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Splash or ripple? The potential impacts of the proposed US merger guidelines

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The US antitrust agencies say proposed updates to their merger guidelines are necessary to capture the dynamics of modern markets and economics. Skadden Arps Slate Meagher & Flom partners Maria Raptis and Joseph Rancour and counsel Michael Sheerin argue the Federal Trade Commission and Department of Justice's proposal presents a revisionist history of favourable case law unlikely to persuade the judiciary or dissuade dealing making.

The Federal Trade Commission and Department of Justice have advertised their draft guidelines as an "update", but they are a drastic departure from earlier iterations. Whereas past guidelines were designed to provide a practical "how to" guide to merger analysis, the newest proposed guidelines are more akin to a legal brief that outlines 13 different ways that a merger may conceivably raise potential competitive concerns. The document sets forth several presumptions that suggest many more transactions would be considered potentially anticompetitive than in the past, but there is little to no guidance as to how the agencies plan to prioritise enforcement.

These changes in style and substance are perceived by many to reflect the current zeitgeist at the agencies, where a "big is bad" mentality arguably has taken root among the leadership and mergers, in general, are viewed more sceptically than before. If applied literally, these 13 "guidelines" – including one that does not specify a particular theory of harm but applies to any merger that "otherwise substantially lessen[s] competition" – could, in theory, allow the agencies to find concerns with nearly any transaction involving competitors, vertically-related companies or businesses with any type of product adjacency.

The proposed guidelines eschew many of the bedrock principles that have guided modern merger enforcement practices since the early 1980s and endorse theories with little support in prevailing merger case law or economics. This is ironic, given that the proposed guidelines have been advertised as necessary to address the modern economy and market realities.

The proposed guidelines deviate from previous versions, the agencies' likely objectives, and the potential practical effects.

In short, the agencies' primary goal appears to be to persuade courts to adopt a more expansive view of merger illegality, notwithstanding the substantial body of merger case law from the past 40 years that is unfavourable to many of the theories in the proposed guidelines. However, the agencies also may have a second objective: to create a chilling effect on merger activity by raising the cost of attempting transactions. This would impact far more companies and, at least superficially, might be easier to achieve, but the FTC and DOJ will face significant obstacles to achieving either of their goals.

Focus on case law

The agencies first published merger guidelines in 1968 and published updated versions in 1982, 1984, 1992, 1997, 2010, and 2020. Starting in 1992, the agencies addressed horizontal and vertical transactions in separate guidelines. While the guidelines evolved, they were consistently styled as practical manuals for antitrust advisers and their clients. As the agencies explained in the press release announcing the 2010 version, the guidelines were intended to describe the "techniques and main types of evidence the agencies typically use to predict" whether mergers violate antitrust laws and "to offer more clarity on the merger review process to assist the business community better. In past guidelines, the agencies have also stressed that they neither have the force of law nor bind the courts.

The proposed guidelines differ significantly from their predecessors. They are the first in history to not only cite case law – 48 separate cases – but to make it the central focus. Notably, the legal citations focus on circuit court and Supreme Court cases and ignore district court cases grappling with modern market dynamics. The proposed guidelines also cover horizontal and vertical transactions as well as deals that do not fit into either paradigm. This represents some return to the earliest guidelines but a departure from recent practice, particularly notable because the last vertical merger guidelines were released in 2020. While the agencies acknowledged in their press release that the proposed guidelines "are not a substitute for the law itself", they have also asserted that they are "designed to make sure that everyone is on notice about what the state of the law is". Taken together with their substance, the proposed guidelines bear little resemblance to their predecessors.

Expanding theories of harm

The 13 guidelines combine new twists on foundational merger enforcement principles – "mergers should not eliminate substantial competition between firms" or "increase the risk of coordination" – with several legal theories that have not been a focus of US merger enforcement in modern times, if ever. Concerning the former, the proposed guidelines endorse conventional "unilateral effects" principles from earlier guidelines (i.e. that a company is able to unilaterally raise prices post-merger) but either create or lower the thresholds at which the agencies will presume a merger violates antitrust laws. For example, any merger resulting in a company with more than 30% market share in any relevant market is presumptively illegal under the proposed guidelines, even if one party has a de minimis market share or the relevant market is otherwise fragmented. In addition, the proposed guidelines impose an entirely new presumption of illegality for vertical mergers where the merged entity could foreclose a competitor's access to over 50% of the market for any input used by a competitor. These are far stricter requirements than regulators – or courts – have imposed for decades.

The more novel theories in the proposed guidelines include: subjecting mergers to higher scrutiny when one company has more than 30% market share in any relevant market; contending that an otherwise legal merger may violate the antitrust laws if it is part of an "anticompetitive pattern" of multiple small acquisitions; furthers a "trend toward concentration" in an industry or may trigger future consolidation; and reasoning that a merger may substantially lessen competition for buyers of labour, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality. The proposed guidelines also strongly focus on mergers that may harm competitors by allowing the merged entity to "control products or services that its rivals may use to compete," regardless of whether the merger fits into the traditional horizontal or vertical merger paradigm.

These 13 guidelines – including one that simply restates the vague language of Section 7 of the Clayton Act – substantially expand how the agencies believe a merger can violate the antitrust laws. This is remarkable in many respects but also is not surprising. FTC chair Lina Khan and DOJ assistant attorney general Jonathan Kanter have long lamented what they perceive to be decades of lax merger enforcement and pledged more aggressive policing of mergers, including on many of the theories that reside in the proposed guidelines but are notably absent from merger case law. Since Kanter and Khan assumed their posts, their agencies have initiated investigations and sought to challenge mergers based on this more expansive reading of the antitrust laws. In this sense, the proposed guidelines reflect the FTC and DOJ's recent enforcement efforts. At the same time, senior officials at the DOJ and FTC have downplayed the significant changes to the guidelines by stating that they are not "substantially different" or a "fundamental change." In reality, the agencies are now institutionalising their policies and practices and clarifying that aggressive enforcement practices will continue.

Persuading the courts

In styling the proposed guidelines as a legal brief and advertising them as a mere recitation of Supreme Court precedent, the agencies' primary goal appears to be persuading federal courts to adopt their view of how the antitrust laws should be applied. However, the agencies' approach to the proposed guidelines may not be well received by courts.

First, the proposed guidelines rely heavily on pre-1980s case law and largely ignore merger cases from the past 20 years in which courts have already grappled with many of the theories raised in the proposed guidelines. While the older case law is still binding, courts have applied this precedent over the past several decades in ways that cut strongly against the agencies' push to introduce new theories of harm. For example, the proposed guidelines strongly focus on mergers that harm competitors (either in the vertical context or otherwise), but Supreme Court precedent has long required the agencies to prove harm to competition, while courts have not blocked a vertical merger in decades. Indeed, the FTC and DOJ have brought and lost vertical merger challenges in the past year. However, the proposed guidelines largely repeat the allegations made by the agencies in those failed challenges without acknowledging their shortcomings. In addition, the proposed guidelines talk a great deal about prohibiting mergers that eliminate potential competition, but the agencies have also struggled to win those cases for years, including when the FTC lost its challenge to Meta's acquisition of Within. Though the agencies do not address this and other unfavourable precedents in the proposed guidelines, it likely will be harder for them to do so in court.

Second, several new guidelines lack any support in the case law. For example, the fifth guideline contends that a merger may violate the antitrust laws if it "creat[es] a firm that controls products or services that its rivals may use to compete"— even if that merger is not horizontal or vertical. Putting aside the vague nature of this guideline, that section only includes three citations for general propositions and not a single citation for any case that supports the theory. The same applies to the guidelines for multi-sided platforms, labour and the catch-all final guideline. Indeed, in the case of the guideline dealing with multisided platforms, the agencies have included a footnote to downplay the impact of the Supreme Court's *American Express* case on the need to address competitive effects on each side of the market. And many other guidelines do not cite a single case within the past fifty years. The absence of supporting precedent for many of the theories in the guidelines presents a significant hurdle that the agencies will need to overcome.

Finally, the proposed guidelines are imbued with the sentiments repeatedly expressed by Khan and Kanter that the antitrust laws have been misapplied for decades and that a new approach is needed to address issues in "the modern economy." But it is unclear how the proposed guidelines, which rely almost entirely on decades-old case law, are more applicable to the modern economy than case law from the past few decades, nor is it obvious how "modern" enforcement principles can reliably be crafted from those cases. The reality is that district court judges have been applying antitrust laws against the background of the modern economy. Ignoring recent district court cases – including in high-tech and recently-emerged markets – appears contrary to the stated goal of seeking to develop guidelines that are consistent with today's market realities. Courts must overcome this curious contradiction to accept many of the guidelines' theories.

The agencies have struggled over the past two years to persuade judges to adopt new or more restrictive legal theories than are supported by recent precedent. How the proposed guidelines will prove more persuasive in federal court is unclear.

A potential chilling effect

Regardless of their success in court, the agencies likely still would be satisfied if the proposed guidelines have a chilling effect on merger activity. In fact, a sceptical observer can view many of the agencies' recent policy changes as designed to achieve that purpose, including suspending early termination of the Hart-Scott-Rodino waiting period, issuing "warning letters" in deals with no substantive issues, subjecting more deals to second requests, more frequently rejecting parties' remedy proposals, and proposing new rules that would make HSR filings substantially more onerous and expensive for every transaction.

Combined with these other policy changes, the proposed guidelines may be viewed by some as yet another way the agencies seek to introduce risk, cost, and burden to the transaction process, as the myriad theories in the proposed guidelines could potentially snare many deals – including transactions that likely never would have received any scrutiny for the past several decades. And even if courts largely ignore the proposed guidelines, the agencies have close to unfettered discretion to investigate transactions and issue second requests. As the agencies recognise, the time and cost associated with those investigations – and the overhanging threat of litigation – can be enough to dissuade parties. On the other hand, these proposed guidelines send a signal to merging parties that they should develop strategies to demonstrate to the agencies that parties are ready, willing, and able to litigate and may seek to force the government to "litigate the fix" where parties can alter or amend transactions to mitigate legitimate competition concerns.

The proposed guidelines promise aggressive merger enforcement and clarify that more deals may be scrutinised and potentially challenged in court. As a result, it may be that certain companies choose not to do deals in this environment – or choose a different transaction partner than they otherwise might have if it presents a lower risk profile; however, the potential deterrent effect of the proposed guidelines should not be overstated. First, the proposed guidelines are unsurprising and do not represent a new direction in merger enforcement. Instead, they reflect the enforcement environment this administration has fostered and companies have lived through for more than two years. Articulating the agencies' theories in the proposed guidelines – particularly the more novel ones – may allow transacting parties to anticipate better and prepare for the theories with which they might need to grapple. Second, as noted above, the agencies have lost most of the court challenges they brought in that time.

Given that the agencies historically won the vast majority of merger challenges, the threat of litigation may not have the same deterrent effect it once did. Third, the agencies are very vocal about their resource constraints, and it is impossible for them to investigate – let alone challenge – the vast majority of deals. Finally, companies have a variety of ways to respond to any additional uncertainty created by the proposed guidelines and have demonstrated that ability in the past two years. For example, merger agreements can be drafted more creatively to account for and compensate for extended review timelines and varying degrees of deal risk, allowing transactions to progress despite a more aggressive enforcement climate.

The agencies undoubtedly view the proposed guidelines as a key achievement and a major milestone in driving greater merger enforcement. It is hard to disagree with either characterisation, but there are serious questions as to how impactful the proposed guidelines will be. In federal court, the existence of case law that is unhelpful or contradictory to the proposed guidelines will likely present a significant challenge to persuading judges to endorse all of the guidelines' theories. In corporate boardrooms, the proposed guidelines will undoubtedly need to be considered but appear unlikely to be a dispositive factor in deciding whether to pursue strategic deals.