JUSTICE NEWS

Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium

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Respecting the Antitrust Laws
and Reflecting Market Realities

Remarks as Prepared for Delivery

I. Introduction

Thank you for the introduction. I am not only honored but incredibly excited to join you all at Georgetown for the Annual Enforcement Symposium. Georgetown is a special place, and this is a special conference. The university was founded just 4 years after the Constitution was ratified, and the law school has existed for longer than the Sherman Act. This institution has been front and center for the history of American law, antitrust and otherwise. At a law school like this, you can feel in the air the obligation we share as lawyers to the law as an institution. Gathering luminaries like we have here today to talk about the antitrust laws continues that tradition and I am honored to open the proceedings.

We meet today as the antitrust community confronts an inflection point. People who had never before heard of the antitrust laws are realizing the costs of underenforcement. In many sectors, just one or two powerful companies dominate. In many others, rampant oligopoly behavior deprives consumers and workers of the benefits of robust competition. We see this in higher consumer prices, lower wages, and fewer new businesses being created. At the same time, we see it reflected in corporate control over the flow of information and public discourse.

I have good news to report, however. At the Antitrust Division we are firing on all cylinders, working to use every tool we have available to promote competition and meet the moment. I am now ten months into my time at the Division, and as I look to my first anniversary I am absolutely amazed at the incredible work of the Division team. Our people are tireless and talented and devoted to the mission.

We are litigating more than we have in decades. Since I was confirmed in November, the Division has challenged or obtained merger abandonments in six cases. Several other transactions were abandoned after parties were informed they would receive second requests. We currently have pending six civil antitrust lawsuits, the largest number of civil cases in litigation in the last 20 years. We will litigate more merger trials this year than in any fiscal year on record. Notably, this litigation occurs against the backdrop of nearly 3,000 notified transactions in FY 2022—which follows FY 2021 as the largest number of filings any year since the reporting thresholds were adjusted in 2000.

We have also indicted 20 criminal cases since November, more than any time since the 1980s. We ended FY 2021 with 146 pending grand jury investigations, the most in 30 years. The Division has prosecuted anticompetitive crimes in industries ranging from construction, to defense contracting, to transportation, poultry, aerospace, and health care.

We are vigorously protecting the rights of workers to competition for their labor. For example, we stepped in to protect chicken growers against anticompetitive practices in the Cargill, Sanderson, and Wayne lawsuit.[1] Our success will return $85 million to growers, but more importantly will require structural changes to the industry to shift the balance of power back toward the workers that are the real engine of the market.

We have filed statements of interest and amicus briefs to oppose non-compete agreements restricting truckers, anesthesiologists, and other workers from switching jobs, and to oppose misclassification of workers as independent contractors that deprives them of organizing rights.

Last month, we completed the trial challenging the Penguin-Random House merger to help protect competition for authors.[2] Alongside United Health/Change,[3] it was one of two merger trials to open on the same day in the same courthouse a few blocks from here. Simultaneously opening two merger trials two floors apart was a first for the Division and reflects our growing commitment to litigating cases to vindicate the antitrust laws.

Companies considering mergers that may harm competition should know that the Antitrust Division will not back down from a fight so long as that threat remains.

It is an incredibly exciting time at the Antitrust Division, and every day I am humbled by the work of the team here.

II. Antitrust Enforcement Benefits Our Democracy

Our country benefits from this critical public mission, for many reasons. First, enforcement protects consumers, workers, citizens, entrepreneurs, and others against market power. Due to competition enforcement, these markets will operate more effectively.

Our work does so much more than that, though. Competition enforcement does not merely drive progress and prosperity for consumers, workers, and others in our economy. Competition enforcement supports economic liberty and protects our democracy. As the Supreme Court explained in *Northern Pacific* and President Biden reiterated in an Executive Order last year, "at the same time" that it leads to a more effective economy, antitrust enforcement "provide[s] an environment conducive to the preservation of our democratic political and social institutions."[4]

We learn in grade school that America is at its core a capitalist democracy, but we often take for granted what those words have in common. Both capitalism and democracy are premised on freedom, choice, and opportunity. They are mutually reinforcing.

As another President, Franklin Delano Roosevelt, said in 1936: “freedom is no half-and-half affair.”[5] He spoke about how equal opportunity in the polling place and the market place go hand in hand. FDR explained that the “age of machinery” had “brought with it a new problem for those who sought to remain free[…] New kingdoms were built upon concentration of control over material things.”

President Roosevelt’s remarks are just as valid today. The age of connectivity has brought with it new problems for those who seek to remain free. New kingdoms have been built upon concentration of control over our digital lives.

Not long after he gave that speech, FDR nominated Robert Jackson to be AAG of the Antitrust Division. One of the most celebrated leaders in the Division’s history, Jackson sparked an era of aggressive and effective enforcement to protect economic liberty. We are humbly undertaking to achieve the same spirit and success in the 21st Century.

III. Developing Guidelines That Protect Competition and Respect the Law

As we do so, effective merger enforcement will be critical. As you know, we are undertaking a major revision of our merger guidelines. I have mentioned before that we are rebuilding them with two core values in mind. First, to better reflect the law as passed by Congress and interpreted by the Supreme Court. Second, to be more accessible to users inside and outside the agency analyzing competition in all its forms.

When we called for public comments, we promised to read every one. Little did we know that we would receive over 5,000 public comments, about 50 times more than in past guidelines reviews. The response was completely unprecedented. Most of the commenters are people who have never sat at an antitrust conference like this and have never billed an hour. They are workers and consumers and entrepreneurs who have no idea what double marginalization is, or how many assumptions you have to credit in order to conclude it would be eliminated by a merger.

These are people who see competition problems in our economy and an antitrust policy framework that appears out of sync with the market realities they live every day. We need to talk about merger policy in a way that is understandable to all of the Americans it impacts.

You may be wondering if we actually have read all the comments given how many came in. Yes, we have. With the help of the incredible team in the Competition Policy and Advocacy section, I am proud to report we have been through every one.

I am also proud to say that we are now working with the staff to prepare a draft of the guidelines for public comment. By that I mean we are engaging the *entire* merger staff of both the DOJ and FTC to get their views and ideas *before* we broaden the discussion to public comment. Our goal is to have the most transparent and engaging guidelines development process ever undertaken at our agencies. This step will be invaluable as we seek to explain complex issues in more accessible language.

By numbers, the public comments we received overwhelmingly call for stronger enforcement. But more than that, they drive at a disconnect that has arisen over the years between merger law, merger policy, and the way competition plays out in the marketplace.

On the one hand, the Agencies’ approach to merger enforcement has fallen out of sync with the values reflected in the Clayton Act and the standards established by the courts for its application. Upholding the rule of law is of course an indispensable part of pursuing justice. It is what Attorney General Garland has called “the foundation of our democracy.” The Attorney General has established it as the Department of Justice’s foremost objective. We need to respect the law.

On the other hand, merger enforcement has become disconnected from the competitive realities of our economy. It has become a sometimes-artificial exercise. We focus too much on a small handful of models for predicting price effects, and lose sight of the competition actually at stake. We obsess in all cases about market definition, when in many situations direct evidence can help us assess the potential for harm. Competition varies, and our framework must adapt accordingly.

It is my hope that the revised guidelines can address this disconnect in both respects. Merger policy can and should tie together the law and market realities.

A. **Understanding the Competition at Stake**

I believe that the first question we should ask when we review a merger is this: How does competition present itself here, and how does the merger threaten that competition? Thinking about merger review from that perspective aligns the language of a statute that explicitly protects competition with the realities of markets that are ever-changing. Both demand that we understand the competition at stake, and the threats it faces.

B. **Preventing Mergers that *May* Harm Competition**

We have to understand the competition at stake in order to prevent threats to competition in their incipiency. Too often, we have treated the test for illegality as essentially a rule of reason balancing framework, limited to models that attempt to concretely predict the precise effects of a merger on prices. But this leaves underenforced a statute that was meant to be prophylactic.

The Clayton Act and Anti-Merger Act were intended to stop, in their incipiency, the problems addressed by the Sherman Act. Indeed, the last time the Supreme Court addressed the standard was in *California v. American Stores*, when it said that “Section 7 creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect ‘*may be* substantially to lessen competition.’”[6] What’s more, writing for a unanimous court, Justice Stevens italicized the words “*may be*.” We should take that standard seriously—if the effect of a merger may be substantially to lessen competition, then the merger violates Section 7.

C. **Preventing Oligopoly Behavior**

Take oligopoly behavior, for example. One of the core concerns of the Sherman Act was preserving the give and take among rivals. As the Supreme Court explained in *American Needle*, "concerted activity inherently is fraught with anticompetitive risk" because it "deprives the marketplace of independent centers of decision making that competition assumes and demands."[7] Indeed, many commenters expressed concern that we have an oligopoly problem in this country.

When a merger combines competitors, it increases the risk of oligopoly behavior. Because oligopoly behavior does not require agreement, either tacit or explicit, Section 1 often does not reach it. Section 7, however, prevents in their incipiency the harms it creates. Like concerted action, oligopoly behavior exacerbated by mergers deprives the marketplace of independent decision-making centers and warrants intervention. Mergers whose effect may be to worsen this behavior or increase its likelihood violate the statute. The courts have made this rather clear: they have long explained that on the basis of an increase in concentration in a highly concentrated market, the Agencies and the courts should presume a merger creates this risk.[8]

Yet I have often heard a contrary view in antitrust policy circles. Some suggest that plaintiffs should need more than a structural presumption to demonstrate a risk of harm from coordinated effects. Under this view, the plaintiffs bear the burden of *also* demonstrating that the market has some special vulnerability to coordination.

Placing the burden on plaintiffs to demonstrate the risk of coordination contradicts the long line of cases applying the structural presumption. For example, in the "baby foods" case, the D.C. Circuit reversed the District Court's analysis making light of coordinated effects. The D.C. Circuit explained that in the presence of a structural presumption, coordinated effects should be presumed unless the merging parties "rebut the normal presumption" by demonstrating the challenges of coordination are "much greater in the [relevant] industry than in other industries." That approach much better protects our markets from oligopoly behavior.

Antitrust policy that respects market realities may also conclude a merger exacerbates oligopoly behavior without our needing to focus on the structure of the market. While a structural presumption always indicates a *prima facie* risk of oligopoly behavior, direct evidence can as well. If the competition already underway reflects the presence of oligopoly behavior, then losing a competitor increases that risk. Likewise, if we are concerned about losing head to head competition and risking so-called unilateral effects, then direct evidence regarding head to head competition will often be more useful than a market definition exercise. Focusing on the competition at issue means using any probative evidence to assess the risk of competitive harm.

IV. <u>Conclusion</u>

There are so many other fascinating issues under consideration as we develop the guidelines. I am sure some will be debated further as this event continues, and the discussion will continue through the coming months as we release a draft for public comment.

Let me conclude, however, by acknowledging that we are in a time of change. President Biden explained last year that after "40 years [of] the experiment of letting giant corporations accumulate more and more power," we have gotten "less growth, weakened investment, fewer small businesses, [and] too many Americans who feel left behind."[9]

Too often, that failed experiment has involved ignoring the rule of law as it applies to antitrust. And too often it has involved distracting diversions away from the core question. How does competition play out, and how does a merger or conduct threaten it? When we answer that question carefully, we will better protect competition and vindicate Congress' vision for the antitrust laws.

Thank you.

[1] Press Release, U.S. Dep't of Justice, *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers* (July 25, 2022), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy.

[2] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster* (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

[3] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[4] *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958) *as quoted in* Exec. Order 14036, Promoting Competition in the American Economy, 86 FR 36987 (July 9, 2021).

[5] Franklin D. Roosevelt, President, Acceptance Speech for the Renomination for the Presidency at Philadelphia, Pa. (June 27, 1936), *available at* https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa.

[6] *California v. Am. Stores*, 495 U.S. 271, 284 (1990) (quoting Section 7, supplying emphasis; citing *Brown Shoe*, 370 U.S. at 323); *see Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 (1962) (Section 7 of the clayton Act gives "courts the power to brake" concentration "at its outset and before it gather[s] momentum" by enjoining "incipient monopolies and trade restraints outside the scope of the Sherman Act" and to do so "well before they have attained such effects as would justify a Sherman Act proceeding.").

[7] *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 2209 (2010).

[8] *See, e.g., FTC. v. H.J. Heinz Co.*, 246 F.3d 708, 724-25 (D.C. Cir. 2001) ("Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above

competitive levels. Increases in concentration above certain levels are thought to raise a likelihood of interdependent anticompetitive conduct."); *FTC v. University Health*, 938 F.2d 1206, 1218 fn.24 (11th Cir. 1991) ("Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level."); *FTC. v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) ("The acquisition has reduced that number to five. This will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of section 1 of the Sherman Act, 15 U.S.C. § 1, or section 5 of the FTC Act, 15 U.S.C. § 45, both of which forbid price-fixing. The penalties for price-fixing are now substantial, but they are brought into play only where sellers actually agree on price or output or other dimensions of competition; and if conditions are ripe, sellers may not have to communicate or otherwise collude overtly in order to coordinate their price and output decisions; at least they may not have to collude in a readily detectable manner"); *H.C.A. v. FTC.*, 807 F.2d 1381, 1387 (7th Cir. 1986) (" The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing."); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (Bork, J.) ("where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding"); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 206–07 (D.D.C. 2017) ("Market concentrations above certain levels are thought to raise the likelihood of interdependent anticompetitive conduct. A merger that 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."); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (" The theory follows that, absent extraordinary circumstances, a merger that results in an increase in concentration above certain levels raise[s] a likelihood of interdependent anticompetitive conduct."); Jonathan B. Baker & Joseph Farrell *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 U. Pa. L. Rev. 1985 (2020). Available at: https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/4 .

[9] Joseph R. Biden, President, Speech Announcing Executive Order 14036, Promoting Competition in the American Economy. (July 9, 2021), *available at* https://www.youtube.com/watch?v=sRQ8n9_IPgw.

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