Clients&FriendsMemo

FTC and DOJ Announce Project to Develop Progressive Merger Guidelines

January 19, 2022

On January 18, 2022, the Federal Trade Commission ("FTC") and the Justice Department's Antitrust Division ("DOJ") (together, the "Agencies") jointly announced plans to "review," "modernize" and "strengthen" horizontal merger enforcement guidelines ("Guidelines"), which may lead to stricter scrutiny of certain deals in the future.

In the press conference announcing the review project, the Agencies argued that many industries have become more concentrated and less competitive in the decade since the Guidelines were last revised. According to the Agencies, the Guidelines should be updated to incorporate new economic learning from that decade. Updated Guidelines likely would solidify emerging progressive standards of merger review. Most notably, revised Guidelines likely would devalue the longstanding consumer welfare standard in favor of more protection for workers and suppliers of the merging firms (under the rubric of scrutinizing "monopsony power") in addition to adding a tech-industry-specific analytical section.

The Agencies have issued a Request for Information on Merger Enforcement, seeking public input on "ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets." Although both emphasized that all of the issues in the broad call for comment are important, FTC Chair Lina M. Khan and Assistant Attorney General Jonathan Kanter each highlighted particular areas of interest for their respective agencies.

Chair Khan spotlighted first whether the Guidelines are "adequately attentive to the range of business strategies and incentives that might drive acquisitions" when analyzing "whether a merger may 'tend to create a monopoly,' including in its incipiency, or whether there is a 'trend towards concentration' in the industry." Second, she asked if the Guidelines adequately assess whether mergers may lessen competition in labor markets and thereby harm workers. Chair Khan questioned whether the Guidelines should consider "factors beyond wages, salaries, and financial compensation" when determining competitive effects, and whether the cost savings generated through layoffs or the reduction of capacity should be treated as "efficiencies." And, third, Chair

Khan asks if the Guidelines should consider additional indicia of market power, for example, with regard to evaluating non-price effects.

AAG Kanter chose to highlight first the DOJ's interest in considering how mergers may "tend to create a monopoly" under the Clayton Act, for example, reviewing how the Agencies "assess transactions by already dominant firms." Second, he noted that transactions often are not neatly categorized as solely horizontal or vertical, and questioned whether the Guidelines should account for market realities by not being limited to a "bifurcated horizontal and vertical analysis." Related to this second point, AAG Kanter stated that the DOJ "shares the FTC's substantive concerns regarding vertical merger guidelines" as they "overstate the potential efficiencies" and "fail to identify important relevant theories of harm." Although the DOJ has not withdrawn the Vertical Merger Guidelines (as the FTC did last year), he cautioned that "[m]arket participants and courts should understand the Vertical Merger Guidelines only in the context of the broad-based review and overhaul" that the Agencies are launching. Third, AAG Kanter emphasized that antitrust analysis should be driven by market realities and "not merely market definition," noting that the Agencies "hope to learn more about additional tools that rely on direct sources of evidence, such as other indicial or market power or of head-to-head competition between merging parties, that may be more reliable in some situations."

The Agencies are encouraging the public to share feedback, evidence and ideas that will lead to the development of merger enforcement and policy guidelines. The broad Request for Information contains questions devoted to assessing mergers in digital markets, seeking examples of mergers that have made it more difficult for rivals to compete, and asking whether current Guidelines adequately account for a transaction's potential effects on labor markets and "non-price elements of competition like innovation, quality and potential competition," among other issues.

Some issues to consider:

- Many deal proponents point to "efficiencies" or "synergies" that in large part consist of the elimination of worker redundancy in the merged firm. Will efficiency arguments survive Guideline revisions when arguments about lowering costs come into conflict with a policy of protecting workers' employment?
- Does the project take specific aim at Private Equity?
- How to balance the consumer welfare standard's focus on objective consumer price analytics with a monopsony standard, which the Agencies specifically mentioned in connection with reviewing the effect of mergers on workers of the merging firms, farmers (in agricultural transactions), and other suppliers of the merging firms?
- To what extent will the Guidelines return merger review to the era of subjective analysis?

- Does the tech industry require industry-specific standards?

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, D.C., Charlotte) and London, is composed of specialists that offer 'end-to-end' advice on HSR compliance, merger investigations and related litigation. Our practitioners are available to assist with the submission of comments to the Agencies' Request for Information, which are due by March 21, 2022. After the Agencies review the initial responses to their questions, there will be another chance for public feedback on a draft version of the merger review Guidelines. The DOJ and FTC hope to issue their revised Guidelines this year.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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