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Can COVID-19 Get Congress to Finally Strengthen U.S. Antitrust Law?

A new bill from Elizabeth Warren and Alexandria Ocasio-Cortez strikes at the myths behind mergers.

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POLITICAL ANIMAL (https://washingtonmonthly.com/political-animal/)

If it wasn't clear that corporate consolidation was a problem before the COVID-19 pandemic, there should be absolutely no doubt now. Mergers have severely subverted the U.S. economy's resilience and undercut the national response to the coronavirus outbreak.

Mergers contributed to the loss of 600,000 hospital beds between 1975 and 2017 (from 1.5 million to around 900,000 beds nationwide) and likely deprived the government of an emergency stockpile of ventilators. And now, with millions of businesses on the ropes due to the crisis but with many of the very largest corporations flush with cash, another wave of mergers and acquisitions may be imminent. Facebook has purchased GIF-creating site Giphy. Amazon and Uber are reported to be near acquiring the movie theater chain AMC and food delivery service GrubHub, respectively.

To stem this tide, New York Congresswoman Alexandria Ocasio-Cortez and Massachusetts Senator Elizabeth Warren have proposed the Pandemic Anti-Monopoly Act, which would halt mergers and acquisitions by large corporations and private equity funds for the duration of the COVID-19 crisis and its aftermath. Other Congressional progressives, including Washington Congresswoman Pramila Jayapal and House Antitrust Subcommittee Chairman David Cicilline, have called on House leadership to include a merger moratorium in the next rescue package. The sponsors understand that the principal lifeline for distressed small and medium-sized businesses and workers should be federal aid, not acquisitions by large corporations and powerful financiers.

The merger moratorium represents a major rethinking of federal merger policy. Although Congress enacted a strong anti-merger law. in 1950, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have maintained a lax posture toward consolidation since the early 1980s. They have permitted nearly all mergers to proceed and blocked them under only extremely limited circumstances.

For instance, out of the 78 mergers proposed between 2015 and 2019 that involved two firms worth more than $10 billion each, the DOJ and the FTC successfully stopped only three of them. The result of permissive merger policy has been a dramatic increase in concentration across industries and markets. This tolerant attitude toward consolidation is built on a series of myths and has been deeply damaging to the public.

Myth 1: Mergers Eliminate Wasteful Redundancies and Produce More Efficient Businesses

Mergers are often justified on the grounds of eliminating redundancies and improving the productive efficiency of firms. In their 2010 Horizontal Merger Guidelines, the DOJ and the FTC said "a primary benefit of mergers to the economy is their potential to generate significant efficiencies." This story rests on false assumptions and little or no evidence.

In fact, by eliminating redundancy in the name of efficiency, mergers can leave the economic and social system unprepared for natural disasters, pandemics, and other systemic shocks.

The current crisis has shown how health care mergers have eliminated essential excess capacity. But the problem overall is not limited to this moment in time. Consolidation in the seed industry has left the United States and the world more vulnerable to the ongoing crisis of climate change. As Monsanto (now part of Bayer) rolled up the industry, it focused on selling the most profitable seeds and discontinuedmany less popular seed lines—food sources that may be essential as farmers try to adapt to climate change.

Equally disconcerting, corporations themselves do not become more productive following mergers. A reputable body of findings shows that mergers often result in a loss in productivity. As then-Judge Richard Posner said in a 2015 interview: "I wish someone would give me some examples of mergers that have improved efficiency. There must be some."

Myth 2: Current Merger Enforcement Protects Consumers

The DOJ and the FTC state that protecting consumers is the principal purpose of merger enforcement. Former FTC commissioner Joshua Wright asserted that mergers "often generate significant benefits for consumers—lower prices and higher quality" and that the two agencies successfully identify and address the small fraction that would hurt consumers.

A closer look at the record, however, does not warrant applause for the DOJ and the FTC's efforts against mergers. The best study on the effect of mergers on consumer prices is Professor John Kwoka's meta-analysis of post-merger evaluation studies. He evaluated the impact on prices from mergers that were not successfully challenged. Of the 42 mergers subject to credible post-merger evaluation, thirty-four resulted in price increases. His review also found that there were adverse quality effects from many of the mergers.

Kwoka's research is consistent with what other scholars have concluded. For instance, hospital consolidation has consistently led to higher prices and been a key driver of rising health care costs.

Myth 3: Merger Remedies Preserve Competition

Even on the rare occasion that the DOJ and FTC do "challenge" mergers through legal action, they generally settle the matter and do not stop the consolidation outright. To address the loss of head-to-head rivalry, as well as other antitrust concerns, the agencies often agree to resolve the lawsuit on the condition that the merging corporations sell a line of business or other business assets to a third party or observe rules of fair dealing. They confidently predict these remedies will "preserve competition."

In reality, these attempts to "remedy" illegal mergers have a poor track record. The FTC itself has recognized that its remedies too often fail, and Professor Kwoka has found they typically lead to significantly higher prices.

One of the most spectacular remedy failures involves the 2015 merger between the grocery chains Albertsons and Safeway. In exchange for not suing to block the merger, the FTC required the two corporations to sell stores in more than 100 local markets. These stores were sold to a small regional chain Haggen, which became nine times larger due to the acquisition. Haggen experienced major operational problems following this huge overnight expansion and soon went bankrupt. In the bankruptcy process, Safeway/Albertsons reacquired many of the stores it had sold to Haggen.

Myth 4: The Current Merger Review System Offers Transparency and Guidance to Businesses and the Public

DOJ antitrust chief Makan Delrahim and FTC commissioner Christine Wilson have stressed that they aspire for transparency and predictability in their decision-making.

But the current merger review system is a model of opacity and subjectivity. One leading antitrust attorney said “there are few government functions outside the CIA that are so secretive as the merger review process.”

The agencies rely on an “effects based”approach in which they attempt to predict how a proposed merger likely will affect consumers going forward. This open-ended, speculative exercise invites aggressive lobbying from corporations and encourages them to assemble an army of economists and lawyers to make the case for their mergers behind closed doors, as ProPublica reported in a 2016 story.

Despite being the nation’s top antitrust enforcer, Delrahim used this system of secrecy to help shepherd T-Mobile’s acquisition of Sprint through to completion in April. Behind the scenes, he effectively served as federal matchmaker for the two wireless carriers and Dish, which purchased some assets from the merging parties with the aim of becoming a telecom company.

The 2013 merger between American Airlines and US Airways painfully illustrates this system in action. The DOJ initially sued to stop this merger that would reduce the number of national airlines from five to four. After a flurry of lobbying activity by the two airlines and their political allies, the DOJ abruptly permitted the merger in exchange for the two airlines selling landing and takeoff rights at seven major airports.

This remedy, however, failed to address the colossal harms from losing national airline, as laid out in the original DOJ complaint. The merger, which the DOJ earlier said would result in “presumptively illegal” levels of concentration on more than a thousand routes, was allowed to go through and subsequently led to higher airfares and fees.

Myth 5: Corporations Need Mergers to Grow

Mergers—even the very largest—are often justified on the basis that they permit corporations to expand their operations and enter new markets. Antitrust enforcers and scholars assert that mergers are a critical way for businesses to grow.

Yet mergers are not the only, nor even the best, way for corporations to grow. Instead, they could hire more workers and invest in plant and equipment and new technologies. Unlike buying and swapping existing business assets, investing in new facilities expands the capital stock of the economy and creates new jobs. Allowing companies to grow through the easy game of buying existing firms actually spurs businesses to strategize toward consolidation and awayfrom investments in production capacity and the latest technology.

A good case in point came after the Obama administration forced AT&T to abandon its takeover of T-Mobile in 2011. Neither wireless carrier stagnated. As a matter of fact, both firms improved their service and invested in their networks, and an independent T-Mobile instigated vigorous competition among the four national carriers.

All of this is important because the federal antitrust agencies, relying on false assumptions, have for too long not enforced anti-merger law. Their tolerance of consolidation has produced an economy that is fragile and now struggling to respond effectively to the current crisis.

The merger moratorium proposed by the progressive powerhouse of Ocasio-Cortez and Warren, alongside other Congressional Democrats, is a chance to change the existing pro-merger policy regime and abandon the associated fictions. It is high time Congress restores a strong anti-consolidation norm in federal antitrust law. The Pandemic Anti-Monopoly Act is the perfect place to start.

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