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Axinn Antitrust Insight: With Final 2023 Merger Guidelines, DOJ and FTC Formalize Aggressive Merger Enforcement Policy

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PRACTICE AREAS

Antitrust

What You Need to Know

- The final 2023 Merger Guidelines are structured around 11 guidelines outlining the Agencies' approach to merger enforcement.
- Together with the massive changes to the HSR form proposed in June 2023, the Guidelines herald longer, tougher merger investigations based on expansive theories of harm.
- The 2023 Merger Guidelines reflect the Biden Administration's general hostility toward mergers, but it remains to be seen whether the Guidelines will be embraced by the courts or maintained in their current form by future administrations.

The U.S. Department of Justice, Antitrust Division (DOJ), and the Federal Trade Commission (FTC) (and together, the "Agencies") released the final version of the 2023 Merger Guidelines ("2023 Merger Guidelines") on December 18, 2023. The 2023 Merger Guidelines aim to "provide transparency into the Agencies' decision-making process" by describing the "factors and frameworks" the Agencies use in reviewing proposed mergers. While the Agencies made some notable revisions to the final 2023 Merger Guidelines in response to public comments on the July 2023 Draft Merger Guidelines ("2023 Draft Guidelines"), the key takeaways remain largely the same.

As we noted in our July 2023 Insight, the 2023 Merger Guidelines are deeply skeptical of mergers and signal continued aggressive merger enforcement, consistent with the Agencies' rhetoric and actions in the first three years of the Biden Administration. In a number of areas, the 2023 Merger Guidelines represent a significant break with recent past practice – including the now-replaced 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines – and the modern economics-driven consensus of the past several decades.

While Agency guidelines are not legally binding, prior versions of the Merger Guidelines have been cited by courts as persuasive authority reflecting widely accepted views on key antitrust principles. It is an open question, however, whether the 2023 Merger Guidelines will be embraced by the courts (especially today's Supreme Court) or maintained in their current form by future administrations. Nonetheless, the 2023 Merger Guidelines remain an important document for merging parties and practitioners to understand the Agencies' priorities and likely investigative paths under the Biden Administration.

The 2023 Merger Guidelines are structured around 11 guidelines that lay out the principles and theories the Agencies follow in merger enforcement:

- Four address potential concerns in horizontal mergers (*Guidelines 1-4*);
- Two address potential concerns in vertical and other non-horizontal mergers (*Guidelines 5-6*); and
- Five explain how the Agencies apply the Guidelines' analytical frameworks to several specific settings relating to transactions that involve firms with a so-called "dominant position," a "trend toward consolidation," a "series of multiple acquisitions," firms characterized as a "multi-sided platform," potential labor market impacts, and partial ownership or minority interests (*Guidelines 7-11*).

Together with the massive changes to the HSR form proposed in June 2023, the 2023 Merger Guidelines herald longer, tougher merger investigations based on expansive theories of harm and appear aimed at discouraging merger activity – in line with FTC Chair Lina Khan's assertion in a November 2023 letter to Congress that "deterrence" of deals the Agencies view as unlawful "is a real mark of success."

Summary of Key Takeaways

- **Agencies focus heavily on structural presumptions of harm and lower the standards for finding mergers presumptively unlawful.**
  - *In Guideline 1*, the Agencies adopt two thresholds for deeming a horizontal merger presumptively unlawful on the basis of market structure alone: (1) post-merger, the market concentration ratio known as the Herfindahl-Hirschman Index (HHI) is greater than 1,800 and the change in HHI is greater

than 100 points; or (2) post-merger, the market share is greater than 30% *and* the change in HHI is greater than 100 points. (HHI is calculated as the sum of the squares of all competitors' market shares.)

- The first represents a 700-point decrease from the HHI threshold in the 2010 Horizontal Merger Guidelines (threshold of 2500), returning to the level introduced in the 1982 Guidelines. As a practical matter, this means the Agencies would treat as presumptively unlawful a horizontal merger of two firms in a relevant market with six (or fewer) companies with roughly similar market shares.
- The second, based on the Supreme Court's *United States v. Philadelphia National Bank* decision (374 U.S. 321 (1963)), is a "new" structural presumption based on post-merger combined market share (as opposed to post-merger HHI) that did not appear in earlier guidelines. For example, this means the Agencies would treat as presumptively unlawful a horizontal merger of firms with market shares as low as 28% and 2.1% in a relevant market.

- In the final 2023 Merger Guidelines, the Agencies make a number of clarifications relative to the 2023 Draft Guidelines to indicate that the structural presumption (and any other evidence establishing a prima facie case) is subject to rebuttal evidence offered by the merging parties, which the Agencies analyze "to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly."
  - At the same time, however, the Agencies express deep skepticism toward this rebuttal evidence and impose very strict pro-enforcement standards on merging parties' proffered evidence (see Section 3 of 2023 Merger Guidelines). In particular, the Agencies appear to be deeply skeptical of the significant benefits that mergers can have through increased efficiency, enhanced R&D investment and capabilities, and expanded output and innovation. Under modern antitrust principles, this sort of rebuttal evidence is critical to the proper assessment of a merger's competitive effects.

- **Building on recent merger challenges, Agencies continue to intensify their scrutiny of vertical and non-horizontal mergers.**
  - Vertical and Non-Horizontal Theories. In *Guideline 5*, the Agencies set forth a framework for analyzing whether a merger may give the merged firm the ability and incentive to adopt a range of so-called "foreclosure" strategies – i.e., actions that "limit access to products or services that its rivals use to compete" (such products or services referred to by the shorthand "related product").
    - According to the Agencies (which cite the FTC's recent Fifth Circuit victory in *Illumina/Grail* on this point), the key question is whether the merged firm could "deny rivals access altogether" to the related product, or engage in strategies short of total foreclosure, such as degrading the quality of the product, limiting interoperability, limiting routes to market, or impeding "product features, improvements, or information relevant to making efficient use of the product."
    - While the final 2023 Merger Guidelines soften the explicit structural presumption of illegality from the 2023 Draft Guidelines where the merged firm has greater than 50% share in the "related product," the Agencies retained their structuralist approach in a footnote asserting they "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."
    - As in the 2023 Draft Guidelines, in the final version, the Agencies assert they are unlikely to credit a range of evidence that merging parties (and courts) frequently present to rebut the likelihood of foreclosure post-merger, including the lack of internal documents suggesting the parties' plans to engage in a foreclosure strategy, "speculative claims about reputational harms," "claims or commitments to protect or otherwise avoid weakening the merged firm's rivals that do not align with the firm's incentives," or "the claimed intent of the merging companies or their executives." This position stands in stark contrast with several court decisions relying on such evidence to find no likely harm to competition in vertical merger cases.

- Conglomerate Theories. In *Guideline 6*, relying on the 1967 Supreme Court case *FTC v. Procter & Gamble Co.* (386 U.S. 568), the Agencies introduce a European-style concept of "dominance" and seek to reinvigorate decades-old theories that would impose increased scrutiny on acquisitions by "dominant firms" that the Agencies assert "would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process."
    - The final 2023 Merger Guidelines remove language from the 2023 Draft Guidelines suggesting that a firm's "dominant" position can be established with a market share of 30%. In its place, the Agencies will assess a firm's "dominant" position based on "direct evidence or market shares showing durable market power" – an ambiguous standard that leaves unclear what firms may be subject to scrutiny by the Agencies under this expansive theory.
    - In the 2023 Merger Guidelines, the Agencies also identify as potentially unlawful a dominant firm's acquisition of a "nascent competitive threat," a firm that "does not substantially constrain the acquiring firm at the time of the merger but has the potential to grow into a more significant rival in the future," which could include firms that may facilitate so-called "ecosystem competition."
    - These types of "conglomerate" merger theories had been discredited across several prior administrations as unsupported by economics.

- **Agencies adopt an expansive set of theories and principles for challenging mergers and reflect the Biden Administration's overall hostility to M&A activity.**
    - Potential Competition. In *Guideline 4*, the Agencies establish a framework for challenging mergers based on an expansive interpretation of "actual potential competition" and "perceived potential competition" theories.

- In particular, the framework in the 2023 Merger Guidelines makes it easier for the Agencies to (i) claim that the acquired potential entrant had a "reasonable probability" of entering a highly concentrated relevant market, including through evidence that the company "considered organic entry as an alternative to merging," and (ii) conclude that this potential entry would be "competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*."
- These new standards could have significant implications for companies undertaking commonplace "build vs. buy" analysis when assessing future product strategy.

- Trend Toward Consolidation. In *Guideline 7*, the Agencies indicate they will examine a "trend toward concentration" and "trend toward vertical integration" as an "important consideration" in assessing potential harm from horizontal and non-horizontal mergers – which appears consistent with the Biden Administration's overall policy position against perceived increased consolidation across the economy.
- Series of Acquisitions. Under *Guideline 8*, the Agencies intend to scrutinize the merging firms' prior acquisition history, including "any overall strategic approach to serial acquisitions," to determine whether "an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines" is unlawful.
- Multi-Sided Platform. Under *Guideline 9*, the Agencies outline various factors suggesting increased scrutiny of mergers involving "multi-sided platform" firms, which the Agencies assert "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." For example, the Agencies may seek to block mergers by "dominant platforms" attempting to "systematically acquir[e] firms competing with one or more sides of a multi-sided platform while they are in their infancy" and mergers by platform firms that may create "conflicts of interest" where the merged firm has "an incentive to give its own products and services an

advantage over other participants competing on the platform."

- Labor Market Effects. Under *Guideline 10*, the Agencies intend to continue their close scrutiny of mergers for potential effects on labor-market competition, including competition "to attract contributions from a wide variety of workers, creators, suppliers, and service providers."
- Partial Ownership / Minority Interests. Under *Guideline 11*, the Agencies reinforce that "partial acquisitions that do not result in control may nevertheless present significant competitive concerns." While this Guideline is similar in a number of ways to the 2010 Guidelines, it also appears to reflect a continuation of the Agencies' current position that private equity investments should be subject to increased antitrust scrutiny.

If you have any questions about the 2023 Merger Guidelines or would like to discuss any other issue raised in this Insight, please contact any of Axinn's antitrust partners.