

EXECUTIVE SUMMARY

Is There Too Little Antitrust Enforcement in the US Hospital Sector?

ZAREK BROT-GOLDBERG *University of Chicago*

ZACK COOPER *Yale University*

STUART V. CRAIG *University of Wisconsin–Madison*

LEV KLARNET *Harvard University*

There were over 1,000 hospital mergers from 2002 to 2020. During that period, the FTC only took enforcement actions against 13 transactions. We show that, from 2002 to 2020, 20% of transactions (238) could have been flagged by the FTC using standard merger screening tools as likely to lessen competition and raise prices. Using data on the prices hospitals negotiate with insurers, we find that mergers that occurred between 2010 and 2015 that could have been flagged by the FTC as likely to raise prices by lessening competition did lead to overall price increases of 5% or more via increases in both inpatient and outpatient prices. We conclude there was underenforcement of antitrust laws in the US hospital industry.

Reference: Brot-Goldberg, Z, Cooper, Z, Craig, SV, and Klarnet, L. (Forthcoming). “Is There Too Little Antitrust Enforcement in the US Hospital Sector?” *American Economic Review: Insights*.

SUMMARY OF OUR RESEARCH

The \$1.3 trillion US hospital sector accounts for 6% of national GDP. From 2000 to 2020, there were over 1,000 hospital mergers among the nation’s approximately 5,000 hospitals. As we show, during that period, the Federal Trade Commission (FTC), the agency tasked with preserving competition in the hospital industry, took enforcement action against 13 transactions and had an enforcement rate of approximately 1%. However, as the hospital market was consolidating, data from the Bureau of Labor Statistics

shows that prices in the hospital industry grew faster than prices in any other sector of the economy. It is against this backdrop that in a forthcoming paper in *American Economic Review: Insights*, we analyze whether there has been too little antitrust enforcement in the US hospital sector.

While a 1% antitrust enforcement rate might appear low, enforcement at this level could, in theory, be appropriate if the mergers that were occurring posed little threat to competition and this level of enforcement was sufficient to deter future anticompetitive

transactions. Alternatively, antitrust enforcement could be inappropriately low because of impediments the federal government faces increasing enforcement activity. Critics of the current antitrust paradigm have pointed to many such impediments, including low enforcement budgets, weak reporting requirements for merging parties, and legal precedents that favor merging parties over the relevant antitrust agencies, the FTC and Department of Justice (DOJ).

In this paper, we introduce a simple test of the efficacy of antitrust enforcement in the hospital sector. If the FTC is optimally targeting enforcement, then the mergers that they *do not* challenge should have minimal effects on competition and prices. As a result, we examine whether there were consummated mergers that did occur between 2010 and 2015 that could have been predicted, using standard screening tools available to the FTC, to lessen competition and which did raise prices.

We analyze the effect of 322 hospital mergers involving 702 hospitals that occurred between 2010 and 2015. We use data from the Health Care Cost Institute (HCCI) that includes the prices hospitals negotiate with insurers. The HCCI data is composed of insurance claims from Aetna, Humana, and UnitedHealth and covers approximately a third of adults with employer-sponsored coverage. We find that the average merging hospital raised prices by approximately 1.6% in the two years after the merger occurred, via increases in inpatient and outpatient prices of 1.1% and 1.8%, respectively. This underscores that not all mergers are problematic.

Are the mergers that led to large price increases the ones that the FTC could have *ex ante* predicted to be harmful via a lessening of competition? To answer this question, we use two common pre-merger evaluation methods to flag presumptively anticompetitive mergers and analyze whether they generated

differentially large price increases. First, we flag mergers using cutoff rules for post-merger changes in market concentration (measured via a Herfindahl Hirschman Index (HHI)) that are most likely to harm competition, as defined by the 2010 Horizontal Merger Guidelines. The Guidelines highlight that mergers that we flag should be “presumed to be likely to enhance market power.” Second, we flag mergers based on whether the merging parties experienced increases in willingness-to-pay (WTP) of 5% or more. WTP represents the value that a hospital, or a set of hospitals, contributes to the value of an insurance network and can be used in simulations to predict the impact of mergers. It is the standard screening tool used in antitrust enforcement cases brought by the government.

We show that while the average hospital merger in our data raised prices by 1.6%, there were many mergers that could have been predicted by the FTC to be harmful, which did in fact lead to meaningful price increases. From 2010 to 2015, approximately 20% of all consummated transactions (and at least 25% of mergers in our analytic sample) could be predicted *ex ante* to increase concentration or lessen competition via our flags for the changes in HHI or WTP. The flagged transactions in our sample generated differentially large price increases relative to deals we did not predict would run afoul of the Horizontal Merger Guidelines. In aggregate, we estimate that from 2002 to 2020, 238 of the 1,164 mergers that occurred likely meaningfully lessened competition and led to price increases.

WHY ARE PROBLEMATIC MERGERS GETTING THROUGH?

The primary impediment to effective antitrust enforcement does not appear to be the FTC’s visibility into the market. Past work has illustrated that

mergers that fall below Hart-Scott-Rodino (HSR) reporting thresholds are less likely to be challenged by regulators (Wollmann, 2019).¹ In our setting, nearly 60% of hospital mergers appear to fall below HSR reporting thresholds. However, we find that approximately half of the deals that can be predicted *ex ante* to raise prices by lessening competition are above HSR thresholds and thus are likely visible to regulators. Likewise, mergers above HSR thresholds generate, on average, larger predicted price increases than deals below the thresholds.

We posit that much of the underenforcement likely results from insufficient funding for the antitrust enforcement agencies. We find that an average year of mergers between 2010 and 2015 raised hospital spending on the privately insured in the first year following the mergers by \$204 million. To put this spending increase in context, the FTC's average annual overall budget and antitrust enforcement budget between 2010 and 2015 were \$315 million and \$136 million, respectively. As a result, we show that mergers in a sector of the economy that accounts for 6% of GDP are generating short-run harms roughly equivalent to the entirety of the FTC's budget. Moreover, the FTC might be hesitant to take further action out of a fear that losing cases will set bad precedent for future enforcement. We show that the cases that the FTC *does* litigate are extremely severe in terms of their expected harm to competition. However, there are a number of clearly problematic

mergers that are not challenged. In 2021, for example, the merger between Adena Health System and Fayette County Memorial Hospital likely ran afoul of the FTC/DOJ merger guidelines. In 2023, a merger of Olathe Health and the University of Kansas Health system also should have raised concerns.

There are also mergers where the FTC may want to intervene but gets thwarted by Certificate of Public Advantage (COPA) laws that block federal action in favor of state oversight. For example, Union Health in Terre Haute, Indiana recently announced plans to acquire Terre Haute Regional Hospital from HCA Healthcare.² This is a transaction that is likely to markedly raise market concentration and lessen competition. Recently, the CEO of Union Health announced they were applying for a COPA through the Indiana Department of Health.³

RECENT FEDERAL ACTION

There have been recent efforts to bolster competition in health care markets. In 2021, the Biden Administration issued an executive order promoting competition in the American economy with a particular focus on hospital markets.⁴ In 2023, the FTC and DOJ released new merger guidelines, which lowered the thresholds for mergers to be considered to lessen competition.⁵ More recently, the White House released a fact sheet outlining the harms from a lack of hospital competition and announcing several

1. Thomas Wollman (2019), "[Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act.](#)" *American Economic Review: Insights*, 1(1): 77-94.

2. <https://www.myunionhealth.org/news-and-media/news/union-health-to-acquire-terre-haute-regional-hospital>

3. https://www.tribstar.com/news/local_news/union-health-to-acquire-terre-haute-regional-hospital/article_c9018634-5242-11ee-a42d-334b03a90f16.html

4. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

5. <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>

proposals to address consolidation including a cross-agency review of rising market power in the health sector, the appointment of a Chief Competition Officer at the Department of Health and Human Services, and the creation of Counsels for Health Care at the DOJ and the FTC.⁶

WHAT ELSE CAN BE DONE TO ADDRESS RISING HOSPITAL CONSOLIDATION?

A number of policy experts have recommended strategies to address rising consolidation in the US hospital industry.⁷ These recommendations have included increasing the antitrust enforcement budgets at the DOJ and FTC, amending the Federal Trade Commission Act to allow the FTC to take enforcement action against anticompetitive conduct by non-profit firms, strengthening federal antitrust laws, reducing the use of COPA laws across states, encouraging states' Attorneys General to take action against cases that lessen competition, and continuing to refine state and federal reporting requirements for mergers, so that they are visible to regulators.

For further information on potential policy solutions to address hospital consolidation, see:

- ▶ Baer, B., Baker, J.B., Kades, M., Scott Morton, F. M., Rose, N. L., Shapiro, C., & Wu, T. (2020, November 19). Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress. Washington Center for

Equitable Growth. Retrieved from <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true>

- ▶ Cooper, Z., & Gaynor, M. (2020). Addressing hospital concentration and rising consolidation in the United States. 1% Steps for Health Care Reform. Retrieved from <https://onepercentsteps.com/policy-briefs/addressing-hospital-concentration-and-rising-consolidation-in-the-united-states/>
- ▶ Gaynor, M. (2020). What to Do about Health-Care Markets? Policies to Make Health-Care Markets Work. Brookings Institution. Retrieved from https://www.brookings.edu/wp-content/uploads/2020/03/Gaynor_PP_FINAL.pdf.
- ▶ Gudiksen, K. L., Fuse Brown, E. C., & Butler, J. (2021, April 12). A tool for states to address health care consolidation: Prohibiting anti-competitive health plan contracts. National Academy for State Health Policy. Retrieved from <https://nashp.org/a-tool-for-states-to-address-health-care-consolidation-prohibiting-anti-competitive-health-plan-contracts/>
- ▶ Hughes, S., Murphy, N. (2023, February 16). Empowering state attorneys general to fight health care consolidation. Center for American Progress. Retrieved from <https://www.americanprogress.org/article/empowering-state-attorneys-general-to-fight-health-care-consolidation/>

6. <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/07/fact-sheet-biden-harris-administration-announces-new-actions-to-lower-health-care-and-prescription-drug-costs-by-promoting-competition/>

7. See, for example, Cooper and Gynor (2021)'s recommendations from the 1% Steps for Health Care Reform Project (<https://onepercentsteps.com/policy-briefs/addressing-hospital-concentration-and-rising-consolidation-in-the-united-states/>), proposals from a range of former leaders at the DOJ in Equitable Growth to restore competition (<https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true>) and House and Senate Testimony from Dafny (<https://www.budget.senate.gov/download/101823-dr-dafny-testimony>), Gaynor (<https://www.judiciary.senate.gov/download/martin-gaynor-testimony>), and Cooper (<https://www.finance.senate.gov/download/06082023-cooper-testimony>).

- ▶ Hulver, S., & Levinson, Z. (2023, August 7). Understanding the role of the FTC, DOJ, and states in challenging anticompetitive practices of hospitals and other health care providers. Kaiser Family Foundation. Retrieved from <https://www.kff.org/health-costs/issue-brief/understanding-the-role-of-the-ftc-doj-and-states-in-challenging-anticompetitive-practices-of-hospitals-and-other-health-care-providers/>
- ▶ Roy, A. (2020). Affordable Hospital Care Through Competition and Price Transparency. The Foundation for Research on Equal Opportunity. Retrieved from <https://freopp.org/affordable-hospital-care-through-competition-and-price-transparency-765714c69ed8>.