WILMERHALE

FTC and DOJ Release New Merger Guidelines

DECEMBER 22, 2023

On December 18, 2023, the Federal Trade Commission and the Department of Justice jointly released their final Merger Guidelines. The Guidelines "identify the procedures and enforcement practices [the agencies] most often use to investigate whether mergers violate the antitrust laws."[1] The agencies issued the Guidelines after a nearly two-year process that included issuance of draft Guidelines on July 19, 2023, a subsequent public comment period, four public "listening sessions" and three workshops that the agencies hosted. *See our alert on the draft Guidelines here.*

In the end, the final Guidelines are broadly consistent with the July draft, with some (largely tonal) changes. Substantively, the most notable changes from the draft Guidelines include (i) removal of draft guideline 6, which would have established a structural presumption that a vertical merger is illegal based on market shares (market shares are now an element of a more holistic analysis of vertical mergers); and (ii) inclusion of a detailed section on analytical, economic and evidentiary tools in merger analysis in the body of the Guidelines (this was split across multiple annexes in the draft Guidelines).

The 2023 Guidelines reflect a significant change from the 2010 Horizontal Guidelines and the 2020 Vertical Guidelines. We discuss below key components of the Guidelines and some differences between the draft and final Guidelines.

Key Points From the Merger Guidelines

- ***Market Concentration***. Consistent with the draft, the final Guidelines significantly ***lower*** the market concentration thresholds at which mergers are presumed to harm competition and ***strengthen*** the force of that presumption. Under the Guidelines, a merger is presumptively unlawful if (i) the post-merger Herfindahl-Hirschman Index (HHI) is greater than 1,800 and increased by more than 100 points; ***or*** (ii) the merged firm would have

[1] U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines, 1 (2023) [hereinafter "Final Guidelines"], https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

more than a 30% market share and the merger increases the HHI by more than 100. This is a rebuttable presumption, but the agencies caution that "[t]he higher the concentration metrics over these thresholds, the greater the risk to competition suggested . . . and the stronger the evidence needed to rebut or disprove it."[2]

- ***Vertical Mergers***. The final Guidelines articulate harms that may occur when a merger combines firms that supply products that have a vertical relationship with each other, i.e., where one party makes an input that can be used in the other party's final product. The Guidelines focus on traditional input foreclosure (the most common type of vertical concern), increasing visibility into competitors' sensitive information, and non-overlap transactions that increase entry barriers. Under the Guidelines, the agencies consider four factors to assess the risk of harm to competition from input foreclosure: (i) whether there are substitutes for the products or services at issue; (ii) the significance of the product or service that may be foreclosed for rivals' competitiveness; (iii) the importance of potentially foreclosed rivals to competition in the relevant market; and (iv) the closeness of competition between the merged firm and rivals that depend on its products or services, since "[t]he merged firm's incentive to limit the dependent firms' access depends on how strongly it competes with them."[3]
- ***Potential Competition***. The final Guidelines devote substantial attention to the elimination of potential competition. This includes both "actual potential competition"—where one of the merging parties has actual plans to enter a market—and "perceived potential competition"—where current competitors are disciplined by a perception that one or more merging parties might enter. The perceived potential competition theory was at the heart of the FTC's recent unsuccessful challenge of Meta's acquisition of the virtual reality company Within. The Guidelines claim that "[i]n general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition."[4] This is consistent with agency leadership's public arguments that there may be competitive concerns where an acquirer chooses to "buy" rather than "build."
- ***Dominant Firms***. The final Guidelines emphasize that "mergers can violate the law when they entrench or extend a dominant position," either because one of the merging firms has a dominant position or the merger creates a dominant firm.[5] The term "dominant position" is widely used outside the United States but has no developed meaning in US antitrust law. The agencies will assess whether a merged firm will be in a "dominant position" based either on "direct evidence" or "market shares showing durable market power."[6] The agencies state that they will evaluate not just "short-term" effects of a merger involving a dominant firm but also the long-term impact of the merger on "industry dynamics"—

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[2] *Id.* at 6.
[3] *Id.* at 14–15.
[4] *Id.* at 11.
[5] *Id.* at 18.
[6] *Id.*

including investment, innovation, and terms that the merged firm and other industry participants will offer—even where the agencies "cannot predict specific reactions and responses with precision."[7]

The agencies explain that a merger can "entrench" a dominant position where it (i) increases switching costs, (ii) interferes with the use of competitive alternatives, (iii) deprives rivals of scale or network effects, or (iv) eliminates a nascent competitive threat.[8] Additionally, the Guidelines discuss a potential "conglomerate" concern that a "merger could enable the merged firm to extend a dominant position from one market into a related market," by, for example, "leverag[ing] its position by tying, bundling, conditioning, or otherwise linking sales of two products."[9] The FTC pursued a similar theory in its challenge to the proposed Amgen/Horizon transaction. *See our alert here*. This challenge resulted in a settlement in September, which among other things prohibited Amgen from offering bundled discounts or rebates conditioned on the customer buying drugs that Amgen had acquired from Horizon.[10] This is the first time agency Guidelines have directly stated a position regarding conglomerate effects since the 1968 Merger Guidelines.[11] The final Guidelines remove a provision in the draft that would have established a 30% market-share threshold for a finding of a dominant position. The Guidelines also expand the definition of "nascent threats" to a dominant firm to include companies that target a "narrow customer segment," provide services that "only partially overlap with those of the incumbent" or serve "an overlapping customer segment with distinct products or services."[12]

- ***Labor Markets***. The final Guidelines include extensive discussion of possible harm in labor markets resulting from combinations of employers that compete for talent. The Guidelines identify lower wages or slower wage growth, worse working conditions or benefits, or other decreases in workplace quality as potential anticompetitive effects from such mergers.[13]
- ***Multi-Sided Platforms***. The final Guidelines devote an entire section to assessing mergers involving multi-sided platforms. They say that the agencies will "consider competition *between* platforms, competition *on* a platform, and competition to *displace* the

[7] *Id*. at 18–19.
[8] *Id.* at 19–20.
[9] *Id*. at 21.
[10] Press Release, FTC, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition
[11] U.S. Dep't of Just. & Fed. Trade Comm'n, 1968 Merger Guidelines (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.
[12] Final Guidelines at 20.
[13] *Id*. at 26–27.

platform" and assess various ways in which a merger involving one or more platform suppliers could harm competition.[14]

- ***Serial Acquisitions***. The final Guidelines explain that a firm may violate Section 7 of the Clayton Act through a series of acquisitions of smaller firms in the same or related sectors. In a change from the draft Guidelines, the final Guidelines removed a statement that a series of acquisitions may violate Section 7 "even if no single acquisition on its own would risk substantially lessening competition."[15] The Guidelines say that the agencies will focus on the cumulative effect of serial acquisitions and assess both consummated and proposed acquisitions by the acquiring firm and the firm's overall strategy regarding those acquisitions.[16] This portion of the draft is consistent with recent speeches by agency leadership that have emphasized employing Section 7 to block mergers that are part of an incipient trend toward industry concentration,[17] and with an FTC statement regarding a merger challenge where it said it will "continue to scrutinize and challenge serial acquisitions, roll-ups, and other stealth consolidation schemes."[18]
- ***Partial Ownership and Minority Investments***. Like the earlier draft, the final Guidelines articulate ways in which acquisitions of partial ownership and minority investments could harm competition—principally by (i) giving the acquirer the ability to influence a rival's competitive behavior through board representation or other influence, (ii) reducing the incentives for a firm that owns an interest in a competitor to compete robustly against the competitor because the firm is entitled to share in the competitor's profits, or (iii) giving the acquiring firm access to competitively sensitive information from the target, which could reduce the robustness of competition between the two firms.
- ***Factors in Defining Markets***. The final Guidelines list four tools on which the agencies may rely in defining relevant antitrust markets: (i) direct evidence of substantial competition between the merging parties, (ii) direct evidence of market power, (iii) "practical indicia" of a market as discussed in *Brown Shoe* and (iv) the hypothetical monopolist test.[19]

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[14] *Id*. at 23–26.

[15] U.S. Dep't of Just. & Fed. Trade Comm'n, Draft Merger Guidelines, 22 (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

[16] Final Guidelines at 23.

[17] Lina M. Khan, FTC Chair, Remarks at Fordham Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf; Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Keynote Speech at Georgetown Antitrust Law Symposium (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

[18] Press Release, FTC, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[19] Final Guidelines at 40–41.

What Is Next?

The new Merger Guidelines largely reflect the approach the agencies, under their current leadership, have been taking to merger analysis. But they will also guide the agencies' approach to future merger reviews—including whether to open a formal investigation, issue a second request or challenge a merger. This will have substantial implications for businesses contemplating transactions. It is less clear, however, whether courts will follow this guidance. Agency guidelines are not legally binding and courts have generally deferred to them only to the extent that they are persuasive. It remains to be seen, however, how persuasive these final Guidelines will be compared to previous guidelines. Unlike previous merger guidelines, the new Guidelines do not reflect bipartisan consensus about modern merger analysis and are arguably more of a statement about the enforcement ideology of current leadership than they are a framework for analysis applying well-accepted principles to specific mergers. Additionally, much of the final Guidelines are rooted in caselaw, some of which is dated or has been called into question by more recent court decisions, and courts generally do not defer to agencies when assessing judicial precedent.

At the FTC, the new Merger Guidelines were approved by a 3–0 vote of only Democratic FTC Commissioners (there currently are no Republican Commissioners). There are real questions about whether the Guidelines would survive a change to a Republican FTC majority or new DOJ leadership under a Republican administration, which could result in very different approaches to merger enforcement.

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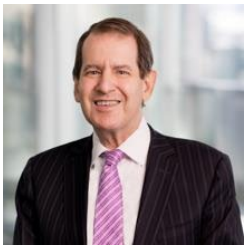

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