FTC and DOJ Announce Final Merger Guidelines

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On December 18, 2023, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) issued final merger guidelines which significantly overhaul how the agencies determine whether potential transactions violate competition law under Section 7 of the Clayton Act. The final merger guidelines are modified from the proposed draft guidelines released in July. The agencies stated that they were revised to address more than 30,000 comments from "consumers, workers, academics, interest organizations, attorneys, enforcers, and many others." The final guidelines are largely consistent with the draft guidelines and present lower market share and concentration thresholds that will expose more transactions to antitrust scrutiny and potential challenges.

The final guidelines largely make changes around the margins and reduce the originally proposed 13 guidelines to 11.

Guidelines 1-6 describe distinct frameworks the agencies use to identify whether a merger raises prima facie concerns. Four frameworks address head-to-head competition, and two address mergers in related markets.

Guideline 1: Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market.

- The final guidelines impose a structural presumption that a market is concentrated if the combined firm's market share is greater than 30%, or if post-merger the market concentration under the Herfindahl-Hirschman Index (HHI) is greater than 1800. The market share presumption is completely new, and the HHI presumption of 1800 is much lower than the previous HHI concentration threshold of 2500, which had been the standard since the 2010 merger guidelines were issued.

Guideline 2: Mergers can violate the law when they eliminate substantial competition between firms.

- If merging firms are substantial competitors, the elimination of competition between them can threaten competitive harm, even if the market shares are low. The agencies note that eliminating competition on researching and developing products or services can result in harm, "even if such products or services are not yet commercially available."

Guideline 3: Mergers can violate the law when they increase the risk of coordination.

- Mergers that increase the risk of coordination or stabilize existing coordination can violate the law. The agencies focus on three primary factors: a) highly concentrated market (30% share or 1800 HHI is enough); b) prior express or tacit coordination among firms that have a substantial market share; and c) elimination of a maverick firm that disrupts the market.

Guideline 4: Mergers can violate the law when they eliminate a potential entrant in a concentrated market.

- An acquisition that eliminates a potential entrant in a concentrated market may substantially lessen competition. The agencies will evaluate whether entry was probable and whether it would have resulted in procompetitive benefits. Both objective and subjective evidence will be considered. For example, if the firm is viewed as a potential entrant by industry participants, or evidence that the firm has an incentive to enter. Subjective evidence that a firm considered entering absent a merger can also indicate entry was reasonably probable. Merging parties, however, will be unable to rely on the same arguments of potential entry in defense of a merger.

Guideline 5: Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete.

- Vertical mergers could threaten competition in several ways: a) limiting access to essential products or services can weaken or exclude rivals; b) gaining access to rivals' competitively sensitive information can facilitate coordination or undermine rivals′ incentives to compete; and c) threat of limited access can deter investment by rivals or potential rivals. The agencies will not consider rebuttal arguments about how the merged firm would not limit access to rivals because of potential reputational harm.

Guideline 6: Mergers can violate the law when they entrench or extend a dominant position.

- The agencies will assess whether one of the merging firms has a dominant position based on direct evidence or market shares, and will consider how the merger would provide short term benefits to some market participants and the longer term impacts on market power and industry dynamics. This includes considering how the merger may raise barriers to entry or competition by: a) increasing switching costs; b) interfering with competitive alternatives by preventing access; and c) depriving rivals of access to scale economies and network effects. The agencies will also focus on whether the merger eliminates a nascent competitive threat or allows the merged firm to extend a dominant position in one market into a related market. Arguments about cost savings or quality improvements will be evaluated against how competition impacts those benefits.

Guidelines 7-11 (Trends, Series of Acquisitions, Platforms, Labor Markets, Partial Acquisitions) outline specific settings and how the frameworks would apply to each.

Guideline 7: When an industry undergoes a trend toward consolidation, the agencies consider whether it increases the risk a merger may substantially lessen competition or tend to create a monopoly.

- Industry trends toward consolidation may increase the risk that a merger may lessen competition. This will make it harder for merging parties to argue that the merger will enable greater competition against larger competitors.

Guideline 8: When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.

- This reiterates the agencies' focus on whether a merger is part of a series of multiple acquisitions, and when the agencies may examine the whole series. This focus on roll-up transactions will likely impact private equity firms the most.

Guideline 9: When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.

- The agencies have stated that "[m]ergers involving platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform." The agencies will seek to prohibit a merger that harms competition for any product or service offered on a platform to any group of participants.

Guideline 10: When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers.

- The agencies will evaluate whether mergers among competing buyers may lessen competition for labor. The agencies have focused heavily on labor market enforcement, and this guideline codifies many positions taken in those enforcement efforts. The agencies explain that labor markets can be narrow and competition concerns may arise at lower levels of concentration in labor markets as compared to product markets. Indeed, the guidelines explicitly note that "a merger's harm to competition among buyers [of labor] is not saved by benefits to competition among sellers."

Guideline 11: When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

- The agencies explain that acquisitions involving partial ownership or minority interests can present significant competitive concerns. The agencies will focus on three main risks of partial acquisitions: a) ability to influence the competitive conduct of the target; b) reduce the incentive of the acquiring firm to compete; and c) lessen competition by giving the acquiring firm access to non-public competitively sensitive information.

The final merger guidelines reflect and codify several theories pursued by the agencies since 2020. For example, Guideline 5 focuses on the harm from limiting a competitor's access to an essential product or service. That was exactly the FTC's theory in its unsuccessful challenge of the Microsoft/Activision Blizzard merger. The FTC argued that Microsoft would control and limit competitor's access to the top-selling video game series Call of Duty, and that Microsoft's arguments about the risk of reputational harm were speculative. The district court disagreed. Guideline 5 codifies the agencies' position of not crediting "speculative claims about reputational harms." The FTC relied on the same theory in its challenge to the Grail/Illumina merger, arguing that Illumina's control of an essential input for cancer tests would hurt competition and diminish innovation. The Fifth Circuit's recent decision largely agreed with the FTC's argument, and shortly after the decision, Illumina announced it would divest Grail.

Similarly, Guideline 10 is consistent with the DOJ's successful challenge to the $2.18 billion merger of Penguin and Random House, where the DOJ argued that the merger would affect a narrow labor market for best-selling authors to sell their manuscripts. (Having Steven King as a DOJ witness probably didn't hurt.) The district court credited DOJ's narrow labor market definition and DOJ's expert opinion that the alleged harm from the merger would amount to $29 million a year. In contrast, the merging parties' efficiency analysis—showing cost savings from the merger generating over $100 million in additional author compensation by 2025—was excluded by the court. The resulting enforcement message—that harm to labor markets is in itself a basis for blocking a merger, even when that harm may be offset by efficiencies—is now part of the Merger Guidelines. Going forward, merging parties will have to consider potential labor market harms and how to mitigate them.

The new merger guidelines have embraced several of the theories the agencies have pursued over the past several years. And now that those theories are enshrined in the new guidelines, it is more important than ever to think about potential antitrust concerns and solutions early in the merger process.

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