

Senate Judiciary Antitrust Subcommittee Hearing: “Does America Have a Monopoly Problem? Examining Concentration and Competition in the U.S. Economy”

**Questions for the Record
Submitted March 12, 2019**

QUESTIONS FROM SENATOR GRASSLEY

RESPONSES OF JOSHUA D. WRIGHT

1. Could you explain your position on agency retrospective evaluations of mergers? If you are supportive, would you recommend that agencies conduct retrospectives of all their decisions, or just transactions pertaining to specific industries?

A fundamental question facing enforcers is whether current merger policy is systematically too lax or too stringent. It is important to distinguish that question from simply asking whether an agency got a particular merger enforcement decision right or wrong. It is certainly true that compiling more information about the competitive effects of specific mergers is a good thing, and merger retrospectives should be encouraged because they help us to improve our understanding of individual agency decisions. An important, but often overlooked, aspect of merger retrospectives is that merger retrospectives focused only on ex-post outcomes are surprisingly poor guides for analyzing merger policy.¹ In short, whether the government made an error in an individual case—whether condemning a procompetitive merger or failing to challenge an anticompetitive one—does not identify a policy bias. Perfectly calibrated merger policy will inevitably result in some Type I and Type II errors given imperfect information in predicting competitive effects. The fundamental question we seek to answer with merger retrospectives should not simply be whether an agency got it right or wrong—it should be whether an agency’s merger policy is *systematically* biased.

The good news is that merger retrospectives can be modified to address this fundamental question. One way to make merger retrospectives more useful is to refine our approach to the design of the studies. There are two types of data that must be collected. The first is data on the relevant market pre- and post-merger—the focus of most existing studies. The second is data on the specific predictions of the agencies about the market post-merger. The goal should be to compare the estimated effects pre-merger and details of the agency’s assessment with actual outcomes. For example, “[f]or each merger that the agencies review closely . . . they should record which analytical tools they employed and what predictions they reached with each tool. Then, for those mergers that are consummated, the antitrust agencies should undertake retrospective reviews of actual marketplace outcomes in comparison with those predictions.”² Moreover, retrospective studies could be used to test not only the analytical tools used, but the

¹ See Dennis Carlton, *Why We Need to Measure the Effect of Merger Policy and How to Do It*, 5 COMPETITION POLICY INT’L J. 77 (2009).

² Dennis Carlton, *Revising the Horizontal Merger Guidelines*, 6 J. COMP. LAW & ECON. 619, 651 (2010).

entire merger assessment process—including qualitative information about the judgments made by enforcers throughout their assessment.³

I do not believe merger retrospectives ought to focus on any one particular industry. Whether merger enforcement is too lax or too stringent is a question of overall merger policy, and an effective answer requires systematic review across industries and over time. Ideally the agencies would have the capacity and resources to review all merger decisions, including those instances where they decided not to open an investigation. Of course, the reality is that limited resources must be put to their most effective use. A modest first step is redesigning the framework of retrospective studies. Rigorous evaluation of *policy* effectiveness is in some ways a heavier lift than ex-post evaluation of specific outcomes, but it is worth the investment in my view. Ensuring merger policy is properly targeted on only those mergers that are likely to generate anticompetitive outcomes promotes competition and improves consumer welfare.

2. I'm interested in hearing your views on increased transparency with respect to Justice Department and Federal Trade Commission closing statements and other guidance. Are the Justice Department and the Federal Trade Commission currently required to do closing statements? For which transactions? How burdensome would it be to require this for all transactions?

There is no general requirement that the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission provide closing statements. I believe that more closing statements would be a good thing for all stakeholders and that the benefits outweigh the costs, so long as the value of closing statements is appropriately understood and not abused.

Closing statements increase transparency about how the antitrust agencies approach their analyses and the rationale underlying specific decisions. Opening the agencies' analytical framework to outside scrutiny can offer myriad benefits. They can be valuable to practitioners, can provide guidance for businesses, and can increase the reputational capital the agency has available to promote its missions.⁴ The scope of the value provided by increased transparency is a function of the quality of the information made available. Useful closing statements should address directly the evidence, or lack thereof, and factual findings in the relevant case.⁵ The closing statements in Zillow/Trulia⁶ and Office Depot/OfficeMax⁷ are good examples.

³ See Gregory J. Werden, *Inconvenient Truths of Merger Retrospective Studies*, J. ANTITRUST ENFORCEMENT 287, (2015) (explaining that while Professor Carlton proposed to expand merger retrospectives to test analytic tools, they could be used to test the entire merger assessment process).

⁴ See William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237 (2015).

⁵ Similarly, I have previously called for amending FTC Rule of Practice 2.34 to mandate that the Bureau of Economics publish, in matters involving consent decrees, and as part of the already required "explanation of the provisions of the order and the relief to be obtained," a separate explanation of the economic analysis of the Commission's action. See Statement of Commissioner Joshua D. Wright on The FTC's Bureau of Economics, Independence, and Agency Performance (August 6, 2015), https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

⁶ Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeney Concerning Zillow, Inc./Trulia, Inc., FTC File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

⁷ Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131-0104 (Nov. 1, 2013),

Requiring closing statements for all transactions would certainly involve some significant increase in burden in terms of resources. The burden of an individual closing statement is not likely very significant. At the time of closing the agency staff have already conducted the investigation and often have written down the rationale for its recommendation to close in the form of memorandum to individual Commissioners. A closing statement also need not provide confidential information or a lengthy analysis to communicate the basic rationale for the agency decision to the public. The benefit of closing statements in all cases may not exceed the costs of such a requirement if applied to all investigations. But a less burdensome solution would be to identify a subset of investigations—for example, merger investigations involving a Second Request or conduct investigations lasting longer than one year.

3. As Chairman of the Finance Committee, I'm particularly interested in making sure that companies in the drug and health care industries are playing by the rules. Everyone is concerned about the high cost of health care, especially the skyrocketing price of prescription drugs. Not only am I concerned about increased concentration, I'm concerned about certain practices in the health care and pharmaceutical industries that could be anti-competitive. Do you share these concerns? How can our antitrust regulators improve enforcement in this area? What about Congress?

The rising cost of health care is an important, complex issue that affects all Americans. Because health care costs are so significant, policing anticompetitive conduct in the health care sector using the best-available economic tools is critical. The agencies should be commended for their recent and ongoing work in this space. Mergers have been condemned when the evidence has shown that health care prices would increase for consumers. After sufficient economic evidence was developed, reverse payment settlements in patent infringement cases were stripped of immunity from antitrust attack. Keeping health care markets competitive—from reviewing hospital mergers to scrutinizing prescription drug prices—should remain a top priority moving forward. However, as is the case with any enforcement in any sector, antitrust rules and enforcement practices must strike an appropriate balance to encourage price competition without chilling innovation in this industry. Some issues are appropriately beyond the reach of competition laws.

4. Do you believe that the agriculture industry presents unique competition concerns? How can the Justice Department and the Federal Trade Commission improve how they have been looking at this sector?

This question has been the subject of important recent work, including a joint series of public workshops held by the Antitrust Division of the U.S. Department of Justice and the U.S. Department of Agriculture in 2010. The workshops culminated in a 2012 report.⁸ Standard antitrust principles apply in all industries, including agriculture. The consumer welfare standard applies flexibly across industries to protect consumers, tethering antitrust analysis and law to economic insights and evidence. The antitrust agencies have the tools necessary to keep the

https://www.ftc.gov/system/files/documents/public_statements/statement-commission/131101officedepotofficemaxstatement.pdf.

⁸ Dep't of Justice, *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward* (May 2012).

agriculture industry competitive, and vigorous enforcement of the laws will ensure that they do. Where the evidence suggests that a merger or certain conduct in the agricultural sector will result in higher prices, lower quality, or fewer choices to farmers, or otherwise harms consumers, it should be condemned.