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BLOG

AAI Report Claims that Antitrust Merger Enforcement Falls Short Under the Current Administration Amid Growing Political Interest in Antitrust Enforcement

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In a recent "report card" on the state of U.S. antitrust law, the American Antitrust Institute (AAI) gave the federal antitrust agencies a failing grade for, among other things, a "step-down" in the enforcement of Section 7 of the Clayton Act to prevent anticompetitive mergers and acquisitions. The nonprofit organization, which advocates for vigorous public and private enforcement of the antitrust laws, reported that the average number of requests for additional information and documentary materials (so-called Second Requests) and merger challenges have both declined by almost 20% between the prior and current presidential administrations. As a result, it said, "[m]erger enforcement is now effectively constrained to preventing only the most patently anticompetitive mergers and acquisitions." The AAI's report is consistent with increasing calls for more stringent enforcement of the antitrust laws that could find traction if there is a change in administration after the November 2020 election.

Background

Section 7 of the Clayton Act makes unlawful mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."[1] Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act), transactions of a certain size that are not subject to exemption must be reported to and approved by the Federal Trade Commission (FTC) and Department of Justice (DOJ) prior to closing. If the reviewing agency believes that a transaction raises competitive concerns, the agency can issue a Second Request, which extends the statutory waiting period and gives the agency additional time to investigate the deal. At the conclusion of the waiting period prescribed by the HSR Act, the agency can approve the transaction, approve the transaction with an agreed-upon remedy to address the alleged competitive concerns, or sue to challenge the transaction. The agencies, along with the state attorneys general and private litigants, can also challenge consummated mergers.

Fewer Second Requests and Merger Challenges

According to the AAI, U.S. antitrust enforcers have for decades "pulled their punches based on assumptions that most mergers and business practices are pro-competitive." The decline in enforcement, AAI argues, is even more pronounced since the start of President Trump's administration. The AAI found that the average annual number of Second Requests and merger challenges in HSR-reportable transactions fell by 18.7% and 18.1%, respectively,

between the administrations of President Obama and President Trump. The decline has been particularly pronounced, the AAI said, in DOJ Second Requests, which have fallen nearly 30% between administrations. Although the number of Second Requests issued by the FTC appears to have remained largely constant, the number of merger challenges by the FTC declined roughly 20% between administrations. These declines reverse a trend of increasing merger enforcement from the Clinton to Obama administrations, including increases in the average annual number of Second Requests and merger challenges of approximately 15% and 35%, respectively, between the Bush II and Obama administrations. According to the AAI, these numbers reflect "less agency effort to screen mergers that could raise competitive concerns" in a time when "[m]any markets feature tight oligopolies or dominant players with stronger incentives to exercise market power."

AAI's Criticism of Enforcement Under Trump Administration

The AAI also criticized the agencies for the enforcement actions they *have* taken in the last four years, which it said "bear no resemblance to the stronger enforcement of the previous administration" and "have had decidedly negative implications." For example, the AAI took issue with the DOJ's approval in 2019 of a "conduct-heavy" remedy in agreeing not to challenge the Sprint/T-Mobile merger despite the agency's stated policy favoring structural remedies.

And the AAI cited the DOJ's failed challenge to the AT&T/Time Warner merger as one "of a series of poor outcomes and troubling precedents" concerning vertical mergers. The effect of that decision, the report said, is that agencies have "largely ignore[d] vertical issues" in subsequent transactions, including transactions the AAI viewed as raising "concerns over input foreclosure," "lock[ing] out rivals," and "withhold[ing] critical information from rival" firms. Although the agencies recently released a draft update to their joint vertical merger guidelines, the AAI characterized that effort as falling "woefully short" and providing "at best, abbreviated guidance . . . that will likely create confusion and uncertainty."

The report further criticized the DOJ's novel use of arbitration to address market definition issues in the Novelis/Aleris merger. Because arbitration is a private process, the AAI explained, the use of arbitration in the "controversial area" of market definition "will remove important information from the case law" and thereby deprive the agencies and courts of an importance source of guidance in future cases.

What's Next?

The void created by "lax federal merger enforcement" might be filled, the AAI said, by more private merger challenges and actions by state antitrust enforcers. The report cited recent, successful post-consummation merger challenges by private litigants and suggested that such actions could play a larger role addressing deals that evaded federal scrutiny but ultimately "turned out to be anticompetitive." According to the AAI, state antitrust enforcers' activism in, for example, challenging the terms of the Sprint/T-Mobile settlement, may also signal a larger role for states in merger enforcement. The AAI nevertheless recognized that such private and state enforcement is limited and may not be able to pick up all "of the slack in federal under-enforcement." It is too early, it said, "to know whether these cases signal a trend" toward greater state participation in merger challenges.

The AAI's report comes amid growing concern from politicians—primarily Democratic Senators and presidential candidates—about perceived underenforcement of the antitrust laws. Senator Elizabeth Warren, for instance, made breaking up "Big Tech" a centerpiece of her presidential campaign. Senator Bernie Sanders bemoaned the "level of corporate concentration not seen since the Gilded Age" and promised to review all mergers approved during the current administration, expand the FTC's authority, and institute new merger review guidelines. And Senator Amy Klobuchar has introduced several antitrust bills in Congress, including the Consolidation Prevention and Competition Promotion Act of 2019, which would shift the burden to the merging companies to show that a proposed transaction will not harm competition. Indeed, according to the AAI, Senator Klobuchar's bill is one of almost 60 antitrust-related bills introduced in the current session of Congress.

The likely Democratic nominee, former Vice President Joe Biden, has to date been more circumspect on issues of antitrust law than his former Democratic opponents. As the campaign progresses, however, he may well adopt positions similar to those promoted by his former opponents. Accordingly, while merger enforcement remains down—through both Second Requests and merger challenges—many of the concerns outlined in the AAI report may find traction in a Democratic administration.

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[1] 15 U.S.C. § 18.
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