What's New In The DOJ-FTC Proposed Merger Guidelines

By **Maria Raptis, Kenneth Schwartz and David Wales** (July 20, 2023)

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The Federal Trade Commission and Antitrust Division of the U.S. Department of Justice released a draft of proposed new merger guidelines Wednesday, 18 months after FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter announced plans to "modernize" the agencies' approach to merger enforcement.

As with past iterations, the new guidelines are "designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers."

While the guidelines are subject to revision following a 60-day public comment period that may be extended, as drafted they reflect both agencies' current approach to merger enforcement and provide insight into how mergers will be analyzed going forward — at least under current agency leadership.

The agencies will issue final guidelines after the public comment period closes, which will take several more months at least.

The agencies have structured the draft guidelines around 13 principles they call "guidelines" that lay out "frameworks" the agencies will use to assess whether a merger violates the antitrust laws.

While many of these guidelines initially appear to reflect well-established basic principles of antitrust law — e.g., recognition that both horizontal and vertical mergers may violate the antitrust laws — a closer examination reveals a stark departure from the agencies' approach to antitrust enforcement over the past 40 years in at least two respects.

First, the thresholds at which a merger is presumptively anti-competitive are substantially lower compared to the most recent guidelines — meaning more mergers could be challenged or at least subjected to close scrutiny than in the past.

Most notably, the guidelines:

- Significantly lower the Herfindahl-Hirschman Index and market share thresholds that the agencies use to assess whether a merger of competitors is presumptively anti-competitive. Notably, any merger resulting in a firm with more than 30% market share in any relevant market will be presumed to violate Section 7 of the Clayton Act, even if one party has de minimis market share or the relevant market is otherwise fragmented.

- Assert that acquisitions by firms with a "dominant position" in any relevant market will be subject to heightened scrutiny to see if the acquisition will either entrench that dominance or extend it into additional markets, with "dominant" defined as any firm with a market share exceeding 30%.

- Impose a presumption of illegality for vertical mergers where the merged firm could foreclose a competitor's access to over 50% of the market for any input used by the competitor.

Second, several of the guidelines are predicated on novel or less proven legal theories, including:

- Prohibiting transactions that may enable a firm "dominant" in one market to entrench or extend its position in other markets, even if one of the merging firms has no presence in those other markets. The guidelines say such transactions may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act.

- Finding that a firm may violate both Section 7 and Section 2 by engaging in an "anti-competitive pattern" of multiple small acquisitions, even if no individual acquisition would violate the antitrust laws. Relevant evidence will include the acquiring firm's past M&A practices, including unconsummated deals in other markets or industries, and future potential acquisition strategies by the acquiring firm or others in the industry.

- Reasoning that a merger may substantially lessen competition for buyers of labor, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality.

- Asserting that mergers can raise competitive concerns even if they do not neatly fit either the horizontal or vertical merger paradigm. The guidelines call out the risk from mergers that give an acquiring firm control over access to any product, service or customers that its rivals use to compete, as well as mergers involving multisided platforms — including those involving the same company both operating and participating in a platform.

- Articulating a very narrow approach to defining a relevant market, including by allowing the agencies to ignore the impact of "significant substitutes" that may not fit within the narrow relevant market definition.

Five Main Takeaways

The 51-page draft offers a great deal to unpack, but there are some early takeaways.

The guidelines are informative but not particularly surprising. The agencies have been pressing these new principles from the outset of the Biden administration, and the draft guidelines merely attempt to institutionalize this administration's policies.

The draft guidelines press a philosophy that has failed to produce results in merger litigations to date. The agencies have lost all but one merger challenge in federal court under Khan and Kanter, and have suffered losses in cases based on several of the theories promoted by the guidelines, including vertical (UnitedHealth Group Inc.'s purchase of Change Healthcare Inc.; Microsoft Corp.'s merger with Activision Blizzard Inc.) and potential competition theories (Meta Platforms Inc.'s purchase of Within Unlimited Inc.).

The agencies also have lost cases (U.S. Sugar Corp.'s acquisition of Imperial Sugar Co.; Booz Allen Hamilton's purchase of EverWatch Corp.,) premised on the overly narrow approach to relevant market definition endorsed by the guidelines.

The guidelines have no legally binding effect on courts and may not be persuasive given their departure from widely accepted principles of merger analysis. Specifically, the guidelines ignore many of the guiding economic principles underpinning decades of modern merger enforcement and are largely untethered from recent case law.

Instead, they read like a legal brief supporting the pre-1980s approach to merger enforcement that Khan and Kanter have — mostly unsuccessfully — pursued. The agencies have not persuaded judges to adopt this view, and it is unclear how the guidelines would boost that record of losses.

The guidelines have been touted as necessary to address competition issues in "the modern economy," a concept that appears four times in the agencies' joint press release. But it is unclear how pre-1980s case law — which represents the majority of the cases cited in the guidelines — is 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. Courts would need to overcome this contradiction in order to accept many of the guidelines' theories.

Whatever their impact in court, the guidelines promise continued aggressive — and to some degree, unpredictable — merger enforcement practices at both agencies, particularly as to industries that have been in the crosshairs of recent enforcement activity such as tech, health care and private equity.

The guidelines also should be considered alongside the agencies' recent proposed changes to the reporting requirements under the Hart-Scott-Rodino Act, which, if adopted, would provide substantially more information and documents in the early merger review process, potentially allowing the agencies more opportunity to assess broader theories of harm under the guidelines. Taken together, these recent agency proposals reinforce the importance of a well-considered strategy for weathering the antitrust review process.

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