IDEAS
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The FTC Gets in Its Licks

by George C. Leef

The freedom of Americans to peacefully manage their own affairs has been shrinking for many decades, as government officials find more and more reasons to tell us what things we must do and what things we may not do. The pettiness of it all is wonderfully demonstrated in a recent decision by the agency that supposedly acts as a protector of the consumer: the Federal Trade Commission (FTC).

The FTC has legal power to block business mergers that it decides might "lessen competition." Recently, the management of Dreyer's Inc., a firm that makes ice cream, concluded a deal with the international food giant Nestlé, under which Nestlé would purchase Dreyer's stock and wind up with majority control of the firm. Dreyer's shareholders approved the transaction, only 0.1 percent of the shares being voted against. But it isn't enough just to have a willing buyer and a willing seller in modern America. You also have to play "Captain, may I?" with government officialdom. In March, the FTC announced its opposition to the merger. If Nestlé and Dreyer's want to merge, they will have to fight it out with the FTC in court.

Here are the pertinent facts. There is a huge market for ice cream and similar frozen desserts (like Eskimo Pies). A small part of that market consists of what the FTC calls "superpremium" ice cream—very rich and costly brands such as Häagen-Dazs, Ben & Jerry's, and Godiva. The FTC contends that 98 percent of the "superpremium market" is "controlled" by three large manufacturers: Nestlé, Dreyer's, and Unilever. If two of those three were allowed to merge, the result would be "greater concentration" in the industry, which the FTC invariably assumes to mean less competition and therefore harm to consumers. The director of the FTC's Bureau of Competition, Joe Simons, said, "This merger, as structured, would likely raise prices and reduce choice for consumers. The market for superpremium ice cream is already highly concentrated and this deal will reduce the number of significant competitors from three to two."

This is the classic approach of antitrusters: define markets with absurd narrowness and then assume that any reduction in the number of competitors is an "injury to competition" necessitating their intervention. It's all done to help those of us who can't resist an occasional bowl of ice cream. I cheerfully admit to being one of those people, and would be quite pleased to see the FTC stop pretending to do me favors.

First, the "superpremium ice cream market" is nonsense. There is nothing unique about Häagen-Dazs, Dreamery, Ben & Jerry's, or any of the other brands. They cost more per ounce and have a higher butterfat content, but still it's just ice cream. Dreyer's

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superpremium ice creams compete for consumer favor with their premium labels, as well as with many other ice creams, like Sealtest and Texas Gold. If the three or two makers of superpremium ice cream should start to raise their prices, they will find their sales falling as consumers switch to other ice creams or other luxury desserts that now seem to be a better value.

Second, the FTC treats as of no consequence the sellers of that small slice of the "superpremium market" not accounted for by the big makers. But they exist and offer real competition. I grew up in a city known for its custard stands (Milwaukee) and consumers can and do purchase terrific ice cream there. (Maybe the FTC wizards don't think that "custard" belongs in the same market as "superpremium ice cream," but I do.) If the Dreyer's-Nestlé merger takes place and prices go up for superpremium ice cream sold in stores, many consumers will stock up on pints or quarts of custard. Also, most cities have specialty ice-cream shops such as Baskin-Robbins that sell scrumptious products that I'd bet the regulators at the FTC couldn't tell from "superpremium" in a blind taste test. If prices for products like Häagen-Dazs go up, those shops will find themselves serving more customers.

Number of Competitors Doesn't Matter

Third, the FTC makes far too much of the reduction in the number of major competitors from three to two. It's an economic old wives' tale that the intensity of competition is a function of the number of firms. Fewer firms do not necessarily mean less competition. Unilever's Ben & Jerry's brand will still struggle just as hard to win purchasers away from other labels, no matter the ownership arrangement of Dreyer's and Nestlé facilities. That's because they are also struggling to win customers from other ice creams and luxury desserts.

Finally, even if all the competitors in the "superpremium" market were to raise their prices, that would simply invite new competition from ice-cream makers who don't currently produce superpremium brands but could readily do so.

It looks awfully silly for a government agency to flex its muscles over a proposed merger involving a small part of the market for one kind of dessert. Even if the FTC's fears were realized, all that would happen is that a container of Cherry Garcia or Black Raspberry Avalanche might go up in price from perhaps $3.29 to $3.49. Why should that be any concern of the federal (or state or local) government? Anyone who doesn't like the price increase can buy something else, or have "superpremium" ice cream less often. Government is supposed to protect our rights to life, liberty, and property, not fret over whether we're getting the lowest possible price for ice cream.

So why go through this exercise, either forbidding a harmless merger or forcing the firms to spend huge sums on legal fees to fight an FTC injunction in court? In a column in the March 12 *Wall Street Journal*, writer Holman Jenkins put his finger on the reason: "Now the agency has manufactured an enemy monopolist that it can be seen vanquishing in a fabulous war of regulatory coercion. . . . It's obvious why the FTC engages in such intellectual sleight of hand. It wouldn't have anything to do otherwise. Were they obliged to wait until presented with a case raising genuine antitrust concerns, its lawyers might spend the whole of their government service twiddling their thumbs."

That's exactly it. Government agencies want to be perceived as beehives of activity. If they weren't, taxpayers might start asking impertinent questions like, "Why are we paying high salaries to all these people?"

Jenkins's column hit a raw nerve at the FTC. It drew an indignant reply letter from Bureau of Competition Director Simons, who harrumphed that Jenkins was displaying his "indifference to consumer welfare."

But free markets are the best maximizers of consumer welfare, and they don't stop working just because the owners of two competitors want to merge their operations. We no more need a federal agency to oversee competition than we need one to make sure that gravity keeps working. □

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Green for Profit

by Scott McPherson

Have you ever heard the expression "one man's trash is another man's treasure"? What about one man's trash being another man's golf course? That notion is actually becoming a reality, and it proves once again the value of private initiative and the wisdom of entrepreneurialism over government control.

In the sunny suburban landscape of Sandy Springs, Georgia, a private developer has turned a former dump into a recreational area, providing local residents with an 18-hole, executive-length golf course. As the *Washington Times* saw it, "The stinky Morgan Falls landfill was a constant source of complaints from people who lived nearby and from environmental regulators concerned about pollution in the nearby Chattahoochee River. Now, golfers are admiring the ridges and valleys next to the river." (Ty Tagami, "Converted Landfill Par for the Course," December 31, 2002. Subsequent quotes are also from this source.)

Seeing a potential opportunity, Kay Broaddus, a Coca-Cola marketing executive who is now president of Eagle Golf Ventures, had researched demand for sports facilities in the area and concluded that many residents wanted access to a green. The trouble was that increased residential development had taken up all the choicest spots. Rather than abandon an obvious money-making scheme, however, Ms. Broaddus set her sights on a piece of ground that was already occupied, but not exactly being put to its most gainful use.

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What Broaddus was eyeing was the Morgan Falls landfill, full since 1988, and, to the concern of state officials, a major cause of erosion and runoff because of poor county maintenance. Worse, this eyesore was costing Fulton County taxpayers $250,000 a year to maintain. By comparison, Eagle Golf Ventures could develop the landfill, remove a blot on the scenery, relieve the county of a needless expense, provide local citizens with golfing facilities, and turn an otherwise useless piece of real estate into a profitable enterprise.

Fortunately, the proposition was approved, and Eagle Golf Ventures spent $5 million to construct Blue Heron Golf Club, after the county spent $1 million on a methane-extraction system to ready the landfill for development. Ideally, that cost too would have been borne by Eagle, but that imperfection in the formula is arguably outweighed by one particular benefit: an end to maintenance costs alone will see the county reimbursed in just four years.

Philosophically speaking, the only thing that really soils the deal is that Eagle does not get deed to the property—it is paying rent to the county to the tune of $40,000 a year and, eventually, a percentage of its greens fees, as well. This regime should clearly be replaced by one passing full own-

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