Akin

Senate Democrats Introduce “Better Deal” Antitrust Enforcement Legislation

Sep 15, 2017

Reading Time : **5 min**

By: Ed Pagano, Gorav Jindal, James Romney Tucker Jr., Maral Arslanian (Public Policy Specialist)

Indeed, yesterday, Sen. Amy Klobuchar (D-MN) introduced two bills that would strengthen antitrust enforcement as outlined in the antitrust section of *A Better Deal*.

Sen. Klobuchar’s first bill, The Consolidation Prevention and Competition Promotion Act, S. 1812, would dramatically change current antitrust law by proposing new legal standards for approval of larger corporate mergers—those greater than $5 billion in value or involving a party with assets greater than $10 billion.

Most dramatically, the legislation would replace the well-established standard against mergers that would “substantially lessen” competition with a lower “*materially* likely” standard, which it now extends to monopsony in addition to monopoly. (emphasis added) In the preamble, the legislation makes clear that consolidation itself is harmful because, among other things, it threatens democracy by concentrating political power and creates hurdles for fresh competition from small businesses. A conclusion that a transaction “*may* cause more than a *de minimis* amount of harm to competition” is sufficient to make it illegal. Among the factors to be considered are the transaction’s impact on market concentration, the value of the transaction ($5 billion, to be adjusted annually), the market capitalization, the value of assets held or the amount of sales made by any party ($100 billion, to be adjusted annually), regardless of horizontal competition between the merging parties.

These provisions codify intent to investigate vertical and conglomerate transactions, which the authors believe also create competitive harm. For transactions that satisfy these screens, the legislation would switch the burden of proof by requiring that both parties prove, by preponderance of evidence, that the acquisition will not be reasonably likely to lessen competition or tend to create a monopoly or monopsony. Indeed, the legislation signals a desire to return to the "quick-look," rebuttable presumption approach of *Philadelphia National Bank*, suggesting that market concentration rather than more recent economic tools (e.g., critical loss, upward pricing pressure and merger simulation) is a more salient predictor of adverse competitive effects. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) (finding that a "merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects").

The antitrust portion of *A Better Deal* makes clear that the sponsors believe that antitrust reform should include "tak[ing] corrective measures if the [regulators] find abusive monopolistic conditions where previously approved measures [that were implemented in the context of allowing a merger to go forward] fail to make good on their intended outcomes." To accomplish this goal, this bill proposes to establish a "new competition advocate," which would have broad authority to monitor a range of potential market distortions and formally recommend competition investigations to the Federal Trade Commission (FTC) and the Department of Justice (DOJ). In addition, the legislation would require postsettlement data to be submitted annually for five years after approval of a merger on the competitive impact of the acquisition, including information on pricing, availability and quality of any impacted product or service, as well as data on cost savings, consumer benefits and effectiveness of any merger conditions.

To date, the co-sponsors of the bill include Sen. Kirsten Gillibrand (D-NY), Sen. Richard Blumenthal (D-CT) and Sen. Ed Markey (D-MA). The legislation has been referred to the Senate Judiciary Committee.

Sen. Klobuchar's second bill, The Merger Enforcement Improvement Act, S. 1811, proposes four more modest changes to the current antitrust laws:

First, the bill would adjust the current three-tier merger filing fee structure—fees not adjusted since 2001—and increase the fees at the top end nearly tenfold. Specifically, the bill would adjust the filing fees as follows:

- transactions from $80.8 million to $161.5 million – fee would drop from $45,000 to $30,000

- transactions from $161.5 million to $807.5 million – fee would drop from $125,000 to $100,000
- transactions from $807.5 million to $1 billion – fee would drop from $280,000 to $250,000
- transactions from $1 billion to $2 billion – a new $400,000 fee would be created
- transactions from $2 billion to $5 billion – a new $800,000 fee would be created
- transactions above $5 billion – a new $2,250,000 fee would be created.

These fees, in turn, would adjust annually to changes in the gross national product, creating symmetry with the annual adjustment mechanism that occurs for the monetary thresholds listed above.

Second, the legislation would formally require acquiring parties that enter into settlements with the FTC or the Antitrust Division of the DOJ as a precondition to allowing the deal to proceed to supply significant information to the government each year for five years, including the pricing of goods covered by the settlement, cost-saving efficiencies that were passed through to consumers (versus those claimed to justify the merger) and evidence demonstrating the "effectiveness" of the merger settlement.

Third, borrowing from recent economic literature suggesting a link between common ownership of competitors and higher prices, the bill would direct the FTC to conduct a study, using any compulsory process necessary, to examine the competitive impacts of institutional investor ownership in competitors in moderately concentrated or concentrated markets, including assessing whether, and to what extent, mechanisms exist by which an institutional investor could affect competition. If the results of the study—which must be published within two years of enactment—find that there is undue influence, subsequent remedial action could profoundly impact the form and shape of institutional investor holdings.

Lastly, and despite the FTC's 2017 retrospective ordered by the Obama administration in which an examination of 50 merger settlements between 2006 and 2012 found that more than 80 percent maintained or restored competition, the measure would direct the Government Accountability office (GAO) to repeat and expand that effort to merger settlements that were approved in the six years prior to enactment. The GAO would also be directed to conduct a study of the impact that mergers have on wages, innovation and new business formation. Both of these studies are required to be completed within one year of the effective date of the statute.

To date, the co-sponsors of the bill include Sen. Patrick Leahy (D-VT), Sen. Al Franken (D-MN), Sen. Richard Blumenthal (D-CT), Sen. Corey Booker (D-NJ), Sen. Richard Durbin (D-IL), Sen. Mazie Hirono (D-HI), Sen. Ed Markey (D-MA), Sen. Kirsten Gillibrand (D-NY) and Sen. Tammy Baldwin (D-WI). The legislation has been referred to the Senate Judiciary Committee.

While it is unlikely that these measures will advance in this Congress, this policy statement and these proposals reveal a broad agenda to enlarge the scope of antitrust enforcement and are noteworthy as we contemplate the political landscape after the 2018 midterm elections. While this legislation clearly takes aim at the expected antitrust enforcement under the Trump administration, it also serves as an indictment of the antitrust record of the Obama administration—an administration that set records for merger litigation and the length of its investigations—as being too lax, particularly in merger enforcement and in the remedies that were accepted by the enforcement agencies in allowing mergers to go forward.

Categories

Mergers & Acquisitions

Policy & Regulation

Antitrust