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## VIEWPOINT

# Competition Policy In Health Care Markets: Navigating The Enforcement And Policy Maze

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**ABSTRACT** US health care is in ferment. Private entities are merging, aligning, and coordinating in a wide array of configurations. At the same time, there is a great deal of policy change. This includes the federal government's Affordable Care Act, as well as actions by Medicare, state legislatures, and state agencies. The health system is built upon markets, which determine how (and how well) goods and services are delivered to consumers, so it is critical that these markets work as well as possible. As the primary federal antitrust enforcement agencies, the Federal Trade Commission and the Department of Justice are charged with ensuring that health care markets operate well, but they are not alone. The functioning of health care markets is also profoundly affected by other parts of the federal government (notably the Centers for Medicare and Medicaid Services) and by state legislation and regulation. In this current period of such dynamic change, it is particularly important for the antitrust agencies to continue and enhance their communication and coordination with other government agencies as well as to maintain vigilant antitrust enforcement and consumer protection in health care markets.

**A**fter a period of relative quiescence, US health care is in ferment. Traditional players, such as hospitals, doctors, and insurers, are merging, aligning, coordinating, and re-inventing themselves in a dizzying array of configurations.<sup>1,2</sup> Some of these configurations appear to be new and innovative, while others seem to be rearrangements that do little to improve upon the status quo. For example, new delivery and contracting arrangements such as retail clinics,<sup>3</sup> tele-intensive care units,<sup>4</sup> or employer-contracted centers of excellence<sup>5-8</sup> have the potential to improve quality and control costs. On the other hand, some mergers and acquisitions involving hospitals or doctors appear to be primarily motivated by a desire to enhance negotiating power with insurers.<sup>9</sup> Which of these new configurations will have staying power, and how

much impact they will have upon the US health system, remains to be seen.

At the same time as these changes by private actors are happening, profound alterations are under way in a number of aspects of public policy. The most visible of the public policy change engines is the Affordable Care Act (ACA). Complete implementation of the health care reform law will take years, and the impact may be profound. In addition to the ACA, states are pursuing a wide array of policy initiatives, including a single-payer initiative in Vermont,<sup>10</sup> an innovative cost control measure in Massachusetts,<sup>11</sup> price transparency reporting requirements in a number of states,<sup>12</sup> and the creation of all-payer databases.<sup>13</sup>

These developments and initiatives all have implications for health care markets, or how (and how well and at what price) goods and

services are exchanged between producers and consumers. Paul Ginsburg and Gregory Pawlson<sup>14</sup> and William Sage<sup>15</sup> have written two stimulating articles in this *Health Affairs* collection pointing out specific challenges with health care markets that pose obstacles to improving the US health system and how policy can be best crafted to address these issues. The authors of both articles are concerned about increasing provider consolidation, its impact on the performance of health care markets, and possible policy responses to these issues.

### The US Market-Based System

The United States has a market-based health care system: Hospitals and doctors are private entities (with the exception of a dwindling number of public hospitals). Approximately half of health care spending is publicly financed (mostly via the Medicare and Medicaid programs), but beneficiaries of those programs obtain care from private hospitals and physicians via markets. While the ACA will greatly expand the amount of public financing of health care, that care will still be obtained via existing private markets.

Strong research evidence demonstrates that competition leads to lower prices in hospital markets. The opposite is also true. Hospitals that face less competition charge substantially higher prices (regardless of whether they are not-for-profit). Hospital mergers that create a dominant system can lead to very large price increases, even as high as 40–50 percent.<sup>16–18</sup> Furthermore, price increases by hospitals are fully passed through to consumers. When prices go up, health insurance premiums go up. When premiums go up, employers simply reduce workers' total compensation dollar for dollar by the amount of the premium increase. This can come in the form of lower pay; increased cost sharing for premiums; or lower benefits, including dropping coverage entirely in some cases.<sup>19–22</sup>

There is also substantial research evidence that quality is enhanced by competition in hospital markets.<sup>16–18</sup> Although there is less evidence on competition in physician services markets, recent research points to competition leading to lower prices in these markets as well.<sup>18</sup>

As a consequence, it is critical that US health care markets work as well as possible, particularly during this era of rapid change. Even the best-conceived and -executed public or private efforts will come to naught if health care markets don't function well enough to act as an effective vehicle for reform initiatives, so understanding markets and ensuring their smooth operation is essential to the success of the developments and trends described above.

### Antitrust Law And Policy

Antitrust law and policy are critical for the successful functioning of markets. The primary US antitrust enforcement agencies are the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). These agencies monitor market developments and address arrangements or behaviors that harm competition and consumers. The goal is to keep markets functioning so that they benefit consumers. In some mature industries (such as the manufacture of glass bottles, apparel, and footwear), this may simply mean allowing competition to keep prices low for standard products. In dynamic, innovative industries (such as telecommunications, information technology, and pharmaceuticals), this means preserving the ability of new products, firms, or organizational arrangements to emerge.

In health care, the antitrust enforcement agencies serve both of these functions. It is important to prevent arrangements or behaviors that have the effect of increasing prices (without concomitant increases in value) or harming quality. At the same time, one of the most important roles for the antitrust agencies in health care is to promote a market environment that allows for new, "disruptive" innovations, which can transform markets, forcing competitors to be more efficient or produce higher-quality goods, or risk extinction.

### The FTC's Role In Health Care Markets

The FTC has been very active in ensuring competition to keep prices low for standard products and in preserving the ability of new products, firms, or organizational arrangements to emerge.<sup>23</sup> Examples include a number of recent antitrust suits blocking hospital mergers and a merger of physician practices.<sup>24–28</sup> The FTC also plays an important role by issuing comments and advocacy letters in response to proposed state legislation or federal rule making.<sup>29–34</sup> Last, the FTC has a mandate to perform original research to advance knowledge in key policy areas.<sup>35</sup> FTC research has added to the body of knowledge about the functioning of health care markets<sup>36–41</sup> and has shed light on the impacts of questionable practices and legislation.<sup>42</sup>

US antitrust enforcement agencies have a substantial role to play in health care, but it is important to realize what they can and can't do. The antitrust laws do not address all possible problems with markets. For example, if a health care system dominates a local market and has done nothing illegal to obtain that dominance or maintain it, then US antitrust laws do not pro-

hibit it from charging whatever prices it can obtain from its market dominance, even if it is a nonprofit. This can harm consumers and may be inconsistent with a nonprofit hospital's ostensible mission, but it doesn't necessarily (in this example) constitute an antitrust violation.

However, highly concentrated markets can be problematic. A number of the private initiatives discussed by Ginsburg and Pawlson (narrow networks, tiered networks, reference pricing, and price and quality transparency)<sup>14</sup> depend on the potential for the active exercise of choice. If consolidation has led to a market's being dominated by a single firm, there may be no viable alternatives, and so these sorts of initiatives are simply not feasible.

There are some potential remedies for a market dominated by a single health care system: Antitrust enforcers can attempt to undo a merger, new competitors can enter the market, or states can step in and regulate. However, at this point in time, none of these approaches is likely to be completely effective. It is difficult for antitrust enforcement agencies to undo mergers once they've happened. There can be entry into a market, but this is typically difficult, and new forms of delivery such as telemedicine or national contracting with centers of excellence have not yet developed to the point at which they offer tough enough competition to dominant firms. As Ginsburg and Pawlson point out, returning to direct regulation of provider prices in this kind of situation is a policy option; however, they then go on to indicate that implementing it is far from simple and unlikely to be done outside of a relatively small number of states.<sup>14</sup>

The challenge of finding effective policies for dealing with highly concentrated markets underscores the importance of active antitrust enforcement. Preventing harmful consolidation *ex ante* is far more effective at promoting efficiency and protecting consumers than is trying to deal with the consequences *ex post*, once it has occurred.

### Many Actors Set Competition Policy

Another fact that is particularly important for health care is that no single entity has authority over all aspects of policy toward markets. There is no federal competition policy entity for the economy overall, let alone specific to health care. This is a particular point of emphasis in Sage's article.<sup>15</sup> He points out that federal and state laws and regulations have profound impacts on the structure and functioning of health care markets and that antitrust enforcement operates in that environment. Competition policy in health care is made by many different actors, at both the federal and state levels, and effective policy re-

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quires harmonizing their actions.

To illustrate this at the federal level, the Centers for Medicare and Medicaid Services' (CMS's) decisions about Medicare policy can have impacts on the functioning of health care markets, both for Medicare beneficiaries and for the privately insured and Medicaid beneficiaries. Accountable care organizations (ACOs) are a prominent example of this. An ACO formed to serve Medicare beneficiaries may also function in the privately insured market. CMS, the FTC, and the DOJ have worked together to harmonize their actions to support the formation of ACOs that promote efficiency and benefit consumers, while guarding against the possibility of entities attempting to use the ACO framework to acquire market power, instead of truly creating new, more efficient delivery models.<sup>43</sup>

At the state level, decisions about health care regulations, such as scope of practice, any-willing-provider regulations, or certificate-of-need can have profound impacts on markets and competition. For example, appropriate expansions in the scope of practice for advanced-practice registered nurses both promote competition and expand care,<sup>30</sup> particularly to underserved populations, while restrictions do the opposite.<sup>32,34</sup> Any-willing-provider regulations prevent payers and employers from selectively contracting with providers (such as via tiered networks, narrow networks, or reference pricing). Because employers and payers can no longer selectively contract, providers do not have to compete to be awarded a contract and, therefore, do not have to offer lower prices or higher quality. This ends up raising the costs of care.<sup>29</sup> Certificate-of-need regulations were intended to rationalize the supply of care in a community but have the effect of dampening competition and, in

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particular, may prevent the emergence of new, innovative forms of health care delivery.<sup>44</sup>

These state policies can, and do, interact with federal policies. For example, if the expansion of coverage via federal policy in the ACA leads to increased demand for health services, then expanding the scope of practice for nurses via state legislation may help to meet this increased demand. State legislation that restricts payers' ability to selectively contract with providers can counteract federal antitrust policies designed to promote competition. If higher prices are the result, this could harm not only people already enrolled in private insurance plans but could harm those newly eligible for plans in the exchanges by increasing the expense of those plans, and possibly end up affecting the federal budget.

It is a feature of the US health system that a

number of government entities at the federal and state levels have authority over different aspects of health care markets. As discussed above, the actions of any one of these entities can have large impacts on the functioning of health care markets and substantial spillover effects on policies being pursued by other government entities. Of course, this has been true for a long time, but its importance has become enhanced as a result of the dramatic changes occurring in health care markets. In particular, policy decisions by CMS and the states can have large impacts on the fundamental environment for market participants. These decisions can help enable and facilitate competition, leading to a dynamic, responsive marketplace, or can hamper it, benefiting incumbents and frustrating attempts to introduce new, innovative ways to deliver health care.

## Conclusion

The FTC has long engaged in efforts to communicate and coordinate with the various other government agencies whose decisions affect the functioning of health care markets. Continuing and strengthening these efforts, supported by commitments at the highest levels in the relevant government agencies, is particularly important at this crucial moment for US health care. Combining these activities with vigilant monitoring of conditions in health care markets and appropriate enforcement will help preserve and improve competition in health care markets at present and provide the conditions to allow markets to innovate and respond dynamically in the future. ■

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