of a non-operational interest in Southern Belle." *Dairy Farmers*, 2004 WL 2186215 at *7. But "with respect to school milk bidding, DFA's involvement and even its access to information regarding same, is almost nil." *Id.* The court noted that "[e]very investor, however small, has an incentive to achieve higher profits and perhaps even to communicate with management on these issues. But this obvious point does not establish the probability of anticompetitive effects that would render the investment illegal under Section 7." *Id.* Because it found that the DOJ had not identified any actual mechanism through which DFA would have influenced Southern Belle's operations, the court granted the defendants' motion for summary judgment.

The Sixth Circuit's Opinion. The Sixth Circuit reversed. It first held that the district court should have considered the DOJ's claim with respect to the *original* agreement, which provided DFA with some level of control over Southern Belle, and went on to apply the district court's reasoning to that agreement. The Sixth Circuit agreed with the district court that control or influence may be the mechanism through which an acquirer causes competitive harm, but "[did] not agree with the district court's conclusion that a lack of control or influence precludes a Section 7 violation." *Dairy Farmers*, 426 F.3d at 859.

The Sixth Circuit found that the original agreement's provision of voting rights to DFA provided a mechanism for it to exercise some control over Southern Belle. In light of that control, the court found that the acquisition resulted in a significant increase in market concentration and provided DFA with an "undue" percentage of the market. The Sixth Circuit therefore held that the acquisition was presumptively illegal under *Philadelphia National Bank* and that summary judgment should not have been granted (albeit implicitly) as to the original agreement.

But the court found that "control" was not the only way that a partial ownership could violate Section 7. The Sixth Circuit in *Dairy Farmers* read the *Du Pont* case to stand for the proposition that "even without control or influence, an acquisition may still lessen competition." *Dairy Farmers*, 426 F.3d at 860.

In *Du Pont*, the Supreme Court reversed the lower court's judgment in favor of plaintiffs and found DuPont's 23 percent interest in General Motors to violate Section 7 in large part because DuPont had acquired the interest for the express purpose of entrenching itself as General Motors's primary supplier and because it had succeeded in doing so. *Du Pont*, 353 U.S. at 606. On remand, the district court ordered that DuPont's voting rights be stripped and transferred to DuPont shareholders and prohibited DuPont officers or directors from serving as General Motors officers or directors. *United States v. E.I. du Pont de Nemours & Co.*[9] But on appeal of that decision, the Supreme Court again reversed on the grounds that the remedy was inadequate. *United States v. E.I. du Pont de Nemours & Co.*[10] Because the shareholders to whom the voting rights would be divested had the same interests as DuPont, the likelihood of competitive harm was not eliminated in the view of the Court. Because DuPont had so entrenched itself, General Motors might not find reason to change its practices and DuPont's competitors might be discouraged from dealing with GM. And because DuPont could reunite the ownership right with the voting right by selling the stock, the Court found that DuPont had some leverage with General Motors.

Turning to the revised agreement, the Sixth Circuit found that the district court had focused too heavily on control and, in doing so, had "ignore[d] the possibility that there may be a mechanism that causes anticompetitive behavior other than control." *Dairy Farmers*, 426 F.3d at 862. Citing again to *Du Pont*, the court noted that DFA and its partner in Southern Belle, which would retain all voting rights under the revised agreement, had "closely aligned interests to maximize profits via anticompetitive behavior." *Id.* While the court did not elaborate on how these "closely aligned interests" would in fact lead to anticompetitive behavior, the phrase implies unilateral effects of the kind alleged by the DOJ.

In any event, the court found that the district court incorrectly held that the DOJ had not presented sufficient evidence of control to survive summary judgment because, among other possibilities, DFA might still "leverage its posi-

tion as Southern Belle's financier to control or influence Southern Belle's decisions." *Id.* The court ultimately held that "a genuine issue of material fact exists as to whether there is a reasonable probability that the revised agreement would substantially lessen competition, through DFA's control or otherwise." *Dairy Farmers*, 426 F.3d at 862. While the court did not discuss the import of Southern Belle's and National Dairy's past collusion or their unsuccessful attempt to merge, those facts could also have influenced the court's decision to reinstate the DOJ's case.

Did the *Dairy Farmers* Opinions Offer Any New Perspectives on Partial Acquisitions?

The district court and Sixth Circuit employed very different analyses to reach very different conclusions. The district court held that to show that harm to competition was likely the DOJ needed to show some mechanism by which DFA could control or influence Southern Belle, and that it had not done so. The Sixth Circuit, on the other hand, relied on *Du Pont* and found that the district court had focused too much on the notion of actual control. According to the Sixth Circuit, the DOJ needed only to show some mechanism—control or something else—by which the transaction might harm competition, and it had.

The opinions merely reaffirmed the two theories of possible harm that could result from a partial acquisitions—control or changed incentives. However, neither opinion offers guidance on how either theory could be implemented to produce an anticompetitive effect or whether any effect had been seen in the marketplace since the acquisition was completed. Even the Sixth Circuit, which hinted at potential unilateral effects, failed to address the economics or law of that theory in any meaningful detail. Its failure to do so is unfortunate in light of the fact that the agencies have regularly pursued cases that involve questions of changed incentives, with or without a change in control.

Treatment of Minority Acquisitions by the Agencies

The potential harms associated with changed incentives as a result of minority acquisitions are articulated both in agency guidelines and public statements. For example, the Joint Venture Guidelines state:

> In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration. The Agencies also assess direct equity investments between or among the participants. Such investments may reduce the incentives of the participants to compete with each other. In either case, the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's investment in its independent business operations in the markets affected by the collaboration.[11]

This concern has been echoed in the DOJ's competitive impact statements accompanying consent decrees:

> By acquiring a partial ownership interest in Lamar, Clear Channel will have reduced incentives to compete against Lamar for out-of-home advertisers and will have incentives to charge higher prices than it otherwise would. This is because Clear Channel will indirectly benefit when a customer chooses Lamar rather than Eller.[12]

The DOJ has therefore required divestiture of partial ownership interests as a condition of approval for several mergers on the basis of potential unilateral effects resulting from changed incentives, though the cases have often also involved claims of coordinated effects.[13] While the FTC has also pursued consent decrees in minority acquisition cases, it has appeared somewhat less concerned with unilateral effects and therefore more amenable to remedies that simply neutralize any potential control by removing potential mechanisms for influence (e.g., by removing voting rights and director seats) but leaving the financial investment intact.[14]

Prior to *Dairy Farmers*, perhaps the best example of the DOJ's approach was its challenge of the proposed acquisition of Continental Airlines by Northwest Airlines. After Continental emerged from bankruptcy in the early 1990s, Northwest investigated entering into a code-sharing alliance with Continental and acquiring a 14 percent ownership interest that, due to the corporation's structure, controlled approximately 50 percent of its voting rights. As a result of Continental's concerns, the parties agreed to a number of provisions that would limit Northwest's influence or control, including the placement of Northwest's stock in a voting trust and guarantees that Continental would retain control of its board. The DOJ approved the code share alliance, but sought a declaration that the equity acquisition violated Section 7 and requested full divestiture on the theory that the equity interest would impact Northwest's incentives to compete. Northwest attempted to rely on the same cases cited by the district court in the DFA case, and the DOJ attempted to rely on the changed incentives analysis. The case settled, however, after one day of trial when Continental withdrew its support for the acquisition, preventing the court from deciding the incentive issue.

The European Commission has also pursued several minority acquisition cases. While the EC, like the U.S. agencies and courts, looks first to whether the acquiring party will obtain control, it also considers whether there are "important structural links" and whether such links might affect either party's incentives to compete.[15] Though the terminology is different, the EC's theory resembles the unilateral effects theory pursued by the DOJ.

Challenges Facing Minority Acquisition Cases and a Possible Solution

Notwithstanding *Dairy Farmers* and *Northwest*, there have been few challenges to minority acquisitions not involving control, perhaps because of the inherent difficulties they present. The difficulty with any analysis of non-controlling minority interests is that influences and incentives, and con-

sequently competitive effects, are difficult to measure. As an initial matter, the first step in any merger analysis—measurement of the level of and change in market concentration—becomes more difficult because that analysis is based on the percentages of a market that different firms control. To overcome this difference, Daniel O'Brien and Steven Salop have shown that calculating market concentration changes resulting from minority acquisitions is possible (though doing so requires a different model for each different financial interest and corporate control scenario). The more significant obstacle, however, is actually proving likely anticompetitive effects in the context of the dizzying variety of financial interests, ownership forms and shares, management structures, and market factors that can surround minority acquisitions.

In light of these difficulties, it is reasonable to consider whether prospective challenges under Section 7 are the best method for the agencies to challenge minority acquisitions that do not involve control.

Waiting to proceed until after an acquisition, when the competitive effects of a minority acquisition are known, would make the agency's task easier and reduce the possibility of error.[16] For example, the parties and the courts would not have to speculate whether a mechanism might exist for control or influence to be exerted, because the record would disclose whether it did. And hypothetical incentives and opportunities would not have to be considered in a vacuum, because the record would disclose whether they had materialized. Indeed, the *Du Pont* case on which the Sixth Circuit relied so heavily provides a good example of how and why later challenges may be more attractive. *Du Pont* was litigated and decided over 30 years after the original acquisition! Certainly no enforcement agency should have to wait 30 years to see if anticompetitive effects result. But some time delay seems prudent in an area where likely effects are inherently difficult to assess.

Moreover, retrospective prosecution of an anticompetitive minority acquisition is unlikely to cause the harm that can sometimes result from retrospective prosecution of a total merger. The historic criticism of such after-the-fact actions is that by the time they are brought the merging firms have already integrated their operations, or "scrambled the eggs," meaning that any eventual divestiture would be difficult to accomplish and might create nothing more than weakened competitors. In minority acquisitions, however, divestiture will often require nothing more than the sale of stock and the surrender of board seats.

Of course, the agencies are unlikely to abandon Section 7 with respect to all minority acquisitions, controlling or non-controlling, simply because of the possibility of false positives. The DOJ stated in its *Dairy Farmers* brief that "Congress passed Section 7 of the Clayton Act because it deemed enforcement under the Sherman Act insufficient to prevent anticompetitive harm from competition."[17] If nothing else, however, the difficulty and uncertainty involved in analyzing non-controlling minority acquisitions favors restraint in the agencies' use of their prosecutorial discretion in deciding whether or not to challenge partial acquisitions.

Finally, the difficulties and uncertainties addressed above also might warrant a more rigorous standard for analyzing non-controlling minority acquisitions, such as the heightened standards employed in the recent *Arch Coal* and *Oracle* decisions. In *Federal Trade Commission v. Arch Coal, Inc.*,[18] the District Court for the District of Columbia denied the FTC's motion for a preliminary injunction prohibiting the merger of Arch and Triton, two coal manufacturers. While there was evidence that post-acquisition coordination was feasible, the court held that the FTC had not shown that it had occurred or was likely. And in *United States v. Oracle Corp.*,[19] the District Court for the Northern District of California rejected the DOJ's attempt to enjoin the merger of Oracle and PeopleSoft in the enterprise management software market. While market shares and concentration were high, the court held that the DOJ had not proven the unilateral effects theory it offered. These courts essentially declined to rely on presumptions and insisted that the agencies identify with some precision the mechanism by which competition would be harmed. A similar approach in minority acquisition cases could prevent the enjoining or deterrence of beneficial or at least harmless transactions.

Tips for Practitioners

Practitioners should be sensitive to the potential issues facing minority acquisitions, in part because the DOJ has expressed an interest in remaining active in this area.[20] And while the cases and consent decrees that are out there show that the law regarding minority acquisitions is well short of being settled, they do provide, directly or indirectly, some guidance to practitioners and firms, including the following:

- Identify at the outset the goals of a transaction—control or investment—and document them.
- If eventual control is a goal of the transaction, expect close scrutiny.
- If the goal is investment, consider attempting to "fix it first" by crafting the arrangement to contractually limit the acquirer's ability to gain control or influence.
- Recognize that your clients' goals likely fall somewhere between control and investment, and try to craft agreements that protect your clients' interests while not inviting scrutiny. It is sensible for minority acquirers to pursue measures to protect their investments, and the most effective and maybe only way to do so is through their obtaining some influence or control. But the greater the influence or control, the greater the risk of close scrutiny.
- Be wary of the investment-only exemption for acquisitions in highly-concentrated markets. The DOJ argued in *Dairy Farmers* that "the defense is not an exception that immunizes a deal that would otherwise violate Section 7 by creating a reasonable probability of anti-

competitive harm."[21] While this position, if adopted by the courts, would vitiate the exemption, it is not without support.[22]

- Consider the potential effect of the acquisition on each firm's incentives, i.e., unilateral effects. Courts have tended not to, but the DOJ can be expected to pursue both control and incentive theories in future cases.
- Be sensitive to vertical as well as horizontal overlaps. While *Dairy Farmers* involved horizontal competitors, *Du Pont* involved a vertical relationship.
- Hire economists. The agencies have their own and will use them to develop and test all possible theories.
- Finally, don't rely too much on *Dairy Farmers* for guidance because the facts are too specific to that case. Most notably, the relevant market there was highly concentrated—there are only two dairies in many school districts in the relevant market and only three dairies in many others. Harm to competition is considerably easier to presume in the case of cross-ownership among duopolists than it is in a market with numerous firms. Such a presumption is made even easier in the *Dairy Farmers* case by the fact that the two dairies in question had colluded in the past and the DOJ had successfully challenged an earlier attempt by the dairies to merge outright.

Questions Remain

While the *Dairy Farmers* case has brought considerable attention to minority acquisitions, this area continues to raise more questions than answers. The most significant of those questions is whether in future cases courts will examine unilateral financial incentives, rather than focusing primarily or entirely on control or influence. The agencies could foreclose this question, and perhaps add clarity and certainty to the law, by waiting until after competitive effects can be known to challenge minority acquisitions. The courts could help practitioners and potential acquirers by holding the agencies to higher standards in cases involving theories with highly speculative effects. In the meantime, counsel and clients should pay attention to these issues when considering, structuring, and defending partial ownership acquisitions. ■

[1] *See* Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interests and Corporate Control*, 67 ANTITRUST L.J. 559 (2000); *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); Daniel P. O'Brien & Steven C. Salop, *The Competitive Effects of Passive Minority Equity Interests: Reply*, 69 ANTITRUST L.J. 611 (2001).

[2] Because in minority acquisition cases there remain at least two distinct firms whose economic incentives must be considered, such acquisitions sometimes better resemble joint ventures than mergers. *See* Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors ¶ 3.34(c) (2000) [hereinafter Joint Venture Guidelines].

[3] Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment at 10. The DOJ also quoted Areeda and Hovenkamp's discussion of how unilateral effects might work: "At a psychological level, either company might lose some of its former competitive zeal to compete with the other. And, quite apart from any such feelings, the acquired firm may have good reason to direct its competitive energies away from the acquiring firm." *Id.* at 20 (quoting 5 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1203c at 282 (2d ed. 2003)).

[4] 374 U.S. 321 (1963).

[5] 353 U.S. 586 (1957).

[6] 477 F. Supp. 1093 (C.D. Cal. 1979).

[7] 564 F.2d 769 (7th Cir. 1977).

[8] *Id.* at 777.

[9] 177 F. Supp. 1, 51–52 (N.D. Ill. 1959).

[10] 366 U.S. 316, 331–32 (1961).

[11] Joint Venture Guidelines, *supra* note 2, ¶ 3.34(c).

[12] Clear Channel Communications, Inc., 66 Fed. Reg. 12,544, 12,562 (Feb. 27, 2001).

[13] *See, e.g.*, *id.*; United States v. SBC Communications Inc., 64 Fed. Reg. 23,099 (Apr. 29, 1999); United States v. AT&T Corp., 65 Fed. Reg. 38,584 (June 1, 2000); Clear Channel Communications., Inc., 66 Fed. Reg. 12,544 (Feb. 27, 2001); United States v. U.S. West, Inc., 61 Fed. Reg. 58,703 (Nov. 18, 1996).

[14] *See* Medtronic, 63 Fed. Reg. 53,919 (Oct. 7, 1998).

[15] *See, e.g.*, Case No. IV/M.1493, AXA/GRE; Case No. COMP/M.2567, Nordbanken/Postgirot; Case No. IV/M.1080, Thyssen/Krupp; Case No. IV/M.1383, Exxon/Mobil.

[16] Such challenges could be brought under Section 7 or under several other antitrust statutes that generally are not used pre-consummation because of the additional burdens they place on a plaintiff to show an actual anticompetitive effect. For example, minority acquisitions might also constitute restraints of trade in violation of Section 1 of the Sherman Act, unfair trade practices under Section 5 of the Clayton Act, predatory acts under Section 2 of the Sherman Act, or illegal interlocks under Section 8 of the Clayton Act.

[17] Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment at 12.

[18] 329 F. Supp. 2d 109 (D.D.C. 2004).

[19] 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[20] *See* Deborah Platt Majoras, Deputy Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, A Review of Recent Antitrust Division Actions (June 12, 2003) (noting "the Division's continued interest in evaluating the extent to which partial ownership in a rival may constitute control, as well as how partial ownership can affect incentives to compete"), *available at* http://www.usdoj.gov/atr/public/speeches/201159.htm.

[21] Plaintiffs' Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment at 29.

[22] *See, e.g.*, Golden Grain Macaroni Co., 78 F.T.C. 63 (1971) ("[W]hen an acquisition will necessarily affect the competitive behavior of the two involved firms, it cannot be said that the sole purpose of the acquisition was for investment."); 5 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1204 at 294 (2d ed. 2003) ("It would be hard to find that an acquisition that would otherwise be deemed anticompetitive was 'solely' for investment.").