United States: DOJ and FTC Propose New Merger Guidelines

In brief

On 19 July, the Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") jointly released new draft merger guidelines for public comment. The guidelines explain how the DOJ and FTC (the "Agencies") will assess whether future mergers and acquisitions may violate U.S. antitrust law. These guidelines represent another step in the Biden Administration's effort to increase aggressive merger enforcement.

The proposed new guidelines signal the biggest shift in merger review in years and announce a stated preference for "for internal growth over acquisition". Indeed, the new guidelines would entangle many transactions that likely would not have raised competitive concerns under prior guidelines. For example, the guidelines lower the market concentration threshold that establishes a presumption of anticompetitive harm. They announce low thresholds for market shares in supply-chain markets that would trigger concern in vertical mergers. They also announce new guidelines for serial acquisitions, acquisitions by potential entrants, acquisitions of nascent competitors, and mergers involving platform markets. They require assessment of a merger's impact on labor markets. In short, they set forth a new methodology for analyzing acquisitions that would make it easier for the Agencies to challenge future deals.

Until 18 September, anyone may submit public comment on the proposed guidelines.

Key Takeaways

The draft merger guidelines set out thirteen principles to guide the Agencies when evaluating the competitive effects of proposed mergers. The guidelines reflect the Biden Administration's aggressive stance on competition, as announced in President Biden's July 2021 Executive Order on Promoting Competition in the American Economy, which specifically tasked the Agencies with reviewing and strengthening the merger guidelines. If finalized as written, the new guidelines would make it easier for the Agencies to undertake enforcement actions in an effort to extract concessions from merging parties or to justify efforts to block transactions in their entirety. Notable changes and priorities include:

- **Lower bars for market concentration levels and market shares that warrant Agency attention.** Changes are proposed to the Herfindahl-Hirschman Index (HHI) thresholds that the Agencies will use to apply presumptions of market concentration that warrant heightened scrutiny.
    - HHIs of 1,800, rather than 2,500 in prior guidelines, will cause a market to be labeled as "highly concentrated". This means more markets will face a structural presumption that a merger in those markets may substantially lessen competition.
    - Mergers that result in a market share over 30% will be seen as presenting "impermissible threat[s] of undue concentration regardless of the overall level of market concentration."

Contact Information

Mark Hamer
Partner
Washington, D.C.

Creighton Macy
Partner
Washington, D.C.

Brian Burke
Partner
Washington, D.C.

Nandu Machiraju
Partner
Washington, D.C.

Teisha Johnson
Partner
Washington, D.C.

John Fedele
Partner
Washington, D.C.

Daniel Graulich
Associate
Washington, D.C.

Heidi Smucker
Associate
Washington, D.C.

Halli Spraggins
Associate
Washington, D.C

Courtney DeVore
Associate
Washington, D.C

- **Greater skepticism of acquisitions of small and nascent companies by larger firms.** The guidelines are explicit that in concentrated markets, a merger that "eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition". The guidelines also introduce concepts that would target acquisitions by larger firms even in instances where concentration levels may be lower, such as when there is evidence that the company is a "serial" acquirer or there is evidence that the company could have entered the market without the acquisition.

- **Presumptions used for vertical mergers with over 50% market share in related markets.** The proposed guidelines include a commitment to undertake a "structural analysis of a supply chain" to determine whether vertical mergers may substantially lessen competition.

  - If the merged entity would control more than 50% of a related market, that alone would be sufficient for the Agencies to conclude that the merger may substantially lessen competition.
  - If the merged entity would control less than 50% of a related market, the Agencies will consider trends toward vertical integration, the nature and purpose of the merger, whether the relevant market is already concentrated, and whether the merger increases barriers to entry.

- **New focus on evaluating deals involving platform markets.** The Agencies are tasked with considering the "distinctive characteristics of multi-sided platforms". This analysis will be undertaken even when a merging firm's relationship with the platform "is not strictly horizontal or vertical."

- **Deal effects on labor markets to be scrutinized like products and services.** In a deviation from past merger guidelines, the proposed guidelines include a new explicit commitment to analyze the effects of deals on labor markets.

In Depth

Guidelines 1-8 outline several frameworks for assessing whether a merger may substantially lessen competition or create a monopoly.

1. **Mergers should not significantly increase concentration in markets that already are highly concentrated.**

In circumstances where a merger between competitors occurs in or could create a highly concentrated market, the Agencies will presume that the merger could substantially lessen competition based on the current or future market structure alone. Generally, the Agencies measure concentration levels using the HHI which enables the Agencies to assess pre- and post-merger concentration levels. The Agencies' previous 2010 Horizontal Merger Guidelines considered an HHI between 1,500 and 2,500 points to be "moderately concentrated" with markets in excess of 2,500 points to be "highly concentrated". The revised guidelines set the HHI threshold for a highly concentrated market at 1,800.

2. **Mergers should not eliminate substantial competition between firms.**

This guideline focuses on the extent to which firms engage in "head-to-head" competition and view one another as their closest competitor. In determining whether "substantial" competition exists between firms, the Agencies examine several factors: 1) strategic deliberations or decisions; 2) prior merger, entry, and exit events; 3) customer substitution; 4) impact of competitive actions on rivals; 5) impact of eliminating competition between the firms; and 5) additional evidence, tools, and metrics.

3. **Mergers should not increase the risk of coordination.**

The revised guidelines note that mergers may pave the way for increasing the risk of coordination between remaining firms in a given market. While this coordination would typically become an issue addressed by Section 1 of the Sherman Act, the revised guidelines suggest it is within the mandate of Section 7 of the Clayton Act to prevent market structures that could create conditions ripe for collusion—even in the absence of evidence showing prior anticompetitive collusion in the relevant market.

4. **Mergers should not eliminate a potential entrant in a concentrated market.**

The fourth guideline looks to eliminate new entrants as acquisition targets by incumbent players in concentrated markets. Through this principle, the Agencies demonstrate willingness to more closely examine a merger's likelihood of eliminating potential entrants and a stated preference for "internal growth over acquisition."

5. **Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.**

This guideline seeks to address situations where a merger gives one firm control over access to a product, service, or customers that its rivals use to compete. The Agencies will consider two main factors when assessing such situations: 1) the ability and incentive to weaken or exclude rivals, and 2) whether the deal involves access to rivals' competitively sensitive information.

6. **Vertical mergers should not create market structures that foreclose competition.**

This guideline creates a new process for evaluating vertical mergers. Describing the primary risk of vertical mergers as foreclosing competitors "from a segment of the market otherwise open to them," the Agencies plan to undertake structural analyses of supply chains to determine competitive effects of vertical mergers.

The Agencies will first analyze the market share of the related market that is controlled by the merged firm. If the merged firm possesses over 50% of the related market, the merger will be presumed to substantially lessen competition without the need for any additional evidence. Parties can provide rebuttal evidence.

If the merged firm would possess less than 50% of the related market, the Agencies consider several factors to determine the merger's effect on competition. These factors include: the trend towards vertical integration, the nature and purpose of the merger, whether the relevant market is already concentrated, and whether the merger increases barriers to entry.

7. **Mergers should not entrench or extend a dominant position.**

Here, the Agencies are looking to preserve the "possibility of eventual deconcentration" in already concentrated markets through a two-step inquiry. First, the Agencies will examine if there is direct evidence of a firm's dominant position, (*i.e.* the ability to raise prices, degrade quality, and otherwise exert pressure that would not be possible "but-for" the dominant position OR a firm holds at least 30% market share). Then, the Agencies will determine whether a deal reduces an industry's "competitive structure" or extends the dominant firm's position into new markets.

8. **Mergers should not further a trend toward concentration.**

This guideline targets markets or industries where the Agencies identify "a significant trend toward concentration". Evidence that a transaction furthers this "trend" can include steadily increasing HHI or other market characteristics, such as the exit of significant players. The Agencies will then determine if the merger would increase the existing level of concentration, which can be shown by a change in HHI greater than 200 or other facts showing an increase in the pace of concentration.

Guidelines 9-12 address common settings in which the Agencies apply the frameworks above.

9. **When a merger is part of a series of multiple acquisitions, the Agencies may examine the whole series.**

Under this principle, the Agencies are tracking whether firms have a demonstrable pattern of making smaller acquisitions "in the same or related business lines". In determining whether a single acquisition can result in anticompetitive harm, the Agencies may step back and evaluate whether the deal is part of a larger pattern that ultimately violates Section 7 of the Clayton Act. To determine if such a pattern exists, the Agencies will look at a firm's previous acquisitions, consummated or not. They may also consider testimonial and documentary evidence of a firm's current or future plans for expansion.

10. **When a merger involves a multi-sided platform, the Agencies examine competition between platforms, on a platform, or to displace a platform.**

The guideline defines "platforms" as providing "different products or services to two or more different groups … who may benefit from each other's participation". Furthermore, this guideline focuses on three avenues through which platforms may experience competitive harms:

- The Agencies cited several examples of mergers where they intend to protect competition between platforms, including deals where a platform operator acquires a competing platform or a platform participant and acquisitions of firms that offer services allowing users to participate across multiple platforms.
- To protect competition on a particular platform, the Agencies will scrutinize deals involving a platform operator and platform participant. Specifically, they will determine whether a transaction creates a conflict of interest that may incentivize a platform operator to give the acquired platform participant advantages over other participants.
- The Agencies will also protect competition that can displace a platform or its services. In contrast to the focus of the first two directives, this mandate is aimed at protecting firms offering non-platform services to meet the needs of platform participants that were historically addressed on a platform.

11. **When a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers or other sellers.**

In this guideline, the Agencies address competition in labor markets, as well as market concentration that creates dominant buyers.

For labor, the guideline declares that employers are "buyers of labor and workers are the sellers". Based on this context, the Agencies will analyze whether transactions may substantially lessen competition for employees, resulting in anticompetitive harms such as lower wages and stunted wage growth, deteriorating working conditions, or fewer available benefits. To determine whether a firm will establish dominance in a labor market through a deal, the Agencies will examine if it has the power to slash or freeze wages and utilize additional leverage in negotiations with their workforce, "without prompting workers to quit."

Additionally, the guideline highlights that where a deal creates a monopoly in an upstream market (*i.e.* transactions between competing buyers), this harm is not negated by any "purported benefits in a separate downstream product market". The Agencies specifically state that mergers can substantially lessen competition not just in seller markets, but also in buyer markets, or both, and the Clayton Act protections extend across all three instances.

12. **When an acquisition involves partial ownership or minority interests, the Agencies examine its impact on competition.**

This guideline addresses situations where less-than-full control of a firm is acquired. The agencies are concerned that an acquiring firm may still influence decision-making at the target firm in ways that may substantially lessen competition. To evaluate whether the acquisition substantially lessens competition, the Agencies will use three principles to guide their analysis:

- a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm;
- a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete;
- a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm.

Finally, Guideline 13 provides a catch-all to emphasize that the Agencies will examine transactions that raise competitive concerns not addressed by the other guidelines.

13. **Mergers should not otherwise substantially lessen competition or tend to create a monopoly.**

This guideline appears to operate as a catch-all for concerns otherwise not addressed in the guidelines. Examples of deals that would fall under this category are mergers that would enable firms to avoid regulatory constraints and mergers that would reduce an acquired firm's incentive or ability to compete.

Conclusion

It is important to stress that these remain proposed revisions at this time, and any public comment may result in some material changes. Nevertheless, the proposed changes do represent a significant change to the current (and still effective) version of the Horizontal Merger Guidelines, which were issued in 2010.

As a reminder, the Agencies' merger guidelines are not the law. Courts (not the Agencies), applying case precedents, ultimately decide whether a deal violates U.S. antitrust law. While the analytical approach described in prior versions of the Agencies' merger guidelines have been referenced by federal courts, it remains to be seen how these new revisions may be received in court.