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DOJ and FTC Issue Final 2023 Merger Guidelines

- The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have published final 2023 Merger Guidelines. The publication follows a period of public comment on a draft released earlier this year.
- The final 2023 guidelines retain some of the concepts from the previous guidelines. However, there are significant differences that could lead the government to challenge certain deals that in the past would not likely have faced agency action.

On December 18, 2023, the DOJ and FTC issued the final 2023 Merger Guidelines. These guidelines replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The new guidelines are a substantial departure from the prior guidelines in a number of respects. Perhaps the most significant change is that the guidelines lower the threshold market concentration level at which the agencies would presume a merger to be illegal. The new guidelines also include a new presumption that a merger resulting in the merged firm having a market share greater than 30% would be illegal if it also resulted in a relatively modest increase in market concentration. Another new guideline states that the agencies will "seek to prevent those mergers that would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process."

The federal antitrust analysis of mergers is generally governed by Section 7 of the Clayton Act, which prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." The agencies' merger guidelines do not have the force of law and are not binding on courts, though prior merger guidelines have been cited favorably in a number of litigated merger cases. Rather, the guidelines "identify the procedures and enforcement practices" the DOJ and FTC "most often use to investigate whether mergers violate the antitrust laws." Unlike previous versions, the new guidelines cite case law "to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities." However, much of the case law cited is decades old and the agencies explicitly state that they would "not necessarily . . . analyze the facts in those cases identically today."

Notable changes from prior guidelines

Lower threshold for presumed illegality of horizontal mergers. Both the prior and new guidelines contain a presumption that a merger is illegal if it increases market concentration above a certain threshold. Market concentration is usually measured using the Herfindahl-Hirschman Index (HHI). HHI is calculated by adding together the squares of the market shares of the firms in the relevant market. The higher the HHI, the higher the market concentration, and a market with only one firm would have an HHI of 10,000. The prior guidelines identified two categories of mergers that "often warrant scrutiny": those in "moderately concentrated markets" with an HHI between 1,500 and 2,500 where the merger would result in an HHI increase of more than 100; and those in "highly concentrated markets" with an HHI above 2,500 where the merger would result in an HHI increase of between 100 and 200. If a merger in a highly concentrated market would result in an HHI increase of more than 200, the prior guidelines presume that the merger would "be likely to enhance market power."

By contrast, under new Guideline 1, the agencies presume a merger to be illegal if it results in a post-merger HHI greater than 1,800, with a change greater than 100. This was the threshold found in the merger guidelines in effect from 1982 to 2010. The new guidelines also state that a merger that results in an HHI increase of greater than 100 and a firm with greater than 30% market share are presumed to be illegal. This metric was not in the prior guidelines. The 30% figure is from a 1963 Supreme Court case, *United States* v. *Philadelphia National Bank*. Specifically, when a merger exceeds either of these thresholds, the agencies will presume that the effect of the merger "may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger" and therefore that the merger is illegal. The consequence of these new thresholds is that more deals are likely to be presumed illegal by the agencies, requiring the merging parties to submit evidence and argument to "rebut or disprove" the presumption.

If market shares are "difficult to measure," the guidelines state that the agencies "may instead measure market concentration using the number of significant competitors in the market." The guidelines do not indicate the number of "significant competitors" that would constitute a concentrated market.

Mergers involving dominant firms. New Guideline 6 states that a merger violates the Clayton Act if it "may entrench or extend an already dominant position." The concept of dominance does not have a defined meaning in existing U.S. antitrust law, however, and the guidelines do not provide much clarity. According to the guidelines, a determination that a firm has a dominant position is "based on direct evidence or market shares showing durable market power." Yet the guidelines do not give examples of what constitutes direct evidence of a dominant position, nor do they define what level of market share constitutes "durable market power."

The guidelines do cite a 1967 Supreme Court case, *FTC* v. *Procter & Gamble Co.*, in which the Court wrote that "at least 39%" of the "share of sales" of household liquid bleach in certain "regions" of the country was a "dominate [*sic*] position." In various contexts, courts have found that for a firm to have market power it must have a market share of at least 30%. Both of these figures are well below market shares typically associated with monopoly power. Therefore, it would appear that under the new guidelines, firms that fall well short of having monopoly power could be labelled "dominant" by the agencies and face challenges to their mergers as a result.

If a merging firm is "dominant," the agencies will ask whether the "merger may raise barriers to entry or competition," involves an acquisition of a firm posing a "nascent threat" to the acquirer, or "enable[s] the merged firm to extend a dominant position from one market into a related market." According to the guidelines, one way in which a firm might extend a dominant position from one market into a related market is by engaging in tying or bundling. (We note that courts have long held that such conduct, depending on the circumstances, may be lawful and procompetitive.)

Mergers in industries undergoing a trend toward consolidation. New Guideline 7 states that the "recent history and likely trajectory of an industry can be an important consideration when assessing whether a merger presents a threat to competition" and therefore the agencies will "examine whether a trend toward consolidation in an industry would heighten . . . competition concerns" identified in other guidelines, including, for example, making new entry less likely. Notably, the final guideline differs considerably from the draft version, which asserted that a merger that "contributes to a trend toward concentration" could itself be an antitrust violation rather than simply a factor that compounds competitive concerns already identified elsewhere in the guidelines.

Similarities with the prior guidelines

Several of the new guidelines retain and expand upon several concepts found in the prior guidelines.

Competition between the merging firms as measure of harm. Both the prior and new guidelines outline how the agencies may look at the degree of competition between the merging firms to predict whether a merger may substantially lessen competition. The prior guidelines stated that when a merger eliminated "substantial" competition between the merging firms, the merger could have adverse competitive effects. New Guideline 2 states that "if evidence demonstrates substantial competition between the merging parties prior to the merger, that ordinarily suggests that the merger may substantially lessen competition." The new guidelines list a "variety of indicators to identify substantial competition," including evidence that the two firms make strategic decisions in the ordinary course of business with reference to each other, evidence that there is customer substitution between the firms and evidence of "competitive actions by one of the merging firms" impacting the other merging firm.

Increase in risk of coordination as competitive harm. The prior guidelines recognized that certain mergers could harm competition "by enabling or encouraging post-merger coordinated interaction among firms in the relevant market." According to new Guideline 3, "a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective." If the market is highly concentrated, there has been a history of attempted, or actual coordination or a "maverick" firm is being eliminated, the agencies "may conclude that post-merger market conditions are susceptible to coordinated interaction." Other potential factors include whether "a firm's behavior can be promptly and easily observed by its rivals"; whether "a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by its rivals' likely responses" (which would "reduce the benefits of competing more aggressively" and render a market "more susceptible to coordination"); and whether coordination among the firms in a market would be "profitable or otherwise advantageous." Mergers that increase the risk of coordination are also dealt with in new Guideline 5, discussed below.

Harms to potential competition. New Guideline 4 states that "[m]ergers can substantially lessen competition by eliminating a potential entrant," noting that the harm is greater in more concentrated markets. The guideline recognizes that harm could arise in two ways. The first is by the elimination of an "actual potential" entrant where one of the merging firms "had a reasonable probability of entering the relevant market" and the entry had "a substantial likelihood" of deconcentrating the market "or other significant procompetitive effects." The second is by the elimination of a "perceived potential" entrant, that is, a "a firm that is perceived by market participants as a potential entrant." (Notably, these theories of harm to potential competition were asserted by the FTC in its challenge to the Meta-Within deal. The court in that case accepted that harms to potential competition could violate the Clayton Act, but found that the FTC failed to establish that it was likely to succeed on the merits in light of the evidence presented.) The prior guidelines also recognized that a "merger between an incumbent and a potential entrant can raise significant competitive concerns," but did not provide as much detail regarding harms to potential competition as the new guidelines—and did not include a discussion of actual potential versus perceived potential competition.

Mergers resulting in harms to rivals (including vertical mergers). The prior Vertical Merger Guidelines described a theory of competitive harm from raising rival's costs. This could arise when a merged firm had "control" of a "related product" and used this control to weaken an actual or potential rival. ("Related product" was defined as "a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market" being analyzed, such as "an input, a means of distribution, access to a set of customers, or a complement.")

New Guideline 5 sets out a similar, and somewhat broader, theory of competitive harm: "a merger may substantially lessen competition when the merged firm can limit access" to (as opposed to control) a "related product." ("Related product" is now defined as a "any product, service, or route to market that [a merged firm's] rivals use to compete in that market.") According to the guidelines, competition could be harmed not only by actually limiting access to a related product, but also by the mere threat of limited access because the threat "can deter rivals and potential rivals from investing." The guidelines identify several ways a merged firm could limit access short of an outright denial, including degrading quality and limiting interoperability. Whereas the prior Vertical Merger Guidelines were concerned about control over products in a vertical or complementary relationship, new Guideline 5 is concerned about limiting access "to any products, services, or routes to market that rivals use to compete, and that are competitively significant to those rivals, whether or not they involve a traditional vertical relationship such as a supplier and distributor relationship."

The guidelines provide examples of several different types of related products that could raise concerns if a firm were able to limit access to them: "products rivals currently or may in the future use as inputs, products that provide distribution services for rivals or otherwise influence customers' purchase decisions . . . or complements that increase the value of rivals' products." The guidelines note that "[e]ven if the related product is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations."

In evaluating the risk of whether a merged firm would limit access to rivals, the guidelines look at the firm's ability and incentive to do so and take into account several factors ranging from the availability of substitute products to the existence of barriers to entry to a firm's prior actions to limit its rivals' access to the relevant product. The agencies will also look at "market structure" to evaluate a firm's ability to limit access. According to the guidelines, a merged firm will have the ability to harm competition by limiting access if it "is approaching or has monopoly power over the related product." The guidelines state that the agencies "will generally infer, in the absence of countervailing evidence, that the merging firm has or is approaching monopoly power in the related product if it has a share greater than 50% of the related product market." However, a "merger involving a related product with share of less than 50% may still substantially lessen competition, particularly when that related product is important to its trading partners."

According to the guidelines, "the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid weakening the merged firm's rivals that do not align with the firm's incentives." This is notable in light of recent losses by the agencies involving challenges to vertical merger where courts found that commitments made by the merging parties sufficiently addressed competitive concerns.

Guideline 5 also (incongruously) states that a merger could harm competition if it allows the merged firm to "gain or increase access to rivals' competitively sensitive information, thereby facilitating coordination or undermining their incentives to compete." Therefore, according to the guidelines, the acquisition of "products that provide or increase the merged firm's access to competitively sensitive information about its rivals" is cause for concern.

Application to specific scenarios

Serial acquisitions. New Guideline 8 focuses on "multiple acquisitions in the same or related business lines," which the agencies may examine "as part of an industry trend" or as part of an "overall pattern or strategy of serial acquisitions by the acquiring firm." Although the guidelines do not cite the recent academic literature on "horizontal ownership," where a common set of investors owns significant shares in corporations that are horizontal competitors, Guideline 8 seems to address this phenomenon. The guidelines state that the agencies will pay particular attention to historical evidence of the firm's acquisition patterns ("consummated or not") and implications for the acquiring firm's incentives, as revealed by documents and testimony. New Guideline 8 does not appear to be a standalone basis for challenging a transaction. Rather, "[w]here one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly."

Multi-sided platforms. New Guideline 9 introduces a new concept to the merger guidelines: multi-sided platforms. Some of the agencies' apparent concerns involve conventional antitrust analysis. For example, the merger of two platforms that previously competed might be analyzed using traditional horizontal merger analysis. Significantly, however, the guidelines also state 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." This could prove a significant departure from prior practice insofar as it suggests that the agencies might challenge platform mergers that involve neither horizontal nor vertical relationships. Among the types of mergers involving platforms that the agencies say they will consider are acquisitions of platform participants by platform operators that could entrench the platform's position by depriving rivals of participants, acquisitions of firms that facilitate participation on multiple platforms and acquisitions of firms that provide important inputs to platform services. New Guideline 9 also signals that the agencies are especially interested in mergers that have the potential to create conflicts of interest, such as discrimination by a platform in favor of its own services, that may harm competition.

Mergers involving buyer-side power, including labor markets. New Guideline 10 repeats an idea that first entered the Horizontal Merger Guidelines in 2010—that mergers among buyers may be anticompetitive because they create monopsony power. The new guidelines specifically address potential harms to competition for "workers, creators, suppliers, and service providers" and discuss labor market monopsony at length. According to the guidelines, "[w]here a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality." Notably, the guidelines state that: "[t]he level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets" and "[i]n light of their characteristics, labor markets can be relatively narrow." This implies that the agencies will be disinclined to accept arguments that employees can easily switch between types of jobs, preferring instead to see human capital closely tied to narrowly defined job types.

Acquisitions of partial ownership. New Guideline 11 largely continues an idea already present in the 2010 Horizontal Merger Guidelines—that acquisitions involving partial ownership or minority interests may harm competition. This concern is closely related to the one discussed in Guideline 8 involving serial acquisitions, but could also come into play if a firm makes only one small, noncontrolling acquisition. The agencies identify three ways in which such acquisitions may harm competition. First, the acquiring firm may obtain the ability to influence the behavior of the target firm in ways that diminish competition. Second, the acquisition may diminish the acquiring firms' own incentives to compete. Third, the acquisition may allow the acquiring firm access to sensitive, nonpublic information from the target firm that could enable it to shift its own behavior in anticompetitive ways.

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