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Alerts & Publications

US Antitrust Agencies Issue Final Merger Guidelines, Signal Continued Robust Enforcement

December 20, 2023

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On December 18, 2023, the FTC and DOJ released final Merger Guidelines (the "Guidelines")[1]. The FTC and DOJ periodically issue revised merger guidelines to update the public on the Agencies' approach to reviewing proposed mergers. The Guidelines follow on the heels of a draft issued earlier this year. After a public comment period that yielded more than 30,000 comments, the final version reflects several changes and clarifications, but largely retains the same substantive approach as the draft version.

The Guidelines reflect the Agencies' capacious view that more mergers than prior conventional antitrust wisdom taught may reduce competition and thus could be subject to challenge. They also place greater emphasis on market structure, expanding the use of presumptions that mergers meeting certain concentration or market share thresholds are anticompetitive. Significant changes in the Guidelines include:

- For **horizontal mergers** (mergers between actual or potential competitors), the Guidelines lower the market concentration threshold warranting presumptions of anticompetitive effects. Additionally, any merger resulting in a firm with a 30 percent market share will almost always trigger a presumption. This means the Agencies likely will presume many more mergers to be anticompetitive than they would have under the previous Guidelines' thresholds. Any merger that eliminates "substantial competition between firms" or increases "the risk of coordination" is subject to challenge, regardless of market concentration.

- For mergers between firms that compete in **labor markets**, competitive concerns may arise at even *lower* concentrations.

- For **vertical mergers** (mergers between firms at different levels of the supply chain), the Guidelines note that the Agencies will infer, absent countervailing evidence, that a merged firm that controls at least a 50 percent share of a product or service that its rivals use will have the ability to foreclose rivals. The Guidelines also posit that the

mere *perceived threat* of the merged firm foreclosing rivals or gaining access to competitively sensitive information may deter rivals' investment and thereby harm competition.

- The Guidelines are particularly tough on "**dominant firms**." The Agencies identify dominant firms "based on direct evidence or market shares showing durable market power." *Any* merger by a dominant firm is subject to challenge if the Agencies determine it may increase barriers to entry or switching costs, deprive rivals of scale, eliminate nascent competition, or otherwise "entrench [the firm's] dominant position."

- The Agencies will scrutinize **patterns of acquisitions**, including both industry-wide trends towards consolidation and serial acquisitions by a single firm. **Minority investments** are likewise subject to enhanced scrutiny.

The Guidelines do not have the force of law. While many courts have found past Merger Guidelines to be persuasive authority and have cited them in their decisions, it remains to be seen whether courts will find the more aggressive Guidelines to be persuasive, or even whether subsequent administrations retain and follow these Guidelines. At the very least, the Guidelines reflect the Agencies' active merger enforcement stance under the current administration, and possibly portend even more in-depth merger investigations and court challenges going forward.

Key Changes to Horizontal Merger Enforcement

Guidelines 1 through 4 update the Agencies' approach to horizontal mergers. These Guidelines focus on the same concepts as the 2010 Horizontal Merger Guidelines and recent caselaw—market concentration, unilateral and coordinated effects,[2] and potential competition—but significantly expand the horizontal transactions potentially subject to challenge.

Guideline 1 – Market Concentration

The new Guidelines include a structural presumption that mergers that significantly increase concentration in highly concentrated markets may violate the antitrust laws. There are two key changes from the prior Guidelines that reflect the Agencies' more aggressive enforcement approach and purport to lower the bar for establishing a presumption that a transaction violates Section 7 of the Clayton Act:

- **The thresholds for triggering the structural presumption are significantly lower.** The Agencies will presume a merger to be illegal if it results in an increase in the Herfindahl-Hirschman Index (HHI)[3] of 100 or more and *either* (1) a post-merger market HHI greater than 1,800[4] or (2) post-merger market share greater than 30 percent for the merged firm. To illustrate the practical implications: the first threshold (1,800 HHI) sweeps in practically any merger involving a market with six or fewer firms.[5] Under the second prong,

any merger that would result in a firm with a 30 percent market share will trigger the presumption unless one of the firms is so small that it has less than 2 percent market share.[6] When these thresholds are exceeded, the Guidelines assert that the "merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger."

- **No safe harbor for mergers in unconcentrated markets.** Unlike the 2010 Horizontal Merger Guidelines, which indicated that any merger resulting in a market with an HHI below 1500 or an increase in HHI of less than 100 was "unlikely to have adverse competitive effects and ordinarily require[d] no further analysis," the new Guidelines do not exempt *any* horizontal mergers from scrutiny. The practical implication is that *any* horizontal merger that eliminates substantial competition (Guideline 2) or increases risk of coordination (Guideline 3) may be subject to challenge, even if the merger occurs in an unconcentrated market.

Guideline 2 – "Substantial Competition" Between Merging Firms (Unilateral Effects)

Any merger where the "evidence demonstrates substantial competition between the merging parties prior to the merger" may be challenged. The Agencies characterize this as an approach that may be used to identify potentially anticompetitive mergers where market shares are difficult to measure or "understate the competitive significance of the merging parties to one another." The Guidelines outline several categories of evidence that may indicate substantial competition between merging firms, including company documents or economic evidence suggesting customers view the companies' products as substitutes or the two companies took each other's conduct into account when making business decisions.

Guideline 3 – Risk of Coordination (Coordinated Effects)

The new Guidelines significantly lower the bar for challenging mergers on the theory that they increase the risk of coordination. The Agencies identify three "primary factors," ***any one*** of which is sufficient to conclude the post-merger market is susceptible to coordination:

- **Highly concentrated market:** The Agencies presume that any merger that meets the threshold for a highly concentrated market also meaningfully increases the risk of coordination.

- **Prior actual or attempted attempts to coordinate:** The Agencies will look to evidence of prior express or tacit coordination, including failed attempts at coordination.

- **Elimination of a maverick:** Any merger that eliminates or changes the incentives of a maverick—defined as a firm with "a disruptive

presence in the market—increases the market's susceptibility to coordination.

Even in the absence of any of the "primary factors," the Agencies may find an increased risk of coordination based on a number of "secondary factors," such as market observability, rivals' ability to respond quickly to each other's pricing moves, and customers that are likely to put up with a price increase without reducing their purchases.

Guideline 4 – Potential Competition

Guideline 4 outlines the two theories the Agencies may pursue when challenging acquisitions involving a potential entrant:

- Under the "**actual potential competition**" theory, the Agencies may challenge a merger based on the loss of the procompetitive effects that *could have* been realized upon entry of the potential entrant. The Agencies may proceed under this theory if they determine that (1) it is reasonably probable that one or both of the merging firms would enter the relevant market, and (2) the entry likely would deconcentrate the market or offer other significant procompetitive benefits.

- Under the "**perceived potential competition"** theory, the Agencies may challenge a merger based on the loss of a *perceived* competitive threat that has *already* spurred greater competition, regardless of whether the potential entrant *actually* would have entered the market. The Agencies may proceed under this theory if they determine that (1) market participants could reasonably consider a firm to be a potential entrant, and (2) the potential entrant likely influences existing market participants' competitive actions.

While potential competition theories have long been a part of antitrust doctrine, the Agencies have not had much success bringing merger challenges based on these theories. Most recently, the FTC lost its challenge to Meta's acquisition of VR fitness app maker Within, where the FTC argued the prospect of Meta launching its own VR fitness app (instead of acquiring Within) would have increased competition in the VR dedicated fitness app market. *See Fed. Trade Comm'n v. Meta Platforms Inc.*, No. 5:22-CV-04325, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023).

Key Changes to Vertical Merger Enforcement (Guideline 5)

For vertical mergers and any other transactions involving access to products, services, or routes to market that rivals use to compete, the Agencies apply an analytical framework that focuses both on the relevant market where the merged firm competes with rivals, and the related product, service, or route to market that rivals use to compete in the relevant market.

Consistent with the 2020 Vertical Merger Guidelines, the new Guidelines focus on two inquiries. The first is whether the merger creates a firm that has

both the ability and the incentive to use its control over the related product, service, or route to market to make it more difficult for rivals to compete—for example, by denying rivals access to a key input for production, raising rivals' costs by increasing the price of inputs, or foreclosing rivals' access to key customers. The second is whether the merger results in a firm gaining access to rivals' competitively sensitive information—for example, one seller gaining access to information about a rival seller's pricing by acquiring a buyer thar regularly negotiates prices with the rival seller.

The new Guidelines also introduce a **new theory of harm**: the mere threat that the merged firm will foreclose rivals or gain access to rivals' proprietary information may deter rivals' investment and therefore make the market less competitive.[7]

The new Guidelines depart from the 2020 Vertical Merger Guidelines in at least three other ways:

- **An inference that, absent countervailing evidence, a merged firm that controls over 50 percent of a market for a related product that its rivals use to compete has the ability to weaken or exclude rivals.** No previous Guidelines contained a structural presumption for vertical mergers, and no modern court has ever recognized one. The draft Guidelines contained an even stronger presumption that a foreclosure share above 50 percent was sufficient to conclude that a merger was anticompetitive. The final version retains the 50 percent threshold, but only applies it to the question of whether the merged firm has the *ability* to exclude rivals, leaving open the question of whether it has the *incentive* to do so.

- **Deemphasizing that that vertical mergers are frequently pro-competitive and have positive effects.** The 2020 Vertical Merger Guidelines highlighted that vertical mergers may lower prices by eliminating double marginalization—i.e., a vertically integrated firm no longer has to pay a mark-up on its own inputs—and indicated that the Agencies would take this pro-competitive benefit into account in assessing the merger's net effect. The new Guidelines focus much less on pro-competitive effects: the draft version makes no mention of elimination of double marginalization and the final version relegates the concept to a single footnote and treats it as "rebuttal evidence" rather than as part of the Agencies' assessment of the merger's overall effect.

- **Discounting and deemphasizing the types of evidence that courts have relied on in rejecting the Agencies' recent vertical merger challenges.** As Guideline 5 explains, the Agencies will give little weight to claims that a firm will not foreclose rivals due to risk of reputational harm, commitments to avoid harming rivals, or the claimed intent of the companies' executives. All of these types of

evidence have played a role in the Agencies' three recent vertical merger district court losses.[8]

Key Other Potential Sources of Harm to Competition

Guideline 6 – Entrenching or Extending a Dominant Position

This Guideline provides new insight into how the Agencies will evaluate mergers involving so-called dominant firms. While the draft Guidelines concluded that a firm may be dominant if it has a 30 percent market share (or if there is direct evidence of its power to set prices, reduce quality, or obtain favorable terms), the final version of Guideline 6 abandons the 30 percent threshold.

According to the final version, the Agencies will assess whether a firm has a dominant position "based on direct evidence or market shares showing durable market power." If a merger involves a dominant firm, the Agencies will evaluate whether the merger will entrench the dominant firm's position—such as by making it harder for competitors to enter a market or making it harder for customers to switch to other suppliers—or extend the dominant firm's position into a related market—such as by tying or bundling its products together.

Guideline 6 also includes an extensive discussion, not present in the draft Guidelines, of types of "nascent competitive threats" that may be eliminated if acquired by dominant firms, including the nascent competition from "firms with niche or only partially overlapping products or customers" that "can grow into longer-term threats to a dominant firm."

Guidelines 7 and 8 – Increased Scrutiny for Industries Trending Towards Consolidation and Firms Pursuing Serial Acquisitions

Patterns of acquisitions, which can reflect either an industry-wide trend towards consolidation or a single firm's strategy of serial acquisitions, are subject to enhanced scrutiny under the new Guidelines.

Compared to the draft version, the Guidelines include a more in-depth discussion of trends toward consolidation. In particular, the Agencies identify several potential sources of consolidation that may substantially lessen competition: trends toward horizontal consolidation or vertical integration; an "arms race for bargaining leverage"; or multiple mergers occurring at once or in quick succession.

Under Guideline 8, when a merger is part of a series of acquisitions, the Agencies may examine the series as a whole, looking at both the firm's history and its strategic plans.

Investment firms should take particular note of these changes, which are one manifestation of the Agencies' focus on this sector.

Guideline 9 – Platform Mergers

Multi-sided platforms are businesses that connect two or more distinct groups of users—for example, marketplaces that connect buyers and sellers, or operating systems that connect hardware manufacturers, software makers, and users. Other Guidelines apply to platform and non-platform businesses alike, but the Agencies identify several concerns specific to platform mergers in Guideline 9:

- **Competition on a platform:** The Agencies will examine whether a merger between a platform operator and a platform participant may result in a **conflict of interest**, which may arise if the platform operator has an incentive to operate the platform in a way that favors its own products over the products of other participants.

- **Competition between platforms:** The Agencies will scrutinize both mergers between platforms (horizontal mergers that may eliminate competition between rival platforms) and mergers between a platform operator and a platform participant or platform input provider (vertical mergers that may make it more difficult for rival platforms to compete if the merged firm forecloses rival platforms' access to key participants or inputs). The Agencies will pay particular attention to mergers that may diminish users' ability to participate in multiple platforms, or hinder a rival platform's ability to generate the network effects[9] necessary for successful platform operation.

- **Competition to displace a platform:** The Agencies also suggest that platforms may compete with non-platform businesses for some or all services offered by the platform, and the Agencies' analysis will consider the effect of the merger on the ability of non-platform businesses to offer viable alternatives.

Guideline 10 – Mergers Involving Competing Buyers and Potential Effects in Labor Markets

Guideline 10 addresses mergers that involve competing buyers, explaining that the Agencies assess the effects of a merger among buyers using tools that are analogous to those used to analyze the effects of a merger among sellers. Guideline 10's focus on labor markets as key examples of buyer markets reflects the Agencies' recent priority of protecting competition in labor markets.

Notably, the Agencies assert that competition concerns may arise at *lower* concentrations in buyer markets than they do in seller markets, because labor markets frequently have characteristics that exacerbate the competitive effects of a merger between competing employers, such as the high cost of switching jobs.

Lastly, Guideline 10 rejects the idea that a merger can be justified if it *increases* competition in one side of a market despite *decreasing* competition in another side of the market. In other words, the Agencies appear ready to

reject the argument that *consumers* (in the sell-side market) will benefit from the merger, even if *workers* (in the buy-side market) may be harmed by the merger.

Guideline 11 – Acquisitions Involving Partial Ownership or Minority Interests

Under Guideline 11, the Agencies may also scrutinize acquisitions that result in less-than-full control of a firm, but still substantially lessen competition because they may allow the investor to exert influence over the firm, lower the incentive to compete, or give the investor access to competitively sensitive information.

For the Agencies, these concerns arise where there is *cross-ownership* (an acquiring firm “holding a non-controlling interest in a competitor”) and *common ownership* (“individual investors hold[ing] non-controlling interests in firms that have a competitive relationship”).

According to Guideline 11, these types of transactions may lessen competition by “softening firms’ incentive to compete, even absent any specific anticompetitive act or intent.”

Investment firms should take particular note of Guideline 11. While a similar discussion of minority investments appears in the 2010 Horizontal Merger Guidelines, the Agencies have made clear that they are closely studying these issues following recent academic scholarship examining the competitive implications of common ownership.

Agencies May Pursue Any Lessening of Competition, Regardless of the Mechanism

Although no longer listed as a separate guideline, the document continues to include catch-all language noting that mergers may lessen competition through a variety of other mechanisms. For example, a merger may enable a firm to avoid a regulatory constraint or exploit a unique procurement process. Under such circumstances, the Agencies will undertake a fact-specific inquiry to identify any lessening of competition, whatever the mechanism.

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Beyond the individual guidelines, the Guidelines’ approach to market definition and rebuttal evidence underscores the Agencies’ aggressive stance on merger enforcement.

Market Definition

The Guidelines indicate that the Agencies may choose to define relevant markets very narrowly, asserting that even “significant substitutes” may be outside the relevant market if there is “effective competition” among a smaller group of products.

While the Guidelines retain the traditional Hypothetical Monopolist Test (which delineates a product or service market based on the substitutes (if any) buyers would switch to in response to a small but significant and non-transitory increase in price), they expand it to encompass non-price effects. Instead of just focusing on whether a hypothetical monopolist controlling all the products in a candidate market could profitably raise price, the new Test assesses whether the hypothetical monopolist could "worsen[] terms along any dimension of competition," including "quality, service, capacity investment, choice of product variety or features, or innovative effort." It also applies in the bargaining context, where a hypothetical monopolist would have a stronger bargaining position and would likely extract higher prices during negotiations, or in an auction setting, where bids by a hypothetical monopolist would cause purchasers of its products to pay higher prices.

The new Guidelines provide the Agencies with even more flexibility by claiming that direct evidence of substantial competition between merging parties or exercise of market power can obviate the need for precise market definition analysis altogether (stating that the Agencies may block a merger in these circumstances "even if the metes and bounds of the market are only broadly characterized"). Given that market definition is a key issue in many market challenges, the added flexibility in defining a market gives the Agencies even more discretion to challenge a wide range of mergers.

Rebuttal Evidence

Overall, the Guidelines offer more clarity to merging parties seeking to rebut an Agency presumption that a transaction lessens competition. The Guidelines also outline several categories of rebuttal evidence that merging parties often put forth to show that no substantial lessening of competition will occur as a result of the merger. These include: (1) the failing firm defense; (2) the entry of other competitors into the market following the merger; and (3) procompetitive efficiencies that would be achieved as a result of the merger. Generally speaking, the Guidelines lay out narrow circumstances in which they will give weight to this rebuttal evidence. In several instances, the circumstances in which the Agencies will consider this evidence are narrower than in previous versions of the Guidelines.

The Road Ahead: Anticipated Effects of the Final Guidelines

The Guidelines serve as an important statement of how the Agencies intend to analyze mergers and enforce the law. Indeed, the Agencies have already put many of these principles into effect in their recent enforcement actions.

Moreover, the Guidelines' effect should be assessed together with the Agencies' proposed changes to rules that would broaden the information called for in Hart-Scott-Rodino ("HSR") filings. If implemented, these HSR rule changes would give the Agencies immediate access to information and documents that may speak to the principles articulated in the new Guidelines.

But the ultimate impact of these Guidelines remains unsettled. Although the Guidelines do not have the force of law, a number of courts have cited

previous iterations of the Guidelines as persuasive authority in Agency merger challenges. Whether the new Guidelines—which mark a departure from those prior Guidelines in important ways—will have the same impact on courts is an open question.

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Consistently ranked among the top global antitrust practices, O'Melveny's Antitrust & Competition team is well-positioned to help companies navigate the complex strategic questions posed by the Agencies' aggressive enforcement posture. If you have any specific questions, please reach out to a member of the team identified here.

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[1] The Guidelines replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines (which both Agencies have previously withdrawn).

[2] Unilateral effects refer to a firm's ability to raise prices unilaterally as a result of a merger; coordinated effects refer to firms gaining power to raise price because the transaction makes it easier for firms to coordinate.

[3] The HHI is a longstanding tool for assessing market concentration and consists of a score from 0 to 10,000 calculated as the sum of the squares of the percentage market shares of each competing firm.

[4] Under the 2010 Horizontal Merger Guidelines, the presumption was triggered if the merger resulted in an increase in HHI of over 200 and a post-merger HHI of over 2,500.

[5] The lowest possible HHI for a post-merger market with five firms is 2,000 ($5 \times 20^2 = 2{,}000$).

[6] For example, the change in HHI due to a merger between a firm with 28 percent market share and a firm with 2 percent market share is 112 ($30^2 - 28^2 - 2^2 = 112$).

[7] DOJ relied on this theory in its 2022 lawsuit against the UnitedHealth – Change merger, but the court dismissed the theory as overly speculative. *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 141 (D.D.C. 2022).

[8] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022); *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

[9] Network effects make a platform more valuable to participants when there are more other participants using the platform.

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