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*A REVIEW OF THE 2023 US DRAFT MERGER GUIDELINES***

The aim of this article is to provide a short overview of the 2023 US Draft Merger Guidelines and some interpretations of its impact on merger control practices. The US practice shows that merger control standards have been changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which could reduce innovation and other behaviours of undertakings that lead to an increase in economic efficiency and improve competition.

Due to the fact that guidelines can influence how judges evaluate challenges to mergers, it remains to be seen how the final guidelines will enable the courts to understand and support the agencies' views on antitrust enforcement.

Key words: *Merger control. – Merger guidelines. – Clayton Act. – Competition law. – Antitrust law.*

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** The interpretations expressed in this paper are those of the author and do not necessarily reflect the views of the Commission for the Protection of Competition.

1. INTRODUCTION

On 19 July 2023, the US competition authorities, i.e. the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the Agencies), jointly released for public comment the 2023 Draft Merger Guidelines (Draft Guidelines).[1] The Draft Guidelines, which would replace the current separate horizontal and vertical merger guidelines, describe and guide the Agencies' review of mergers to determine compliance with federal antitrust laws.

The Draft Guidelines, which was a highly anticipated draft published by the Agencies, were subject to public comment for 60 days. According to the Agencies, the goal of this update is to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law. After the comment period, the agencies would review the comments received and finalize the new Merger Guidelines.

The proposal of the Guidelines is part of President Joe Biden's economic reform agenda and is the response to the executive order he signed in 2021 to improve competition across the economy.[2] The executive order directed the DOJ and the FTC to rewrite their guidance for companies on how the agencies seek to enforce antitrust laws that cover mergers. These Guidelines correspond to an effort to support the Biden administration's aggressive antitrust enforcement agenda. In addition, the Commissioners Alvaro Bedoya and Rebecca Slaughter, as well as Chair Lina Khan, issued statements regarding the proposed merger guidelines.

The Draft Guidelines explain how the Agencies identify potentially illegal mergers in order to help the public, business community, practitioners, and courts understand the factors and frameworks that the Agencies take into consideration when investigating mergers. In general, the US merger guidelines describe the Agencies' review of mergers and explain

1 See press releases US Department of Justice, Office of Public Affairs. 2023. Justice Department And FTC Seek Comment on Draft Merger Guidelines, 19 July. *https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-guidelines* (last visited 30 October 2023); US Federal Trade Commission. 2023. FTC and DOJ Seek Comment on Draft Merger Guidelines, 19 July. *https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines* (last visited 30 October 2023).

2 See White House. 2021. Executive Order on Promoting Competition in the American Economy, 9 July. *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/* (last visited 30 October 2023).

how they approach merger enforcement. The first US merger guidelines were published in 1968 and have been revised multiple times by different administrations. The last update was in the Horizontal Merger Guidelines for mergers in 2010. The Vertical Merger Guidelines were last revised in 2020, however the FTC has withdrawn its approval of the Vertical Merger Guidelines, which were issued jointly with the DOJ.

The US courts are not bound by the guidelines, because the guidelines are not law, therefore there is no major change in merger enforcement decision making as yet. The guidelines serve to educate the courts about the analytical tools that the Agencies use in merger analysis and thus the courts need time to adopt the new approach and framework within which merger analysis takes place.

The Guidelines should help the business community to assess how the Agencies are likely to evaluate horizontal mergers, because it must consider how the Agencies will react to potential mergers. Therefore, it is very important that the Agencies and courts harmonise their practice in order to increase the certainty and transparency of the analytical process underlying the enforcement decisions. Because guidelines can influence how judges evaluate challenges to mergers, it remains to be seen how the final guidelines will enable the courts to understand and support the agencies' views on antitrust enforcement.

2. SPECIFIC GUIDELINES

The Draft Guidelines point out the question from which the Agencies should begin their merger analysis: how does competition present itself in the given market and could this merger risk lessening that competition substantially at the present or in the future? In order to answer this question, the Agencies apply the 13 core 'guidelines', which reflect the most common issues that arise in merger review:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.

5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

As it is prescribed in the Draft, Guidelines 1–8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be to substantially lessen competition or to tend to create a monopoly. Guidelines 9–12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies assess mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

These Guidelines include references to binding legal precedent which do not necessarily suggest that the Agencies would analyse the facts of those cases the same way today. The Draft also provides a more in-depth analysis and tools that may apply to individual categories.

If we focus on some key highlights of the 13 principles spelled out in the guidelines used by the DOJ and the FTC as the framework in merger assessment, we can conclude that the Draft Guidelines endorse a more rigid reliance on the standard for considering a merger anticompetitive under the Clayton Act.

The Agencies pay greater attention to the strengthened structural presumption that the merger may substantially lessen competition or tend to create a monopoly, as well as to serial acquisitions, elimination of potential entrants, coordinated effects, vertical mergers and foreclosure concerns, companies with dominant positions, labour competition, and innovation.

For example, the Draft Guidelines adopt lower concentration thresholds and market shares that trigger the presumption that a merger is anticompetitive. Threshold concentration, measured by the Herfindahl–Hirschman Index, is decreased from 2,500 to 1,800, and a new 30% market share threshold is adopted for the structural presumption, i.e. as the basis for the presumption of the illegality of the merger. The Draft Guidelines claim that in highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition. As a result, even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition. The Draft also introduces new theories of harm for vertical mergers, by adding structural presumption for when a vertical merger should be deemed unlawful, i.e. presumption of harm in vertical mergers if the foreclosure market share is above 50%.

Other notable expansions include: concerns regarding the acquisition of potential competitors (elimination of potential entrants); roll-up strategies and serial acquisitions, even if no single transaction itself substantially lessens competition; competition in labour markets; concerns raised by minority or cross partial ownership and multisided platforms, as well as concerns regarding transactions undertaken by a firm with a dominant position.

It seems obvious that the Guidelines reflect the DOJ and FTC's current thinking regarding merger review, while at the same time reflecting a significant change in their approach to merger enforcement. If the Guidelines are adopted as currently proposed, some unproblematic mergers would be viewed by the Agencies as presumptively illegal. In the long term, a broad range of transactions will undergo fact-intensive scrutiny. Considering that competition law should not intervene where the markets tend to be self-correcting and where the competition can restore or create competitive conditions, this Draft moves away to a more sceptical view of the benefits of mergers in ways that would subject more mergers to scrutiny.

Also, the judiciary will have difficulties to follow the new 2023 Draft Guidelines while the Agencies will have to persuade the courts to accept the Guidelines as reasonable and reliable. The Agencies declare their aggressive merger enforcement and radical shift in both procedural and substantive

standards regarding merger assessment. The Guidelines make reference to the precedent of the 1960s and 1970s, and return to historic Supreme Court case law for guidance. It is recognised that while these older decisions have not been explicitly overturned, modern decisions have not relied on many of their more sweeping holdings (Crowell & Moring 2023). Therefore, the Draft Guidelines do not point to broader trends in antitrust law and more modern merger precedent, although it is stated that the Guidelines are revised to reflect shifts in economic understanding and economic conditions (White House 2023). It would be valuable if the courts could consider these Guidelines as instructive and adopt many of their principles as legal standards. However, the real implications of the Draft Guidelines and how they will influence the courts once issued, will remain an open question, as will the broader issues of predictability and credibility. This will depend on how the Agencies and courts will use and treat the Guidelines and whether the courts will rely on them and actually write them into law.

3. PUBLIC COMMENTS ON THE DRAFT MERGER GUIDELINES

In order to finalize the new Merger Guidelines, the DOJ and the FTC are currently reviewing comments from the public on the Draft Guidelines, which were submitted online during the comment period ending on 18 September 2023. As expected, the Draft Guidelines have generated significant comments by prominent academics, numerous industry participants, practitioners, and others – more than 3,300 public comments have been received.[3] In response, several debates and discussions on this topic were organized, including the ProMarket Merger Guidelines Symposium, which hosted a two-round symposium where 12 antitrust experts provided their comments on the Draft Merger Guidelines.[4]

These comments included both favourable and negative views on the draft Merger Guidelines. The negative comments suggest that the Draft Merger Guidelines overly emphasize law, at the expense of economics, and rely on unjustified and potentially counterproductive assumptions about concentration and competition. Those who provided mixed comments seem

3 See Federal Trade Commission. 2023. Draft Merger Guidelines for Public Comment. *https://www.regulations.gov/docket/FTC-2023-0043* (last visited 31 October 2023).

4 See ProMarket. 2023. ProMarket Merger Guidelines Symposium. *https://www.promarket.org/tag/promarket-merger-guidelines-symposium/* (last visited 31 October 2023).

to generally agree with the goals of the new Guidelines, but question whether they are likely to advance those goals. The favourable comments noted that the new Guidelines would move merger enforcement towards its status prior to the incorporation of the Chicago School into merger analysis and the Reagan-era 1982 Merger Guidelines, and that would be a good outcome (Capps, Dafny 2023).

For example, negative opinions claim that Draft Merger Guidelines demote economics to justify aggressive antitrust enforcement and that the proposed Guidelines will fail to receive the broad-based support that recent prior Guidelines have achieved (Carlton 2023b). Bearing in mind the highly selective cited cases, it is noted that those cases are old, their principles have often been rejected in subsequent court decisions, and they are often based on economic reasoning that would be rejected today (Carlton 2023b). Another deficiency of the Draft Guidelines, in comparison with prior ones, is the failure to state clearly what is their overriding goal, which increases the risk of falling into the antitrust trap of confusing the protection of rivals with the protection of competition. Therefore, it is not clarified whether the Agencies have abandoned their public pronouncements that they will discard the 'consumer welfare standard' and broaden their goals to include other issues, such as fairness, income equality, employment, and perhaps others (Carlton 2023a).

A similar opinion is that the Draft announces a dramatic shift in merger policy and abandons the focus on market power, which has been fundamental to all previous merger guidelines. The Draft ignores the central harm that merger control seeks to prevent, namely harm to consumers caused by a lessening of competition. It favours an approach based on preserving deconcentrated market structures, instead of making the clear statement that mergers should not be permitted to enhance market power and consequently harm customers (Shapiro 2023). Another view is that Guideline 1 is concerned with structural concentration, but never discusses the relationship between structure and performance, measured by output, price, or innovation. It does not identify any harm associated with concentration, which is an approach that is at odds with the structuralism that dominated antitrust thinking in 1950, when the merger law was amended (Hovenkamp 2023a; Hovenkamp 2023b). In addition, it is stated that the Draft Guidelines treat as a presumption of law the Supreme Court's Philadelphia Bank conclusion that a merger creating a firm with a market share above 30% is unlawful. However, the question whether a merger of that magnitude harms competition is factual is ignored and nothing in the Draft speaks to that question, and certainly not to the 30%. According to

this opinion, more questionable is the treatment of general economic effects as if they were matters of law, thus placing them beyond empirical review (Hovenkamp 2023a).

The favourable comments emphasise the need for greater enforcement of the antitrust laws, i.e. merger control rules, because these rules have been underenforced, resulting in more powerful companies, higher prices, lower quality and other. These comments claim that the Draft Guidelines are consistent with modern economics, displacing older Chicago School views (Fox 2023). The Draft actually covers the concerns dropped in prior Guidelines, such as those related to: mergers that significantly increase concentration in highly concentrated markets; mergers that eliminate substantial competition between firms; mergers that increase the risk of coordination; mergers that eliminate potential entrants in concentrated markets; vertical mergers that create market structures that foreclose competition; mergers that entrench or extend a dominant position; and mergers that undermine innovation incentives (Fox 2023). Therefore, the claim that the Draft Guidelines abandon reason, economics and consumers is wrong (Fox 2023).

Another opinion suggests that the Draft Guidelines address many of the issues by incorporating the latest economic wisdom and the Agencies' experience since 2010 (Posner 2023). Such examples propose strengthen the Herfindahl–Hirschman Index thresholds for challenging mergers to what they were in the 1980s, and remind businesses that the legal theories that the Supreme Court endorsed in the 1960s are still good law (Posner 2023).

4. CONCLUSION

It is not always easy to distinguish between mergers that should be allowed and that should be prohibited. The US antitrust law is not regulatory and it should not stand in the way of companies using regular means to maximize their profit, on account of it protects the openness and competitive structure of the market. Therefore, the US courts have taken a relatively conservative approach toward merger control, in the sense of showing reluctance to penalize a firm simply because of its monopoly status or dominant position.

It is often said that US antitrust law protects competition and does not protect competitors from hard or rough competition, from unfair, even fraudulent, competition; it protects consumer welfare by not intervening in the marketplace (Fox 2006, 69–70). The basic concept of the US

antitrust law is that price should be controlled by the free market because if the firm prices at monopoly levels, the high price itself may invite new entry and expanded competition, and market forces would gradually wear away the monopoly power (Fox 1986, 993). Considering that 'efficiency' is the watchword of the US antitrust law, it is understandable why the courts are ready to apply the antitrust law only to improve efficiency (Fox 1986, 983).

Therefore, there is no need for the expansive application of merger control rules that may reduce innovation, which means that the US should not repeat early mistakes by protecting competitors instead of protecting competition. The US antitrust law should not be an obstacle to innovation and growth. This is why merger control standards should be properly defined and the Draft Guidelines should respond to modern market realities and enable the Agencies to transparently and effectively protect the consumers from the harm caused by anticompetitive mergers.

The analysis in this article shows that the Draft Guidelines would significantly expand the reach of merger reviews. Major changes include a departure from the focus on the 'consumer welfare' standard, which focuses on price effects, and the lowering of the threshold for a companies' post-merger market share that would lead to the Agencies challenging a deal.

The Draft advances the Agencies' view that prevailing approaches to merger control rules have been too permissive and do not fully address mergers that harm consumers. Therefore, it is understandable why the Draft would represent a significant change to the Agencies' longstanding policies and practices in merger reviews. The proposal to advocate market analyses with 'structural presumptions' in favour of direct evidence of competition, could potentially represent a radical change in merger enforcement.

The final Guidelines should include all constructive feedback in order to allow the Agencies to effectively conduct merger investigations and attract support from commentators and courts, and convince them that these Guidelines provide useful guidance.

However, it remains to be seen whether the final Guidelines will gain wide acceptance from the courts because (as it is stated) only 11 of the 46 cases cited in the Draft Guidelines were decided after 2000, and the only cited case to be decided since 2020 is not a merger case (Buffier, McDonald, Edwards 2023). The Agencies rely primarily on case law from the 1960s and 1970s, which is believed to reflect the prevailing view of Chair Lina Khan and Assistant Attorney General Jonathan Kanter on how the law *should* be applied rather than an accurate summarization of how the judicial branch

applies the law today (Buffier, McDonald, Edwards 2023). That is why the Draft Guidelines are substantively different from prior guidelines and are also stylistically quite different from prior guidelines due to the extensive citation of case law in the Draft. As a consequence, it is difficult to expect that the Draft Guidelines will be significantly changed in the long run.

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