Insight

Implications of the Competition and Antitrust Law Enforcement Reform Act

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Executive Summary

- The Competition and Antitrust Law Enforcement Reform Act (CALERA), introduced by Senator Amy Klobuchar, aims to significantly change current antitrust enforcement.
- CALERA would shift the burden for many mergers from requiring the government to prove that such a merger is anti-competitive to requiring the merging companies prove their deal is not harmful.
- The legislation would also reduce the requirements for potential government action by removing the need for enforcers to define the market in certain cases; market definition is often a key element of dispute in antitrust cases.
- While the legislation purports to address problems stemming from the power of large companies, it could deter many mergers that would continue to encourage innovation or otherwise benefit consumers.

Introduction

Senator Amy Klobuchar last week introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), which primarily focuses on the enforcement and standards associated with mergers and acquisitions and more generally lessens the burdens on government for engaging in antitrust enforcement. This is the first significant bill regarding potential changes to antitrust law in the 117th Congress and as such provides insight into how Democratic leadership may be considering approaching the issue with control of both Congress and the White House. While recent conversations about potential antitrust reform have largely focused on the so-called "Big Tech" companies, the impact of this bill's overhaul of antitrust laws would not be contained to only one sector of the economy. In fact, CALERA would change the dynamics of antitrust with significant consequences for not only large firms but small firms and consumers as well.

In general, this proposal seeks to make it easier for enforcers to bring antitrust cases and to make it more difficult for large companies to pursue mergers and acquisitions. It does so by requiring companies prove that a proposed merger will not be anti-competitive, lowering the standards for government enforcement, and removing the requirements for enforcers to define the market when pursuing antitrust action. While these changes may make it easier to enforce antitrust law, these new standards would not clearly benefit consumers and could create uncertainty regarding what actions are allowable.

Would Changing the Burden for Mergers and Acquisitions Benefit Consumers?

Currently, the consumer welfare standard, which governs much of antitrust law, focuses on whether mergers or acquisitions would result in harm to consumers as a result of reduced competition. Currently, regulators must prove the proposed change in the market will hurt consumers. The advantage of this approach is that it focuses

on intervening when consumers lose out rather than focusing on the impact of a merger on other competitors. It also places the burden for proving harm on the government, as regulators must prove that the transaction is anti-competitive and harmful. In other words, mergers are presumed to be allowed unless the government proves otherwise.

CALERA proposes to change both the standard and the burden for proving that the merger or acquisition would not cause harm. First, it would change the government's requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would "create an *appreciable risk* of materially lessening competition." Additionally, in many cases, it would shift the burden of proof from the government onto the merging or acquiring entities. The merger or acquisition could go through only if the private firms can prove that the deal would not hurt competition. Otherwise, regulators could prevent it.

Changing these standards would make mergers and acquisitions more difficult. This shift would be particularly harmful in dynamic markets such as the technology sector where it is unpredictable what disruption may gain popularity or fundamentally change the market. The current, higher standard for government intervention already prevents mergers and acquisitions that could improve competition and aid consumers. Misunderstanding the changing market or the impact of innovation can already lead to denying mergers that would actually benefit consumers or allow smaller players to pool resources in ways that make them more competitive. A lower standard for challenging mergers would also make such beneficial deals less likely.

Shifting the burden presumes that every deal involving companies of a certain size is harmful unless proven otherwise. The existing standard and burden already allow enforcers to successfully prevent and deter mergers they believe may harm consumers. Lowering the standard for action would make benign or beneficial deals more costly, deterring them and the potential benefits for consumers and competition. While most may be focused on the current antitrust action against large tech companies, legislative proposals such as CALERA could have a significant impact on markets well beyond technology. Changes to the burden for mergers to proceed would target large firms regardless of industry. The result could impact not only tech companies, but also large companies in the pharmaceutical and energy industries where such acquisitions often play an important role in promoting competition and boosting innovation.

The Myth of a Big Tech "Kill Zone"

One reason advocates for antitrust reform often express concerns about mergers is the idea that a "kill zone" is allowing the largest tech companies to gobble up competitors before they can rise to challenge the dominance of giants. These critics often lament that rather than seeking to build the next great tech company, today's tech startups merely wish to get acquired by existing giants.

While it is true that getting acquired is a logical exit strategy for many startups, such a framing misunderstands the reasons that acquisitions of these startups may be a smart decision for smaller companies and benefit consumers. A new product may be better able to reach a larger customer base by being acquired by a larger firm, or it may be able to improve its product's features and access valuable talent to aid its development. Often these acquisitions may seem risky for both parties to outsiders or market analysts, but they can provide consumers more access to products that gain popularity (for example Google's acquisition of a small mapping company that improved Google Maps or Facebook's acquisition of Instagram). As the Information Technology & Innovation Foundation's Joe Kennedy points out, studies have found that "killer acquisitions" do not decrease the level of innovation but in fact may lead to increased innovation. Despite claims of a "kill zone," the United States continues to see record-breaking venture capital investment in new tech companies and new, successful

companies that both get acquired and remain independent.

While some innovators may wish to take their companies public or create an industry disruptor, this can be a risky and costly choice. As the Center for Growth and Opportunity's Will Rinehart describes, "For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year." As a result, some innovators may find acquisition a more financially feasible option to their product's ultimate success than incurring these costs.

Increasing regulatory barriers to acquisitions in the tech sector might prevent "killer acquisitions," but this moniker is misleading at best. In the process of stopping these anti-competitive acquisitions, it would also deter beneficial ones. The result would not be an increase in innovation, but rather limiting a valid exit strategy for startups and in the process limiting innovation by both large and small companies.

Changing Requirements for Government Antitrust Action

The bill also makes other significant changes to antitrust law. Among the most concerning, it removes the need in some cases for regulators to define the market in which a company is allegedly acting anti-competitively.

It is difficult to establish or defend key elements of an antitrust claim around market dominance if the market definition has not been established. This change could remove many of the objective benefits of the current consumer welfare focused antitrust standards and return more closely to prior rule of reason standards that allowed enforcers to use antitrust with far more discretion. Without an objective standard for judging antitrust claims, businesses could not be certain of the standards for what was considered anti-competitive behavior, and antitrust could be used as a more political tool to go after unpopular businesses.

While this change on its own would not fully undo existing antitrust standards, it does remove a key element at the heart of many antitrust cases. It is concerning to consider how such a change could easily be abused to allow unchecked discretion by enforcers to target certain industries or companies that may find themselves unpopular. While today it may be tech giants, history has shown that as political winds change so to can the industry that finds itself on the wrong side of those in power. A principled approach to antitrust should require that the government properly identify all elements of its case and continue to apply antitrust in an objective way.

Conclusion

CALERA would create significant changes to the framework of antitrust law. As Senator Klobuchar has indicated in her discussion of the bill, these changes would not be limited to today's tech giants and apply to numerous other industries as well. Many of the proposed changes are based on misguided assumptions that certain actions by large players are always bad and fail to recognize the impact that such changes would have on beneficial as well as harmful business transactions. In considering any changes to antitrust law, the focus should remain on whether these changes reflect the underlying principles of antitrust law's purpose to prevent anticompetitive behavior and would benefit consumers experience in the market. It is important that competition law retain an objective standard that ensures that businesses of all sizes and industries are able to fairly engage in transactions and understand what behaviors risk enforcement.