United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Does America Have a Monopoly Problem?: Examining Concentration and Competition in the U.S. Economy"

Questions from Senator Grassley

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Submitted on March 18, 2019

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?

Past mergers should be studied by both the antitrust enforcement agencies and outside scholars. Such studies could both enhance our understanding of industrial organization in general and enable the agencies to improve their merger enforcement decisions. Application of the antitrust laws to mergers is almost always based on predictions about effects of the merger on innovation and competition and about merger-specific efficiencies. Because the decisions are based on predictions, they are necessarily made with considerable uncertainty. Retrospective examination of consummated mergers would enable to agencies to test their predictions against the actual post-merger facts and thereby to improve their predictions, and thus their merger enforcement decisions, in the future.

I do not think the agencies should study all consummated mergers or even all consummated mergers that the agencies previously reviewed. An investigation of that breadth would be very burdensome and costly. Instead, the agencies should select those mergers that are most likely to shed light on matters about which the agencies are most uncertain or that are most important because of the significance of the issue or the frequency with which it arises in merger reviews.

I doubt that focusing on specific industries would be the best way to identify those mergers. I think the agencies would find it more fruitful to focus on the types of issues raised by the merger that are high priorities for investigation. Such issues might include (i) realization by the merging parties of synergies or other efficiencies not based on scale, (ii) the effect of market structure and other industry attributes on innovation, (iii) price effects of mergers in oligopoly markets or in markets in which imports constitute a substantial part of the supply, (iv) reliability of informal commitments made by the merging parties before the merger is consummated, and (v) whether and how parties to a vertical merger change their way of dealing with competitors after the merger is consummated.

Retrospective reviews might also shed light on the efficacy of certain types of merger remedies. Divestitures of assets that were not operated as separate businesses before the merger and conduct remedies in vertical mergers might be good candidates for such reviews.

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?

The agencies are required to issue what are, in effect, closing statements in cases that they reach a settlement agreement with the parties whose conduct is the subject of the investigation. The agencies' analyses of the antitrust issues are also made public in litigated cases. The agencies are not required to issue closing statements in cases that they close without bringing an enforcement action, but they issue such statements on occasion.

Closing statements can be a valuable source of guidance to businesses and their lawyers about the standards the agencies will use to evaluate future transactions. They can also enhance the legitimacy of the agency by demonstrating that the decisions are made on the basis of legal principles and after appropriate assessment of the facts, and they can educate the legal community and the courts about analysis of new or difficult competition issues.

To serve these purposes, closing statements need to include a fair amount of detail. Most important, they should make clear at a reasonably granular level the legal principles on which the decisions are based. It is the legal and economic principles that are the most important source of guidance for businesses. (The FTC's 2013 closing statement in the Google (Search) matter was not sufficiently detailed and thus neither made clear the basis for the decision nor dispelled the suspicion that the FTC was mistaken.)

Closing statements should be issued more frequently than in the past, but they should be issued selectively. They should not be issued for all transactions. Because useful closing statements are rather detailed, it would be very burdensome to prepare and issue such statements for all transactions. Most matters that the agencies investigate do not present close questions on the facts or raise interesting or novel legal issues. For some matters, a useful closing statement would require disclosure of nonpublic information that the agencies are either required by law to keep confidential or should keep confidential as a matter of sound competition policy. The agencies should therefore issue closing statements only where the statement will educate the public and the business community about an important legal or economic principle not previously widely understood or where a closing statement is necessary to address matters of public controversy.

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?

I share the concern about the costs of health care in the United States. It is a serious problem both for the economy as a whole and, especially, for people of modest means who cannot afford or can barely afford adequate health care.

The health care industry is very complex and is subject to several different kinds of regulation. Although antitrust enforcement is only one part of a complicated mosaic, improved antitrust enforcement can play an important role in reducing the cost of health care.

I believe there are 3 areas in which antitrust enforcement can be improved. The changes will require both commitment by the enforcement agencies and a willingness of the courts to accept new and sound learning about anticompetitive practices in the health care industry.

Merger enforcement in the health care industry has been too lax. Data appear to demonstrate that too many hospital mergers have led to higher prices and other manifestations of increased market power and that in too many mergers predicted efficiencies were not realized. Enforcement agencies and courts should be more vigilant about market power effects of hospital mergers and more skeptical about promised efficiencies. They should be similarly vigilant and skeptical with respect to mergers among pharmacies and other providers.

Practices by large hospitals, insurers and other providers need to be scrutinized. For example, MFN and noncompetition agreements are increasingly common. While such agreements can in some circumstances promote efficiencies, they are often used to exclude new or low cost competitors or to reduce competition for labor and other needed inputs.

Anticompetitive practices by pharmaceutical manufacturers regarding patents on branded drugs are widespread. These include so-called reverse payments and product hopping. Agencies need to be vigilant in reviewing these practices, and courts need to be more understanding of and receptive to antitrust theories challenging them. The courts are too willing to defer to patent holders, even where they are taking steps to create more market power than that to which they are entitled by the patent laws.

Existing antitrust tools are in principle sufficient to address these needs. The biggest obstacle seems to be courts that both have not updated their understanding of antitrust law and markets in light of new economic learning over the past 3 or 4 decades and construe the rights of patent holders too broadly.

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?

Antitrust concerns that arise in the agricultural sector are conceptually and in principle the same as those that arise in other industries. However, the factual context is unique to the agricultural sector, as it is in all sectors. There is no need for new antitrust laws or special rules for the agricultural sector.

There is one issue that arises more often in the agricultural sector than in most other sectors. It is the application of the antitrust laws to protect suppliers, like growers or livestock producers, rather than customers. It is sometimes said that that antitrust laws protect only consumers and not suppliers. That is not correct. Antitrust law is about economic welfare. It protects trading partners, whether buyers or sellers, from the unlawful creation or exercise of market power. The economic analysis of the impact of anticompetitive conduct on sellers is the mirror image of, and in substance the same as, the analysis of the impact of such conduct on buyers. The enforcement agencies should, by speeches, guidelines and enforcement actions, continue to educate courts and the business and legal communities about the application of antitrust laws to protect sellers as well as buyers.