DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook

Skadden

12 / 21 / 23

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

On December 18, 2023, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) released the final 2023 Merger Guidelines (the Guidelines). While the final version of the Guidelines reflects some notable changes made in response to public comments on the draft version released in July 2023, the main takeaways remain the same.

As we wrote in July 2023, the new Guidelines formalize the interventionist approach to merger enforcement that has been a central feature of the Biden administration's antitrust policy in the U.S.

When considered alongside the agencies' recent enforcement activity and proposed changes to the reporting requirements under the Hart-Scott-Rodino (HSR) Act, the new Guidelines clearly signal that the agencies will continue to pursue an aggressive merger enforcement agenda, meaning that more transactions likely will receive scrutiny, and extended investigations will become more commonplace and burdensome.

Main Takeaways

As with the draft merger guidelines released in July 2023, the final Guidelines are structured around principles that lay out "frameworks" the agencies will use to assess whether a merger violates the antitrust laws. These new frameworks differ from the past 40 years of federal antitrust enforcement in at least two key respects.

First, the thresholds at which a merger is presumptively anticompetitive are substantially lower compared to the 2010 Horizontal Merger Guidelines, meaning that 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 (HHI) and market share thresholds that the agencies use to assess whether a merger of competitors is presumptively anticompetitive.

Notably, per the Guidelines, any merger resulting in a firm with more than 30% market share in any relevant market and a small increase in HHI concentration 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.

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 (Section 2) in addition to Section 7 of the Clayton Act (Section 7).
- Finding that a firm may violate both Section 2 and Section 7 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 strategies, 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 that may not raise issues relating to the sale of products or services may nevertheless substantially lessen competition in labor markets, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

© Skadden, Arps, Slate, Meagher & Flom LLP. All rights reserved.

- Asserting that mergers can raise competitive concerns even if they do not neatly fit into either the horizontal or vertical merger paradigm. For example, 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 relevant market definition, including by allowing the agencies to ignore the impact of "significant substitutes" that may not fit within the narrowly defined relevant market.

Notable Changes From Draft to Final Guidelines

While the main takeaways for dealmakers have not substantially changed between the draft and now-final Guidelines, there are a few notable changes that the agencies appear to have made in response to public comments. At bottom, however, these changes are at the margins and do not impact the overall import of the new Guidelines as compared to the original draft.

1. **"How To Use These Guidelines."** The agencies added a new introductory section providing instruction on how to apply the guidelines. This change was seemingly intended to address criticisms that the draft Guidelines did not provide an analytical framework that merging parties could practically apply, but rather advanced a strict set of formulaic rules based on dated precedent, without acknowledgment of the role of economic analysis in modern merger analysis. This section more explicitly acknowledges that any presumption of illegality under the Guidelines can be rebutted.
2. **Addition of recent case law.** Possibly in response to criticism that the draft Guidelines largely relied on citations to decades-old cases from the pre-economics era of antitrust enforcement, the final Guidelines include a handful of additional citations to several more modern cases, most notably the recent U.S. Court of Appeals for the Fifth Circuit decision in *Illumina/Grail*. However, the agencies continue to rely heavily on old case law in support of a number of Guidelines that predate modern antitrust jurisprudence.
3. **Establishing "dominance."** The agencies deleted a provision in the draft Guidelines that asserted a merging firm has a "dominant position" when it possesses at least 30% market share, subjecting the merger to heightened scrutiny. This change was likely in response to wide criticism that a threshold of 30% should serve as a basis for concluding that a transaction could extend or entrench dominance. Instead, the final Guidelines instruct the agencies to "assess whether one of the merging firms has a dominant position based on direct evidence or market shares showing durable market power" before using heightened scrutiny to see if the acquisition will either entrench that dominance or extend it into additional markets. The Guidelines do not provide specific guidance for what direct evidence or market shares are necessary for a firm to be considered dominant under this framework.
4. **Embrace of "ecosystem" theory of harm.** The final Guidelines add new language concerning the elimination of nascent competitive threats, specifically using the concept of "ecosystem competition" — defined as where an incumbent firm that offers a wide array of products and services may be ***partially*** constrained by combinations of products and services from other providers. The Guidelines define a nascent threat as a "firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in its power." This concept has been recently embraced by competition agencies in the U.K. and European Union and is concerned with the ability of a firm operating in several linked markets to injure another firm active only in one of those markets. Adoption of a theory of harm based on ecosystem competition allows a regulator to scrutinize not only the acquisition of a direct competitor but also the addition of a niche or partially overlapping service to a company's ecosystem of services. This approach to merger enforcement would be novel in the U.S. and may suggest that closer scrutiny could be applied to a broader range of deals involving parties with limited competitive overlap. For more analysis of how the U.K. and EU have deployed the ecosystem theory of harm, see our recent *Insights* article.
5. **Vertical mergers.** The final Guidelines consolidated draft Guidelines 5 and 6, focused on vertical mergers, but maintained the same framework for analysis of market structure when reviewing a vertical merger. For example, the final Guidelines simply moved the 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 from the body of the text into a footnote.
6. **Elimination of the "catchall" guideline.** The final Guidelines also deleted draft Guideline 13, "Mergers Should Not Otherwise Substantially Lessen Competition or Tend To Create a Monopoly." Guideline 13 was replaced with a final caveat that the Guidelines are not exhaustive, with a specific note for scenarios that would garner regulatory scrutiny, including mergers achieving regulatory evasion due to constraints applicable to only one of the merging firms, unique product procurement situations favoring the bids of a competitor acquired in a merger and mergers in concentrated markets that would dampen competitive incentives. As a practical matter, this change reflects input from the notice and comment period and suggests an effort to make the Guidelines more thematically cohesive and actionable.

7. **Rebuttal evidence.** The final Guidelines add additional language throughout specifying that the merging parties may offer evidence to rebut the presumption that a deal is anticompetitive, but the agencies will still have the benefit of a presumption that a deal violates antitrust laws and thus rebuttal evidence must be very strong. Section 3 — which provides the framework by which the agencies will assess rebuttal evidence — is largely unchanged from the draft Guidelines' corresponding Section IV.

Conclusion

The final Guidelines indicate that the agencies will continue to pursue aggressive merger enforcement, including through the development of novel theories of competitive harm. Together, these more expansive theories and the significantly lower thresholds applied to ascertain whether a merger is presumptively anticompetitive may mean an increase in merger challenges, or at least closer scrutiny of proposed transactions.

However, while the Guidelines may result in increased and enhanced agency scrutiny of proposed deals, it is important to note that they do not have the force of law — the agencies must convince federal courts to apply them. Indeed, under the Biden administration, the agencies have suffered a number of high-profile losses in federal court, suggesting that courts may be reluctant to embrace the novel or less-tested theories of harm reflected in these new Guidelines. Undoubtedly, the agencies will try to use the Guidelines to overcome any such reluctance.

The final Guidelines also should be considered alongside the agencies' recent proposed changes to the reporting requirements under the HSR Act, which, if adopted, would require parties to submit substantially more information and documents in the early merger review process. The changes would potentially allow the agencies more opportunity to assess broader theories of harm under the Guidelines.

Taken together, prospective dealmakers should continue to expect that more transactions will receive scrutiny, increasing the time and cost of transactions, with extended investigations becoming more frequent and burdensome.

DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook

Contacts

Steven C. Sunshine
Partner / Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

David P. Wales
Partner / Washington, D.C.
202.371.7190
david.wales@skadden.com

Karen M. Lent
Partner / New York
212.735.3276
karen.lent@skadden.com

Tara L. Reinhart
Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

Clifford H. Aronson
Partner / New York
212.735.2644
clifford.aronson@skadden.com

Boris Bershteyn
Partner / New York
212.735.3834
boris.bershteyn@skadden.com

Matthew M. Martino
Partner / New York
212.735.2402
matthew.martino@skadden.com

Michael H. Menitove
Partner / New York
212.735.3517
michael.menitove@skadden.com

Joseph M. Rancour
Partner / Washington, D.C.
202.371.7532
joseph.rancour@skadden.com

Maria Raptis
Partner / New York
212.735.2425
maria.raptis@skadden.com

Kenneth B. Schwartz
Partner / New York
212.735.2731
ken.schwartz@skadden.com

Julia K. York
Partner / Washington, D.C.
202.371.7146
julia.york@skadden.com

Justine M. Haimi
Counsel / New York
212.735.2344
justine.haimi@skadden.com

Michael J. Sheerin
Counsel / New York
212.735.3583
michael.sheerin@skadden.com