John Kwoka's responses

Senator Grassley's Questions for the Record, Senate Judiciary Antitrust Subcommittee Hearing "Does America Have a Monopoly Problem? Examining Concentration and Competition in the U.S. Economy," March 5, 2019

Questions for John Kwoka

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?**

I think it is imperative that the agencies have programs in place and the necessary resources to conduct regular retrospectives on matters that come before them, and on their decisions and actions that they take. The agencies' past record is a great but largely untapped source of information and guidance as to how to improve their own performance.

I think that conducting retrospectives on all matters would be both burdensome and at some point not especially productive, since many of these are routine and have obvious conclusions. I would recommend they conduct some modest number of retrospectives each year—a number such as 5 or 6, consistent with their resources. I think these should focus on matters and issues that are "close calls," so as to provide insights as to how to improve their decision making at the enforcement margin. To be sure their choice of matters is informative in this regard, I believe the agency choices should be subject to oversight by an informed outside entity and the final reports subject to expert review.

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?**

On occasion, for matters of great public interest, the agencies issue closing statements--but they are not currently required to do so. As a result there is a distinct lack of information on matters that they decide not to pursue. While closing statements on more–or even all–matters would obviously be informative to the public and the business community, I do not currently favor such a requirement.

The reason for my view is simply that whatever the agency might announce as a reason for not taking action in one case is likely to be used by parties seeking other mergers. This has already occurred in some instances, notably, the succession of office supply mergers. Disclosure creates an added burden on the agencies in evaluating mergers since they would increasingly have to explain—potentially in court—how each case differs from previous ones that might have been decided differently.

For this reason, therefore, on balance I do not favor mandatory closing statements.

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 drug and health care sectors have been rapidly consolidating as well as engaging in a number of competitively problematic practices. I would urge a stronger stance against consolidation in these sectors. This would mean horizontal mergers between pharmaceutical companies and mergers among hospitals. It would also mean vertical mergers such as those between hospitals and physician groups. Studies have failed to find greater innovation, significant cost savings, or other benefits from these mergers. There is, on the other hand, good evidence of their likely competitive harm. All of this is therefore at odds with the numerous mergers that have been allowed to occur, suggesting that current approaches for evaluating both horizontal and vertical mergers need reconsideration.

Beyond mergers, this sector is replete with practices that impede competition and competitors. The long battle over pay-for-delay is indicative of the difficulty of prevailing even in the most obvious of examples of anticompetitive conduct. That practice is now followed by product hopping and pure monopoly pricing of some drugs. Legislative actions to prohibit certain practices, to facilitate approval and marketing of generic drugs, and even to modify the nature of patent protection are likely necessary to ensure that pricing and marketing practices do not allow pharmaceutical companies to exploit their positions.

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?**

All parts of the agricultural sector have been undergoing rapid consolidation, much of it under the radar. Everything from the ag biotech and fertilizer industries, to the food processing and retail grocery businesses have bee transformed by merger waves. These have created tight supply chains increasingly controlled by a few dominant firms. Many of these mergers have harmed farmers, independent businesses, and consumers in terms of prices, choices, and innovation.

The agencies have permitted some of these mergers outright and sought to devise complicated remedies in order to allow others to go forward. I think policy toward this sector needs to examine what aspect of merger review has failed to detect and prevent anticompetitive outcomes. Is it market definition? Over-estimate of efficiencies? Failure to anticipate strategies harming competitors? Remedies that do not work?

In order to do that, I would urge an initiative at the FTC similar to that which the agency undertook nearly 20 years ago to identify the source of enforcement failures in the hospital sector. That program resulted in renewed and successful enforcement against hospital mergers, and stands as a model of which should be done for the ag sector.

I suspect that one likely weakness of policy is over-reliance on remedies as a supposed solution to competitively problematic mergers. Empirical evidence underscores the concern that remedies often fail, especially behavioral remedies that continue to be used in efforts to allow vertical mergers to go forward. Remedy policy--and others--toward this sector is in urgent need of review and reform.

Responses by John Kwoka

Senate Judiciary Committee
Questions for the Record
March 12, 2019
Senator Amy Klobuchar

Question for Professor John Kwoka, Northeastern University

There has been significant criticism of antitrust law's focus on economic welfare. Some argue that the focus on economics is responsible for the under-enforcement of our antitrust laws.

- **Do you agree? Can you provide an economics-based argument that the United States has a monopoly problem and that we need greater antitrust enforcement?**

The economic evidence leaves no real doubt that concentration has been rising and competition declining in our economy, and that under-enforcement of our antitrust laws has been a substantial cause of those problems. Study after study shows increasing concentration over the past 20 to 30 years. No study of which I am aware reports that concentration has decreased. There is also much evidence that barriers to entry by new firms and growth of existing firms have increased in recent years, resulting in more protected market positions for leading firms. All of these forces have led to higher prices, reduced opportunities to enter and compete, and rising profit rates for the largest existing firms. The totality of this evidence leaves no doubt that there is a monopoly problem in this country.

Some have argued that this is the result of a focus on "economic welfare" as the purpose of antitrust. I do not agree. Rather, I believe that is the result of how that standard has been interpreted and enforced. "Consumer welfare" has become focused on the effect on price in a narrowly defined "antitrust market," but mergers can have adverse effects on entry barriers, potential competition, innovation, and quality as well as price. These other concerns have not been as aggressively pursued because they are less amenable to now-standard methods and metrics of antitrust economics. I would note that the current emphasis on "evidence-based" antitrust risks further distorting enforcement toward a limited set of quantifiable concerns.

While I believe that analyses of market definition, product substitution, and price effects are useful in informing sound antitrust practice, they are not the full extent of possible competitive harm. For that reason, I have advocated a renewed attention to the broader interpretation of "harm to competition," using a full array of analytical techniques to protect all aspects of "consumer welfare." This policy would reverse what my study has shown, namely, that antitrust enforcement over the past 20 years has retreated to an ever-narrower range of mergers.

I recognize a second set of concerns with rising concentration, concerns that are illustrated by the tech sector. As the major tech companies have grown, there is legitimate concern with their broader influence on a variety of economic and social objectives. To the extent these concerns are with consumer choice, worker wages, small firm opportunities, and innovation, I believe that these objectives

can be adequately addressed by better use of standard economics and a broader interpretation of the "consumer welfare" standard.

I strongly believe that a vigorous antitrust posture toward these concerns over the past 20 years would have resulted in a quite different tech sector, one which would have fully contributed to economic progress but without the undue economic and other influences that now prompt concern. After all, the five major tech companies have been allowed to acquire a total of nearly 700 companies, among them some that might well have evolved into credible alternatives. In addition, they have increasingly used their dominant position to disadvantage smaller rivals, potential entrants, and others that need access to their platforms–largely without challenge from our antitrust agencies. None of this need to have happened, but by letting it happen, we have permitted great economic power to arise and created a difficult set of questions for controlling that power after the fact.

- **Some argue that there is insufficient data on rising market power to justify antitrust reforms. How would you respond?**

Some will always argue that we do not know enough to act, and of course there is always more to be learned. But in fact, with respect to market power, we know more than enough. Existing data and studies are quite clear, fully consistent with each other, and in totality leave no doubt about rising market power.

In addition, some calls for more studies are a bit disingenuous since the study they want is simply not feasible. Measuring concentration at the level of the "antitrust market," for example, may sound sensible but this would involve thousands–perhaps tens or hundreds of thousands–of markets. Antitrust product markets involve very narrowly items between which consumers do not switch very much, a good deal more specific that what are commonly thought of as a product or market. Not only that, for most retail goods and services, each of these antitrust product distinctions would be further multiplied by a geographical dimension--the number of cities, towns, or even neighborhoods within which consumers buy and choose.

As a result, there are an uncountable number of antitrust markets in our economy. No data exists for even a minuscule fraction of them. The only entity that might be able to compile any useful fraction of such data would be the antitrust agencies, and they have shown no interest in undertaking such an exercise.

Criticism that the "right" study does not exist is therefore, in my view, a distraction. That criticism simply postpones what needs to be done–indeed, what has needed to be done for a long time.

Responses of John Kwoka
Neal F. Finnegan Distinguished Professor of
Economics Northeastern University

Questions for the Record
Submitted March 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. **This Subcommittee is constantly asking fundamental questions about antitrust law such as: Are the right cases being brought? Are the challenges to mergers preventing bad outcomes? Are consumers seeing lower prices, better quality, more variety, and more innovation?**

   However, as you have argued previously,[1] we don't really have the data to answer many of these seemingly basic questions. Specifically, you have said that antitrust research lacks a lot of the empirical data necessary to make proper evaluations—particularly when it comes to mergers and monopoly practices. When we go back and look at the mergers that have been approved, we're somehow not capturing the changes to innovation, costs, and even price, really, in effective ways.

   a. **Why are the publicly available data on monopolies and mergers so weak?**

At present the agencies have only limited data reporting requirements. The principle regular report covers the two agencies' annual HSR-related activities, specifically, the number of mergers filed and the number of investigations conducted, with some breakdowns by sector and size. Neither this report nor any other annual compilation offers insight into the characteristics of the cases, the reasons for choice of cases warranting investigation, or the basis for deciding which deserve challenge. With respect to monopolization matters, data are even sparser, with only some workload statistics offering any insight into agency reviews or actions.

The value of greater disclosure is demonstrated by the few informative reports that have been issued by the agencies on occasion. On a few occasions, for example, the FTC has compiled and published data and information on their merger investigations.[1] In addition, that agency has twice issued reports on its merger remedies.[2] Despite limitations of these reports, they have added to public understanding of the agency's decision processes and its view of its effectiveness.

This lack of public data severely handicaps outside observers and researchers like myself interested in analyzing agency decisions and actions. We have had to resort to other data, inevitably leading to criticism about coverage, accuracy, etc.

Moreover, for the public, Congress, and in fact the agencies themselves to better understand

[1] FTC Horizontal Merger Investigations Data, 1996-2011.

[2] FTC, A Study of the Commission's Divestiture Process, 1999. FTC Merger Remedies 2006-2012.

whether they are succeeding in their mission, I believe they should regularly undertake a certain number of rigorous retrospective evaluations of their cases, decisions and actions. There are few better sources of insight than analyzing the effectiveness of past practice, yet neither the FTC nor the Antitrust Division of the Justice Department do this regularly. They should do so.

b. What resources and assistance can Congress provide to help improve the data necessary for a more rigorous analysis of mergers?

I would suggest requiring that the agencies regularly report to Congress and the public on the characteristics of the mergers that they challenge and those that they investigate but do not challenge. In addition, I believe that both agencies should be required to do retrospective studies of some number of the mergers and practices that they investigate each year, so as to become better informed about their own decisions and actions, and thereby engage in a process of "continuous improvement."

These initiatives would not be costless, at least in the short run. I would urge that any such requirements be accompanied by the additional resources necessary to ensure that these undertakings do not displace current investigations, negotiations, or litigation. Over time, however, I would expect the insights from these retrospectives would actually make enforcement more effective and more efficient, potentially conserving on resources as better decision-making and enforcement strategies are identified in these studies.

c. **Should the antitrust agencies be required to be more transparent with the data they receive when they engage in formal proceedings?**

While more disclosure would certainly be helpful for a better understanding the issues, I think that mandatory disclosure of data and other information would likely go too far. Most obviously, some data and information would be confidential and could not be disclosed, but that in turn would probably lead to undue attention to whatever is made public. Beyond that, disclosure might encumber the internal evaluation process and even affect the decision-makers at each agency in coming to reasoned decisions. As a result, I would not favor disclosure during the evaluation process.

2. You have written and commented extensively on the 2010 merger between Live Nation, the world's largest concert promoter, and Ticketmaster, the world's leading ticket provider. The consent decree for that merger—set to expire in 2020—was designed to increase competition and prohibit the new, post-merger Live Nation from leveraging its market power in live entertainment to obtain primary ticketing contracts. However, since the merger, Live Nation Entertainment has solidified its dominant position in ticketing; some estimates suggest it controls 80 percent of primary ticketing. Today, the combined company's footprint covers concert promotion, primary ticketing services, secondary ticketing services, artist management, and venue ownership.

a. As the consent decree comes close to expiration, how do you believe the Department of Justice should approach reviewing this matter?

I believe the Ticketmaster-Live Nation matter was wrongly decided since I did not believe that

the competitive problems it posed were fixable. History bears that out, so that we are now left with a consummated merger that has resulted in competitive harm and is likely to continue to do so for the foreseeable future.

The question of what to do at this juncture has no easy answer, but I would urge a two prong strategy. First, given that the anticompetitive incentives are inherent in the merged firm, I believe it may be worth taking a hard look at the possibility of undoing parts of the merger. Restructuring should presumably involve divestiture of Ticketmaster's basic ticket servicing operations from Live Nation's presence in other stages of the live concert production process. It would be important to resuscitate Live Nation's nascent ticketing service, presumably focused (as it was) on its own venues but capable of servicing independent venues as well.

I understand there may be legal and practical difficulties in any such attempt, but it is problematic whether or when competition in this sector will emerge in any other way. In addition, any such effort would put other companies on notice that seeming to prevail by securing a weak remedy would not ultimately constitute a victory.

If no action is taken to undo the merger, then the second prong–as I shall discuss next--would be a much strengthened consent decree.

b. Should the consent decree be extended? In what ways could the consent decree be modified to account for Live Nation's current position in the overall market?

In the absence of an effort to undo the merger, I think a much strengthened consent decree should be considered as an alternative. The areas to be explored as part of an extended decree include possibly requiring mandatory licensing of Ticketmaster's core ticketing technology on terms that might induce new entrants, requiring shorter ticket service contracts with venues or limits on Ticketmaster's opportunities for contract renewal, greater use of monitors with investigative powers for claims of discrimination and retaliation, and much higher penalties for any violations of the terms of any enhanced decree.

Alternative that, in my view, should not be adopted would be to simply let the decree expire without any action or extend the period of the current decree. Those would effectively represent acquiescence in the anticompetitive outcome and an enduring defeat of the antitrust process.

---

[1] *E.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

3. **A recent study confirmed what most of us know, that corporate concentration has a direct relationship to market power in labor markets.[2] Another study by the same authors, using data from Careerbuilder.com, found that the most concentrated labor markets saw a 15-25% decline in posted wages over those in less concentrated ones. The Federal Trade Commission has said that labor effects are already in the agency's merger guidelines, and last year Chairman Simons testified that he had instructed the Commission's staff to look at labor markets in every merger they review. What evidence have you found that increasing corporate concentration is also squeezing labor markets—and harming workers?**

These important studies have started to document the existence and magnitude of the wage effects from concentration–something that the agencies have in the past not paid a great deal of attention to. My work has focused on compiling and synthesizing all existing studies of the various effects of mergers. I am following this literature on wage effects, but to date it is too sparse to allow for statistically significant generalizations–which of course does not imply that these effects are any less real or deserving of policy attention now.

[2] José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* (Nat'l Bureau of Econ. Research Working Paper No. 24,147, Dec. 2017), https://www.nber.org/papers/w24147.