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The Soft Power Of Congress To Challenge Mergers

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On July 13, a Rhode Island congressman published a letter he sent to the chairman of the House Judiciary Committee requesting that the committee hold a hearing on the recently announced Amazon/Whole Foods merger. When and why does Congress hold hearings on particular mergers and what power does Congress have to stop a merger?

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On paper, the separation of powers is self-evident. Congress has no institutional responsibility to enforce the antitrust laws. Its main role in this arena is to enact antitrust legislation. The U.S. Department of Justice and the Federal Trade Commission enforce that legislation and the federal judiciary adjudicates challenges to mergers brought under the antitrust laws.

Notwithstanding these conventional roles, Congress has carved out a space for itself in merger review. Unlike the DOJ and FTC, which under the Hart-Scott-Rodino Act are required to review mergers larger than a particular size before they close, Congress is not required to review mergers at all, nor is it constrained by the HSR threshold if it wishes to do so. Congress tends to hold hearings for mergers that are particularly large and that involve industries likely to be of interest to constituents and consumers generally. For example, Senate or House committees have held hearings on proposed tie-ups between AOL and Time Warner, U.S. Airways and American Airlines, AT&T and Time Warner; AT&T and T-Mobile, Comcast and Time Warner, Comcast and NBC Universal, Universal and EMI, and Dow Chemical and DuPont.

Congressional hearings carry additional risks for companies beyond those faced at the DOJ and FTC. While the agencies focus their merger review on the likely effect on competition in relevant geographic and product markets, and are steered by published horizontal and nonhorizontal guidelines as well as case law, Congress is free to explore any topic even if not directly related to competition.

For example, U.S. Rep. David Cicilline's letter calling for a hearing on the Amazon/Whole Foods merger acknowledges that leading antitrust scholars believe that the proposed vertical merger will not injure competition or consumers, but raises concerns about the merger's effect on employment and inequality. A July 20 letter regarding the merger from 12 additional representatives and senators focuses

on the proposed merger's effect on nutrition and the possibility that it could increase "food deserts" in low-income communities. It calls for scrutiny "beyond the normal antitrust review process that only examines the competitive impact."

Companies and executives that are called to testify before Congress should therefore be prepared to defend a proposed merger on grounds broader than its effect on competition. Congressional hearings add another round of questions and scrutiny for companies and executives that already may be preparing submissions and testimony for the DOJ, FTC, other federal agencies with industry-specific oversight such as the Federal Communications Commission, state attorneys general, and foreign antitrust authorities.

Of some comfort to companies may be that while Congress can ask whatever it wants, it does not have direct power to stop a merger. To the authors' knowledge, Congress has never passed a resolution or special bill disapproving of a particular merger, and any attempt to do so would raise novel separation-of-powers issues. Still, Congress has virtually unfettered power to engage in fact-finding that it considers relevant to possible future legislation, and under that rubric, Congress can use hearings to publicly voice concerns of their constituents and to extract concessions from companies.

As one example, after tough questions and criticisms from senators at a hearing, Comcast and NBC Universal agreed to conditions, lasting seven years, on content distribution and pricing. Similarly, after congressional hearings, the U.S. Airways/American Airlines merger was approved with required divestments of slots and gates at certain airports. There also have been instances where a congressional hearing preceded a lawsuit by the DOJ or FTC seeking to halt a merger. A May 2011 hearing into the proposed AT&T/T-Mobile merger was followed by a DOJ lawsuit in August of that year. Similarly, lawsuits to enjoin the Aetna/Humana and Anthem/Cigna mergers were preceded by a Senate hearing into consolidation in the health insurance industry. None of these three mergers ultimately was consummated. While it is not possible to know whether these conditions would have been imposed — or whether these lawsuits would have been filed — absent the congressional hearing, they demonstrate the "soft" power of Congress in challenging mergers.

Even if Congress does not have the ability to directly stop a merger, and even if Congress does not coordinate its hearings with the DOJ and FTC, testimony given at congressional hearings also can help the merger enforcers in litigation to enjoin a merger. Executives who testify at a congressional hearing can be sure that the agency enforcers are paying attention and following the testimony. Executives are testifying under oath and their testimony may be used against their companies in ensuing court proceedings challenging the merger. While counsel to merging companies can and should carefully vet prepared written testimony to ensure that it does not hurt the prospects of the proposed merger, they should take extra care to prepare executives for live questioning from representatives and senators. A congressional hearing is an additional occasion when executives are put on the record and sound bites can make their way into complaints seeking to enjoin a merger.

Company executives are not the only ones who testify at congressional hearings, which often feature testimony from industry experts and groups with an interest in the success or failure of the proposed merger. For example, a House of Representatives hearing into the 2010 proposed merger of Continental and United Airlines featured testimony from representatives of pilots' and flight attendants' unions and aviation consultants, in addition to an antitrust expert and the CEOs of the merging companies. The testimony from these individuals — over which companies have no control — also can be used to build a case against a merger.

It remains to be seen whether any congressional committee will schedule hearings on the Amazon/Whole Foods merger and whether any hearing will have an impact on the merger. Although the proposed merger is vertical and some commentators have suggested that it accordingly raises few competitive concerns, Congress has shown a willingness to hold hearings into vertical mergers, as in the AT&T/Time Warner and Comcast/NBC Universal mergers. Although Congress does not have the power to enforce the merger laws directly, the power to hold congressional hearings is unconstrained and adds to the scrutiny of a proposed merger. Companies cannot prevent hearings but their counsel can minimize any resulting harm by preparing their witnesses for questions on wide-ranging topics beyond the proposed merger's effect on competition.

While the conventional modern understanding of the merger laws is that they are and should be attuned exclusively to the economics of competition, there has always been a subcurrent in antitrust theory that would use those laws to pursue social objectives beyond competition. This approach was elaborated in 1979 by the soon-to-be FTC Commissioner Robert Pitofsky, who wrote that "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[1] For example, should scrutiny of a merger of tobacco companies be influenced at all by government policies that recognize the negative externalities associated with smoking?[2] The acceptance of an approach that would consider noneconomic factors has waxed and waned over the years. The 1936 Robinson-Patman Act, which deals with price discrimination and used questionable economics to support mom-and-pop groceries against the advent of chain stores, probably represents the high-water mark of the philosophy. But those who advocate the relevance of noneconomic considerations have not vanished. By creating a forum to publicize issues "beyond the normal antitrust review process that only examines the competitive impact" — in the words of the recent letter from 12 congresspersons — congressional hearings give voice, for better or for worse, to the view that antitrust law should be aware of other social and political goals.

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[1] Robert Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979). In Pitofsky's view, the noneconomic "values" to be considered in an appropriate merger case include "a fear that excessive concentration of economic power will breed antidemocratic political pressures, and ... a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all." Id.; see also Maurice E. Stucke, Morality and Antitrust, 2006 Colum. Bus. L. Rev. 443 (2006).

[2] See Daniel A. Crane, Harmful Output in the Antitrust Domain: Lessons From the Tobacco Industry, 39 Ga. L. Rev. 321 (2005).