



UNITED STATES OF AMERICA



March 31, 2023

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

Honourable François-Philippe Champagne
Minister of Innovation, Science and Industry
235 Queen St, Ottawa, ON K1A 0H5, Canada

Re: Ministry's Public Consultation Paper on the Future of Competition Policy in Canada

Dear Minister Champagne:

As the Chair of the United States Federal Trade Commission and the Antitrust Attorney General for Antitrust of the United States Department of Justice, we commend the Ministry for this timely and important consultation on the future of competition policy in Canada. We write to share our agencies' experience with the enforcement of competition (or antitrust) law in the hope that it will aid your assessment. We do so at the invitation of the Commissioner of Competition, who indicated that the United States' experience could be of value to Canadian lawmakers.

We respectfully offer the following comments based on our agencies' experience enforcing the U.S. antitrust laws. We focus our comments on several areas where we believe our experience may be most relevant to the issues facing Canada: the analysis of mergers, especially with regard to the treatment of efficiencies; the importance of market studies for competition policy and law enforcement; the articulation of a standard for abuse of dominance or monopolization; and the importance of an effective and nimble institution for the implementation and enforcement of competition law and policy. Our comments are not a recommendation on the most appropriate law for Canada, but we hope the experience our agencies have amassed on many of the issues raised in the consultation paper will provide useful data points for your inquiry.

I. Mergers

a. *Changes to the Efficiencies Defense*

The discussion paper raises the question of whether Canada's existing efficiencies defense should be limited to circumstances where consumers or suppliers would not be harmed by the merger. In contrast to Canadian law, United States merger law does not permit an efficiencies defense, and no court has ever allowed an otherwise illegal merger to proceed on the grounds of efficiencies. In fact, the Supreme Court

has held that “possible economies [from a merger] cannot be used as a defense to illegality.¹ Section 7 of the Clayton Act prohibits all mergers and acquisitions when the effect “may be substantially to lessen competition or tend to create a monopoly.”² In the words of our Supreme Court, an illegal merger “is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.”³ In short, if a merger might substantially lessen competition or tend to create a monopoly, efficiencies cannot cure the illegal deal. Importantly, competition usually spurs firms to pursue efficiencies internally, and Congress has stated a preference for organic growth over growth through acquisition.

Our experience has been that efficiencies are often claimed but rarely proved.⁴ Not only do the U.S. agencies refuse to credit vague or speculative claims, we would not give credit to claimed efficiencies that purportedly allow a merged firm to be more competitive internationally. Our skepticism of efficiencies is consistent with the position our counterparts in other jurisdictions have taken. In many jurisdictions with strong antitrust enforcement, efficiencies receive little if any credit in protecting an otherwise anticompetitive merger.

To the extent that efficiencies have entered the policy discussion in the United States, it has been a matter of agency discretion. For many years, the U.S. agencies have provided guidance that the consideration of certain efficiencies could lead to a decision not to challenge a merger.⁵ The U.S. agencies are currently reviewing our merger guidelines, which will further clarify the agencies’ treatment of efficiencies. We would be happy to share a copy of the revised guidelines with you once they are available.

b. Revisiting the Standard for a Merger Remedy

The discussion paper raises the question of the appropriate standard for a merger remedy. If the effect of a proposed merger may substantially lessen competition or tend to create a monopoly, the U.S. agencies will seek measures that will fully prevent the anticompetitive harm that the merger might have produced. As a federal court in the United States recently observed, “[t]he ‘fundamental purpose’ of Section 7 is ‘to arrest the trend toward concentration, the tendency to [monopolize or monopsony], before the [buyer’s or seller’s] alternatives disappear [] through the merger’”⁶ It follows that the Agencies will oppose proposed remedies that fail to fully maintain competition. Given that the public should not bear the cost of a risky remedy, the Agencies resolve doubts about the efficacy of a remedy in favor of rejecting it.⁷

¹ United States v. Philadelphia Nat. Bank, 374 US 321, 371 (1963); F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).

² 15 U.S.C. § 18.

³ United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 371 (1963).

⁴ See e.g. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission 1997-2007 (February 2009), <https://www.ftc.gov/reports/merger-efficiencies-federal-trade-commission-1997-2007>.

⁵ See U.S. Dep’t of Justice and Federal Trade Comm’n, Horizontal Merger Guidelines § 10 (2010) (“The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.”)

⁶ United States v. Bertelsmann SE & Co. KGaA, F. Supp. 3d, 2022 WL 16949715, at *10 (D.D.C. 2022) (citing Philadelphia Nat’l Bank, 374 U.S. at 367).

⁷ See F. Hoffman–La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 171 (2004) (“[I]t is well settled that once the Government has successfully born the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.”) (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961)).

Remedies take two basic forms. *Structural* remedies often involve the sale of businesses or assets by the merging firms to address the structure of the relevant market. *Behavioral* remedies typically involve injunctive provisions that would, in effect, regulate the merged firm’s post-merger business conduct or pricing authority. Given the difficulties in crafting behavioral remedies that adequately anticipate corporate incentives and reflect dynamic market realities as well as the challenges of enforcing these provisions, behavioral remedies are particularly disfavored by the agencies

When analyzing a potential remedy, the courts and agencies focus on whether the proposed remedy would “eliminate the effects of the acquisition offensive to the statute.”⁸ Given the difficulties in predicting future market realities, particularly in dynamic markets, the agencies have noted that the optimal remedy is often to oppose problematic mergers outright.⁹ In the same way that preventing illness is the best cure to a disease, stopping problematic mergers ensures they do not harm competition, while attempted remedies necessarily maintain some residual risk of harm.

c. *Extension of the limitation period for non-notifiable mergers*

The discussion paper asks for comment on possible changes to the existing one-year statute of limitation for challenging mergers outside of the notification regime. There is no statute of limitations applicable to an FTC or DOJ challenge to a consummated merger in the United States.¹⁰ Indeed, the FTC and DOJ have sometimes found it critical to address consummated mergers even years after they occurred in order to stop the harm and, if necessary, unwind the merger. Mergers notified to the agencies can turn out to have unanticipated anticompetitive effects that are identified only after consummation.¹¹

We have found that it is important for our agencies to have the authority to address unlawful mergers even after they have been consummated. In our experience, it is a valuable aspect of the United States’ regime that there is no statute of limitations for suing to block transactions, and that were there one it would materially impede our ability to stop mergers that ultimately lessened competition.

⁸ United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607-08 (1957).

⁹ See e.g., Press Release, Dep’t of Justice, Principal Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at Mercatus Center Second Annual Antitrust Forum (Jan. 26, 2023), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers> (“When we think a merger may substantially lessen competition, the optimal remedy is to block it.”); Letter from FTC Commissioner Lina Khan to the Honorable Elizabeth Warren (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf (“While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright.”).

¹⁰ While equitable remedies such as divestiture are theoretically subject to the equitable doctrine of laches, that doctrine is generally not applicable to Federal governmental enforcement, United States v. Kirkpatrick, 22 U.S. (9 Wheat) 720, 735 (1824), although it has been applied to private, Steves & Sons, Inc. v. Jeld-Wen, Inc. 988 F.3d 690 (4th Cir. 2021), and state enforcement, New York v. Facebook, 2021 U.S. Dist. LEXIS 127227 (D.D.C. June 28, 2021).

¹¹ For example, the acquisition of the Highland Park Hospital in the north suburbs of Chicago by Evanston Northwestern Healthcare was notified to the FTC in 2000. It was not challenged at the time, but the FTC’s Hospital Merger Retrospective study showed that it had resulted in significantly higher healthcare costs to consumers. The FTC brought a successful challenge to the merger in 2004. The study was published after the litigation concluded. See David J. Balan & Patrick Romano, A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston (Federal Trade Comm’n, Bureau of Economics, Working Paper No. 307, 2010), <https://www.ftc.gov/sites/default/files/documents/reports/retrospective-analysis-clinical-quality-effects-acquisition-highland-park-hospital-evanston/wp307.pdf>. Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., Docket D-9315 (FTC, Aug. 6, 2007).

II. Unilateral Conduct

a. *Condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision.*

You have asked for comments on the merits of condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision, or alternatively, repositioning those unilateral conduct provisions outside of abuse of dominance for different objectives of the Competition Act, such as fairness in the marketplace.

The current U.S. framework relies on a single, principles-based monopolization standard, which is similar but not identical to the abuse of dominance standard in Canada. In the United States, there are two main federal antitrust statutes that govern unilateral conduct: Section 2 of the Sherman Act, which prohibits unlawful monopolization, actual or attempted, and unlawful maintenance of a monopoly (“Section 2”);¹² and Section 5 of the FTC Act,¹³ which prohibits “unfair methods of competition in or affecting commerce” (“Section 5”) and is enforceable only by the FTC. From time to time, Congress has supplemented these general principles with more specific statutes, such as a law prohibiting price discrimination in retail markets.¹⁴

Section 2 prohibits conduct that attempts to achieve, actually achieves, or maintains that monopoly. As such, Section 2 caselaw has developed primarily around whether certain types of monopolistic behavior, including whether the aggregation of certain acts, rise to the level of unlawful conduct. Section 2 violations may lead to injunctive orders for structural remedies, including divestitures, enjoinder of certain behavior, significant monetary penalties, and/or potential criminal sanctions for corporations and individuals, including potential claims for treble damages in follow-on lawsuits.

Following the adoption of Section 2 in 1890, Congress recognized that not all problematic conduct fit neatly within the Sherman Act and responded by enacting Section 5 of the FTC Act and creating the FTC as an independent agency with a mandate to develop standards to combat “unfair methods of competition.” Conduct may violate Section 5 of the FTC Act even if it does not violate Section 2 of the Sherman Act. The U.S. Supreme Court recognized that the FTC Act as a whole “was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts.”¹⁵ Accordingly, Section 5 covers a broader scope of conduct, and includes conduct that constitutes an incipient violation of the antitrust laws or that violates the spirit of those laws.¹⁶

¹² 15 U.S.C. §2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).

¹³ 15 U.S.C. §45(a)(1).

¹⁴ 15 U.S.C. § 13 (Robinson-Patman Act).

¹⁵ *FTC v. Motion Picture Advertising Service Company, Inc.*, 344 U.S. 392, 394-95 (1953).

¹⁶ FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

b. Creating Bright Line Rules or Presumptions for Dominant Firms or Platforms

To allow for more efficient enforcement, the United States has long relied on presumptions that are solidly grounded in judicially recognized experience. A rebuttable presumption for undue concentration has been well developed in the merger context, and burden-shifting presumptions have also been applied in the monopolization context.

When assessing whether a merger violates Section 7 of the Clayton Act, U.S. federal courts follow a burden-shifting approach.¹⁷ Under this approach, if the government can show that the merger would lead to “undue concentration” in a properly defined relevant market, this creates “a presumption that the merger would substantially lessen competition” and establishes a prima facie case of an anticompetitive effect in violation of Section 7.¹⁸ Courts and scholars alike have described this prima facie case as the “structural presumption,” as it rests on the level and increase in market concentration caused by the merger.¹⁹

The structural presumption was advanced by a 1963 U.S. Supreme Court ruling where the Court acknowledged merger analysis is a difficult exercise in prediction and urged “simplify[ing] the test of illegality” by “dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.”²⁰ Thus, creating presumptions that streamline decision-making are an important tool for Section 7 analysis in the United States. For example, the “undue concentration” presumption aligns with economic evidence showing a statistical relationship between high prices and high market concentration,²¹ as well as U.S. lawmakers’ “intense” concern that increasing concentration was a problem that itself reflected a lessening of competition.²²

The DOJ’s initial 1968 Merger Guidelines reflected the importance of the structural presumption, noting that “[m]arket structure is the focus of the Department’s merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market.”²³ Later iterations of the Merger Guidelines, which were jointly released by the FTC and DOJ, provided guidance on certain market share and concentration thresholds that would satisfy the structural presumption.²⁴ These

¹⁷ See, e.g., *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015).

¹⁸ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (internal quotation marks omitted).

¹⁹ See e.g., John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 837 (2017). Should the government successfully establish the structural presumption, defendants then have the opportunity to rebut this presumption with countervailing evidence; and, if necessary, the burden shifts back to the government to establish additional evidence of anticompetitive effects resulting from the merger, see *H.J. Heinz Co.*, 246 F.3d at 715 (citing *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975); *Baker Hughes*, 908 F.2d at 982-83).

²⁰ *Philadelphia Nat’l Bank*, 374 U.S. at 362-63.

²¹ See Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure and Burdens of Proof*, 127 YALE L.J. 1996, 2001 (2018) (noting that “the structural presumption is rooted in empirical evidence indicating that more concentrated markets tend to have higher prices and higher price-cost margins, all else equal.”)(citing JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956)).

²² *Philadelphia Nat’l Bank*, 374 U.S. at 363.

²³ U.S. DEP’T OF JUSTICE, MERGER GUIDELINES 1 (1968), <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf>.

²⁴ See, e.g., Horizontal Merger Guidelines, *supra* note 5, §5.3 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

thresholds are based on the Herfindahl-Hirschman Index (HHI), a measure of market concentration that results from summing the squares of the individual firm’s market shares.²⁵

As described in the Merger Guidelines, the FTC and DOJ heavily rely on market-share statistics to establish the structural presumption. Indeed, there is strong case law support that these statistics alone suffice to establish the government’s prima facie case.²⁶ Courts have routinely relied on the thresholds prescribed by the Merger Guidelines to establish that the structural presumption is warranted.²⁷ Given the widespread judicial acceptance of the structural presumption, scholars have heralded the presumption as “critical for effective horizontal merger enforcement” by the DOJ and FTC.²⁸

Market power is also an important element of a monopolization case, and the use of structural presumptions may likewise be appropriate in such cases. The United States Supreme Court has endorsed the use of a presumption of market power where high market shares are present.²⁹ While significant market shares are a good indicator of market power, their absence does not always signal the lack of market power, which may be revealed by direct evidence or other market characteristics. As with the structural presumption in merger review, market-share based presumptions of market power are more affective as positive indicators than up or down screens.

In recent years U.S. lawmakers have considered legislation that would establish a presumption against certain types of conduct by dominant digital platforms.³⁰ Specifically, the American Innovation and Choice Online Act (AICOA) would prohibit large platforms from, for example, restricting interoperability or restricting business users from accessing their own data.³¹ Under this proposal, if the plaintiff proves the existence of such conduct by a preponderance of the evidence, the defendant would have the burden to show that the conduct “has not resulted in and would not result in material harm to the competitive process by restricting or impeding legitimate activity by business users.”³² This bill would supplement

²⁵ *Id.*

²⁶ *Philadelphia Nat’l Bank*, 374 U.S. at 363 (“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.”); *see also* *United States v. General Dynamics Corp.*, 415 U.S. 486, 497 (1974) (“The effect of adopting this approach to a determination of a ‘substantial’ lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing. . . .”); *FTC v. Hackensack Meridian Health*, 30 F.4th 160, 173 (3d. Cir. 2022) (holding, after reviewing the FTC’s evidence on market shares and concentration in the relevant market, that “the District Court needed no further evidence to find the FTC had established its prima facie case.”).

²⁷ *See* *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (“This creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market. *See* Horizontal Merger Guidelines, *supra*, § 1.51 (stating that HHI increase of more than 100 points, where post-merger HHI exceeds 1800, is “presumed ... likely to create or enhance market power or facilitate its exercise”)); *see also* *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) (citing the Guidelines and stating “as a general matter, a merger that increases HHI by more than 200 points, to a total number exceeding 2500, is presumptively anticompetitive.”).

²⁸ Hovenkamp & Shapiro, *supra* note 21, at 1997.

²⁹ *Grinnell Corp.*, 384 U.S. at 571 (“The existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market”); *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 481.

³⁰ American Innovation and Choice Online Act, S. 2992, 117th Cong. §2 (Mar. 2, 2022) (as amended), <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>. The FTC and DOJ may jointly, with the concurrence of the other, designate an online platform as a “covered platform” for the purpose of implementing and enforcing the Act. *Id.* at §3(d).

³¹ *Id.* at §3(a).

³² *Id.* at §3(b).

the existing antitrust laws in preventing the largest digital companies from abusing and exploiting their dominant positions to the detriment of fair competition. If passed by U.S. lawmakers, the legislation has the potential to boost competition and dynamism in digital markets and could serve as an important rule to curb the power of dominant platforms.

III. Administration and Enforcement of Law

a. Making the administration of the law more efficient and responsive

The ability to conduct effective investigations of suspected unlawful conduct requires timely access to information and data coupled with strong confidentiality protections. As we understand it, the issue in Canada is whether the Competition Bureau should have the authority to compel information in civil investigations on its own, or whether it should be required to publicly seek a court order when seeking information to further an investigation.

The FTC and DOJ have the authority to compel the production of documents, tangible things, and testimony from both the targets of civil investigations and third parties.³³ The root of the FTC's authority is found in Section 3 of the FTC Act,³⁴ which authorizes the FTC "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce . . ." Its specific investigative powers are defined in Sections 9 and 20 of the FTC Act,³⁵ which authorize the use of subpoenas and civil investigative demands, respectively.

Subpoenas and civil investigative demands are broadly similar. Section 9 of the FTC Act authorizes the FTC to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." By virtue of the FTC Act Amendments of 1994 and the parallel Antitrust Civil Practice Act, both the FTC and DOJ also may use "civil investigative demands" ("CIDs") for investigations of possible antitrust violations. The scope of a CID is slightly different from that of a subpoena. Both subpoenas and CIDs may be used to obtain existing documents or oral testimony. But a CID also may require that the recipient "file written reports or answers to questions" and to produce tangible things.³⁶

Before the Agencies may use compulsory process, the Commission (for the FTC) or the Assistant Attorney General (for the Antitrust Division) must authorize the use of process in the investigation. For the FTC, any member of the Commission may sign a specific subpoena or CID for the authorized investigation. The Agencies may petition a federal district court to enforce the subpoena or CID in the event of noncompliance. Refusal to comply with a court enforcement order is subject to penalties for contempt of court. Neither FTC nor DOJ is required to apply to a court for the issuance of compulsory process unless the recipient fails to comply with a request for information.³⁷

³³ In addition, the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of 15 U.S.C.), which is similar to Part IX of Canada's Competition Act, requires parties to reportable mergers to provide information to the agencies in advance of the merger. Criminal investigations by the DOJ are separately governed by the Federal Rules of Criminal Procedure.

³⁴ 15 U.S.C. § 43.

³⁵ 15 U.S.C. §§ 49, 57b-1.

³⁶ 15 U.S.C. § 57b-1(c)(1).

³⁷ There are multiple layers of due process protection built in to address any concerns about possible overreach. A party may raise objections to a subpoena or a CID by filing a petition to limit or quash. Such petitions in an FTC

One feature of the U.S. system is that information requests are confidential. The existence of a subpoena or CID is not made public unless the receiving party files a petition to limit or quash or otherwise identifies the process, or if court enforcement is necessary.

In our experience, authority to legally compel information from potential defendants and third parties is essential for vigorous, timely, and sound law enforcement. A process recourse to judges for routine information-gathering would dramatically slow the pace of investigations. Being mindful of the old adage that “justice delayed is justice denied,” such delay could allow unlawful business practices to persist, resulting in greater harm to the public.

b. Collection of Information Outside of Enforcement

The Competition Bureau, like the FTC, has the authority to conduct market studies. Unlike the Competition Bureau, however, the FTC has the authority to use compulsory process in the aid of such studies.

The FTC has authority to conduct market studies through Section 6(b) of the FTC Act. Market studies bolster the FTC’s enforcement agenda and advocacy efforts. Market studies provide the FTC with a process to develop a deeper understanding of sectors and business practices. These studies allow the FTC to gather information and documents outside the enforcement context and can play a key role in identifying and analyzing emerging competition trends and issues. They provide the information necessary to help the FTC develop a real-time understanding of business practices that they can share with other federal government agencies, state and local governments, market participants, and other stakeholders, all while maintaining the confidentiality of the information they obtained.

To gather necessary data or information, Congress gave the FTC the authority to use compulsory process to conduct wide-ranging studies. Specifically, the FTC has the power to require an entity to file “annual or special . . . reports or answers in writing to specific questions” to provide information about the entity’s “organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.” The exercise of the power requires a Commission vote to issue a resolution authorizing the issuance of what is known as “6(b) Orders.”³⁸ The authorization is typically accompanied by a public announcement describing the goals of the study. A 6(b) Order gives the recipient a set period of time in which to submit its response or file a petition to the Commission to quash or limit the 6(b) Order. The FTC may enforce a 6(b) Order in federal court in the event of a failure to respond.³⁹

Section 6(f) of the FTC Act authorizes the Commission to “make public from time to time” portions of the information that it obtains, where disclosure would serve the public interest. The FTC has used this

matter will be resolved in the first instance by a Commissioner designated to hear such petitions, and in the second instance by the full Commission. In a matter concerning the Antitrust Division, the petitions are made in federal court.

³⁸ The “6(b)” order is so named because the power is found in Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b).

³⁹ Other generally applicable laws may impose other limitations on the FTC’s 6(b) powers. These include a requirement under the Paperwork Reduction Act to seek approval from the Office of Management and Budget before collecting the same type of information from ten or more businesses or members of the public under its 6(b) authority.

authority in a variety of ways, including to conduct retrospective studies of consummated mergers⁴⁰ and analyzing trends in non-reportable acquisitions by dominant digital platforms.⁴¹ Such studies often inform federal, state, and international competition authorities, as well as lawmakers. For example, prior FTC studies have informed legislative deliberations and assisted members of Congress in crafting policy.

Conclusion

Thank you for inviting us to share our experience with you. We would be happy to follow up should further questions arise.

Sincerely,

Lina Khan
Chair⁴²
Federal Trade Commission

Jonathan Kanter
Assistant Attorney General
Antitrust Division
Department of Justice

⁴⁰ Over the last 35 years, the FTC's Bureau of Economics has undertaken retrospectives for a range of consummated mergers. See <https://www.ftc.gov/policy/studies/merger-retrospective-program/retrospective-studies-bureau-economics>.

⁴¹ The Commission used the information obtained in this study to examine trends in acquisitions and the structure of deals, including whether acquisitions not subject to HSR notification might have raised competitive concerns, whether and to what effect these companies are making acquisitions of nascent or potential competitors, and the nature and extent of other agreements that may restrict competition. See Federal Trade Comm'n, [Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study](https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study) (Sept. 15, 2021), <https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study>.

⁴² Chair Khan's views are her own and do not necessarily reflect the view of the Commission or any other Commissioner.