

ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 52: A new year of fresh challenges: Antitrust highlights from Q1 2022 | April 21, 2022

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Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: Hello out there. This is Jay Levine, your host of the Antitrust Law Source podcast. It's been a while since we've spoken. And it's certainly been a while since I've done a solo podcast. But I've been collecting all of this material to do a very long and in depth article for our blog and series of podcasts, and then I realized that this material is getting way too voluminous. And there are things that are happening, you know, so rapidly that I think it pays to do periodic podcasts on what is going on, and to put everything into perspective. So I'm hoping to be able to do more regular podcasts on the things that are happening in the antitrust and consumer protection world, as well as some more in depth podcasts on particular issues.

But let's just pick up what a few highlights that have happened since the beginning of 2022. So in January, the FTC and DOJ announced a public inquiry to solicit opinions on ways to modernize the merger guidelines to better detect illegal deals in today's markets. That's the, that was their goal. Again, remember, there's a certain perspective that this administration has that past the antitrust enforcement has been far too lacks and has been using an analytical paradigm that it feels does not really apply to today's economic realities.

So they announced this public inquiry, and in March last month, they announced that there's going to be listening forums, and that will include consumers, workers, entrepreneurs, startups, farmers, investors and independent businesses. And that these constituencies will have the ability to tell the agencies whether in their view, the merger guidelines are appropriately protecting the economy, the agencies announced that there will be four forums. In March, there was a food and agricultural forum, and we're going to talk about that sort of separately. In this month, there's going to be a healthcare forum. Later this month, there will also be a media and entertainment forum. And in May, there's going to be a technology forum. And essentially, the announcement had stated that past deals have imperiled choice, and economic gains for consumers, workers, entrepreneurs and small businesses. And therefore, they are now sort of soliciting the comments of these groups to see where and how the merger guidelines that have governed the analytical framework for determining whether a deal is anti-competitive or not, where they may have missed the boat, if in fact, they have.

In March, the FTC and DOJ also announced a spring enforcers summit that happened last week with international enforcers and state attorneys general to facilitate discussion on modernizing merger guidelines and agency collaboration. And again, you're going to start to hear a theme about, we need to revamp the merger guidelines. And there's going to be three panels. The merger guidelines for modern economies. And you know, the Halcyon question asked there was

should a one size fit all across all industries or should there be different guidelines that address specific industry market dynamics? Another panel was going to talk about theories of harm in non-horizontal mergers. And that the question was must an agency describe the way in which the merged firm will exercise market power after the merger, or is it enough to establish that the firm will have the incentive and the ability to act and competitively? And again, that's not a small task because what we're saying basically is do you have to prove that they're going to do it? Or do you just have to prove that there's some incentive to do it and lighten the load in order to stop the merger.

And the third panel, would be talking about this whole of government competition policy, and how the various federal agencies can work together to curb anti-competitive mergers in conduct. So, again, that this harkens back to an executive order that President Biden had issued, talking about a sort whole of an administration approach towards competition. And again, I think we're gonna get into that and its manifestations in future articles and podcasts.

But sort of as a nice segue, the Department of Justice, and the Department of Labor also struck a partnership to, quote unquote, protect workers from employer collusion, and also to refer cases to each other potential illegal activity. So again, this is sort of just implementing this kind of whole government approach. I don't know that it actually changes things on the ground as much as it does really sort of signal a different level of concern for employees and whether employers are acting and a competitively or getting such market power that they can act and competitively towards employees.

Now, here's another, you know, sort of highlight that I think, is going to deserve its own podcast because I think it brings together so many different issues that are facing us in this day and age in antitrust, but it is a bill called the prohibiting anti-competitive mergers act of 2022. It was introduced by Senator Elizabeth Warren and Representative Mundare Jones, both of whom are Democrats. Part of the premise and the need for this legislation is that there is a 70% increase in filing in recent years, and that the enforcement of the antitrust laws in recent years have left us with an economy that is just beset by concentration by few companies having all the power and acting anti-competitively such that consumers are worse off, workers are worse off, and those in underprivileged communities are worse off.

Again, part of this legislation finds problems with the fact that the current state of affairs requires the Federal Trade Commission or the Department of Justice's antitrust division to run to federal court to get an injunction to stop a merger. They can't, on their own stop a merger. And they also use the current consumer welfare standard, as the guideline for determining whether a merger or conduct is anti-competitive. And again, as we've spoken about in the past, consumer welfare standard- the way it is employed by a lot of the critics of today's antitrust regime or antitrust, the state of today's antitrust law, is a consumer welfare standard means all we care about is whether consumers are paying more than they should, where they're not caring about any other sort of aspect, including workers. We don't care about a deal's effect on labor, we don't care about a deal's effect on minority communities or on nascent startups or on the like.

So, again, that's sort of the premise for why we need this bill.

Now, I'm just gonna give you a few highlights for what this bill does. And again, in a future podcast, we'll talk a little bit more about these provisions and sort of what they mean. And in some respects, how revolutionary this would be, should it actually be enacted into law? Now, I want to pause there for a moment, because whether or not it's actually gets enacted into law, in my opinion, is really irrelevant. It may or may not depending on who holds sway in Congress.

And, you know, you know, who wins the midterm elections and the like, and who has the power to get this enacted. But the mere fact that all of these legislations, all of these acts are being introduced into Congress, and that the polemic, if you will, or even just the discussion, is about a lot of these issues, the more and more that discussed, the more and more they are becoming somewhat mainstream, if you will. And the more and more you talk about something, the more and more it has a an ability to just morph into reality.

So whether or not any given piece of legislation actually gets enacted, the fact that these are all trying to deal with a certain view of the world as to the infirmities of today's antitrust law and enforcement, I think over time, collectively and cumulatively can have an effect.

And let's talk about sort of some of the provisions here. The first thing they want to do is overhaul the merger review process. So what this legislation, it wants the agencies to scrutinize the impact on labor of these deals. And with respect to whether or not it's harmful to workers. Now, again, never before has the effect on workers been an explicit variable or an explicit target of any merger or conduct analysis. We care about competition, not about sort of what it's doing to the worker, right or wrong, that's something else. But it hasn't. And this legislation would, in fact, make that law. Clearly now in the administration, and the Department of Justice and the Federal Trade Commission, they are including such inquiries more and more into their incorporating it into their analysis. But this would make it a lot to do.

A second thing is it will allow the agencies to reject deals and not have to run to court to stop them. Now, this is a huge, huge deal. This would essentially mean that a federal agency would have the power to basically say no to a deal, and that you would have to run into court - into appellate court to essentially overturn an agency decision on which they would have deference. So this, this would be huge. And again, we'll speak about this more at a later point. But this really can't be, you know, sort of undersold into how critical of a change would be because again, remember, whatever the state of the law is, is something else. But if the state of the law says, you know, we're not going to take into account a mergers impact on workers, and the agencies are nixing a deal, because of the impact on workers. Well, if the agency doesn't have the power to stop the merger in and of themselves, that merger is dead. And it can't really be revived in court. The legislation would also basically take out from the Supreme Court, any appellate review, so it could go to the Circuit Court of Appeals, but that's where it would stop, it would take away jurisdiction from the Supreme Court to hear any such case.

Another provision of this legislation would break up old mergers that would be considered prohibited. Oh, I, I actually skipped over what a prohibited merger would be. So let me discuss that. They would prohibit out of the box any merger, where the deal was valued over \$5 billion. So if it's 5 billion or more, you can't do it. Second, any deal, resulting in market share over 33% for sellers, or 25%, on the employment side, that would be prohibited, again, right out. And then any deal resulting in highly concentrated markets per the 1992 guidelines, which had a far lower threshold for determining what is a concentrated market. So those are some pretty big changes right there.

As I was starting to say, they also want a retrospective on all mergers happening in the 21st century. And they want to break up any of those mergers, if the market share was over 50%. Or it's a highly concentrated under the 2010 merger guidelines, which had a little bit stiffer, of a threshold for what is a concentrated merger, or if it would maintain harm to competition workers, consumers, or small or minority owned businesses. And again, this is in specifically in the legislation. We are now having a mergers effect on minority owned businesses, again, seems to

be a certainly a policy of the administration to look at these things, even in the world of competition. And this would be explicitly in the in the legislation.

So those are some of the critical highlights over the past few months. Certainly there have been others, but I think those are of some note. As I said, we will be speaking about some of these in more depth in future blog articles and podcasts. But I think I just want to give you a sense of how the administration is moving, where it's moving, where Congress is moving, and that these issues about whether our country is just so hopelessly concentrated, and concentrated in the power of the few and that we need to look at constituencies that we have never looked at before with regards to the implications of antitrust policy and law and enforcement, such as on workers, minority owned businesses, startups, small businesses. This sort of focus is hugely different from the past. And frankly, if it becomes sort of the standard, we'll change the way we as antitrust lawyers will have to counsel our clients.

I hope you've enjoyed this podcast. My name is Jay Levine. I am the editor of the Antitrust Law Source blog articles, the host of the antitrust law soars podcast. I can be reached at letter J L E V I N E at Porterwright.com, or on Twitter at J L E V I N E. I'm also on LinkedIn. Please let me know if there are any topics you want discussed or vetted on the antitrust law source. Thank you for listening and have a wonderful day. Take care.

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