Order remanding case to hearing examiner for further evidence concerning the competitive effects of the challenged conglomerate acquisition of Clorox Chemical Co., the dominant concern in the liquid bleach field, including market share data in specified geographical regions.

681-237—63——78

OPINION OF THE COMMISSION

By the COMMISSION:

The complaint in this matter charges respondent, The Procter & Gamble Company, with violating Section 7 of the Clayton Act, as amended, by acquiring the assets and business of Clorox Chemical Co. (hereinafter referred to as Clorox). The hearing examiner has filed his initial decision holding that the acquisition violated Section 7, as alleged, and the matter is now before the Commission on cross-appeals of respondent and counsel supporting the complaint. The complaint alleges in substance that the acquisition of the dominant firm in the household liquid bleach field by the leading producer in related product fields may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleach. It specifically charges in this connection that producers of household liquid bleach may be unable to compete with respondent due to any one, any combination of, or all of the following factors:

(a) Respondent's market position;

(b) Respondent's financial and economic strength;

(c) Respondent's advertising ability and experience;

(d) Respondent's merchandising and promotional ability and experience;

(e) Respondent's "full-line" of cleansing and laundry products;

(f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;

(g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

As the hearing examiner has pointed out, this case involves a conglomerate acquisition and is therefore one of first impression. In all previous Section 7 proceedings before the Commission, the challenged acquisitions were of either a vertical or horizontal nature. Here, however, the acquiring firm was neither a supplier or customer, nor a competitor of the acquired. Such a merger, therefore, does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger. Nevertheless, such a merger violates Section 7 if it has the proscribed effect. We repeat here with emphasis our recent holding in the *Scott Paper* case:[1] "Under Section 7, as amended, any acquisition whether it be vertical, conglomerate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of com-

[1] *In the Matter of Scott Paper Company*, Docket 6559 (Dec. 16, 1960), 57 F.T.C. 1415, at 1440.

merce." [2] Therefore, respondent's contention that this type of acquisition is not embraced by Section 7 has no merit and is rejected.

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 above-mentioned "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 the pre-merger status of the acquired and acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate.

In this case, the hearing examiner has placed considerable emphasis on evidence relating to the post-acquisition activities of Clorox. Relying primarily on this evidence, he has concluded that the dominant market position held by Clorox in the production and sale of liquid bleach has been enhanced to the detriment of actual and potential competition; that there is an increasing tendency of concentration of competitors in the liquid bleach industry and that other liquid bleach producers will be unable to expand their operations by normal methods of competition. While we are of the opinion that, in the circumstances of this case, he was correct in considering this evidence, we do not agree that it supports his conclusions with respect to the probable effects of the acquisition.

The hearing examiner has found in this connection that, subsequent to the acquisition, Clorox has systematically countered the promotional activities of Purex Chemical Company, the second largest producer of liquid bleach, by its own advertising and promotional campaigns in various market areas throughout the country. With one exception, however, the effectiveness of these counter promotional activities cannot be determined from the record. The evidence discloses that in one market area, Erie, Pennsylvania, Purex was unsuccessful in its attempt to conduct a market test by reason of respondent's counter promotions. We do not believe that it can be inferred from this one showing, however, that the same results would occur in other market areas that Purex or other producers may attempt to enter or in which they may attempt to expand their operations.

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[2] This holding follows both from the language of the statute and from relevant legislative history. The House Committee report stated:

". . . the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." (H.R. Rep. No. 1191, 81st Cong. 1st Sess. p. 11 (1949).)

The hearing examiner has also found that, subsequent to the acquisition, Clorox's market share of the total household liquid bleach sales had increased substantially. This finding is based on data obtained from reports covering the period August, 1957, to November, 1958, made by the A. C. Nielsen Company Marketing Service. It appears that the increase in the Clorox market share in the first twelve months of this period was .3 of one Nielson point and, in the entire sixteen months, .42 of one Nielson point. This increase, however, is only about half of the average increase of .8 of one Nielson point made by Clorox in each of the five years prior to the acquisition. The hearing examiner's failure to consider this pre-acquisition growth trend of Clorox detracts from his conclusion that there had been a substantial increase in the dominant market position held by Clorox as a result of the acquisition.

In our opinion, the post-acquisition data neither supports the hearing examiner's conclusions nor does it indicate in any manner that the acquisition will not result in a substantial lessening of competition or tendency toward monopoly. As pointed out by counsel supporting the complaint, very few of respondent's merchandising techniques were used during the first eight months after the acquisition. Thereafter, when consumer promotions were used, although only on a limited basis, the market share of Clorox increased sharply. Moreover, counsel supporting the complaint contend that, during the sixteen month period after the acquisition, respondent had put into effect only a few of the changes which it might reasonably be expected to make in the production and merchandising of liquid bleach. These changes did not extend to the use of respondent's manufacturing facilities, the use of respondent's sales force in place of independent brokers, coordination of the advertising and promotion of Clorox with respondent's full line of related products and the use of national television advertising. According to counsel supporting the complaint, it is only when respondent begins to use the merchandising techniques and methods by which it has achieved spectacular successes against major competition in the soap and detergent fields that the full impact of this financially powerful corporation will be made on competition in the liquid bleach industry.

The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint and direct our staff to maintain continuing surveillance of this market, with the possibility of bringing another complaint in the future if we think it warranted. We believe, however, that the public interest will be better served and the respondent not unduly inconvenienced by our remanding the case for the taking of additional evidence. This is

likely to obviate the necessity of a plenary proceeding in the future that would be more costly in time and money to both the Commission and respondent than adding to the present record. Moreover, this disposition of the matter, providing as it will a more complete and detailed post-acquisition picture, has the advantage of allowing the Commission an informed hindsight upon which it can act rather than placing too strong a reliance upon treacherous conjecture.

The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent.

Chairman Dixon and Commissioner Elman not participating.

ORDER REMANDING PROCEEDING TO HEARING EXAMINER

Counsel supporting the complaint and respondent having filed cross-appeals from the initial decision in this matter; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

It is accordingly ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

It is further ordered, That after the receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein.

Chairman Dixon and Commissioner Elman not participating.