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New Merger Guidelines 'Want To Turn Back The Clock'

By **Bryan Koenig**

Law360 (July 21, 2023, 9:19 PM EDT) -- The Justice Department and the Federal Trade Commission put two-plus years of Biden-era merger theories on paper Wednesday in draft guidelines they hope will help shape a fundamental transformation of U.S. antitrust enforcement, but experts say the guidance may run into the same limitations those theories already have encountered in court.

The draft guidelines' 13 individual items are familiar to anyone who has closely monitored Biden-era FTC and U.S. Department of Justice Antitrust Division merger enforcement, from concerns over private equity rollups to labor impacts, crucial competitive bottlenecks, intrusive access to rival's data, coordination between rivals, market disruption and more.

"They're nothing if not consistent," said Shawn R. Johnson, a Crowell & Moring LLP partner and co-chair of its antitrust and competition group. From the theories already expressed, Johnson said, it's clear: "They'd like to turn back the clock."

How far back would the enforcers like to set back the clock? FTC Chair Lina Khan and DOJ Antitrust Division head Jonathan Kanter say it should go back to the beginning of antitrust law.

Congress and the U.S. Supreme Court passed the original antitrust laws and established the foundational precedent in the early and mid-20th century. Biden's enforcers argue that Congress wrote, and the high court upheld, antitrust laws meant to be highly skeptical of corporate concentration, especially when achieved through mergers and acquisitions rather than organic growth.

"The guidelines are one step, as part of a larger effort by the agencies to articulate and solidify a more aggressive antitrust enforcement agenda, and ultimately to achieve acceptance of the courts," said Peter Guryan, a Simpson Thacher & Bartlett LLP partner and global co-chair of its antitrust and trade regulation practice who previously served as an Antitrust Division trial lawyer.

The problem for the agencies is that the development of antitrust case law over the last 40 years has steered U.S. enforcement in a very different direction. That direction, current leadership argues, has been far too permissive and allowed rampant concentration that has stagnated wages, hiked prices and cost consumers important choice.

It's as if the recent refinements by court precedent "never happened," Fiona A. Schaeffer, a partner with Milbank LLP, said of the draft's heavy reliance on older precedent and its dearth of citation to newer cases.

Initial attempts to turn the ship in court have already proven difficult for the enforcers, who have suffered a series of stinging defeats in litigated merger cases. Those losses have been offset somewhat by a few court wins, and the agencies have managed to force the abandonment of some deals and helped create at least some hesitation in the boardroom.

Whether or not the draft guidelines can help cement the agencies' agenda, especially in court, is an open question, one many antitrust professionals said presents a steep climb in the face of judges who have already shot down cases based on the same theories.

"They've not had a great track record thus far," said Joseph M. Rancour, a Skadden Arps Slate Meagher & Flom LLP partner.

A DOJ official speaking on condition of anonymity told Law360, however, that those cases have failed on the specific facts, not the legal theories the agencies want to enshrine in the draft guidelines, which will now go out for public comment.

For Gerald A. Stein, a Norton Rose Fulbright partner and former FTC attorney, the problem the agencies have run into is that when pushing economic theories, they don't listen to enforcement targets about why the theory doesn't apply in their particular circumstances. Because antitrust officials could soon have explicit policies to support those merger challenges, he warned that the new guidelines could help foment more litigation and discourage settlement talks between enforcers and merging companies.

"The staff is now going to be able to point to a specific number and say, 'This transaction falls under No. 10 and we are now well within our guidelines to oppose it. It's not some crazy theory … It's in the guidelines,'" said Stein.

What's New

As much as the guidelines largely walk merging parties through the thinking already seen, observers say the draft does add some details or at least provides further context when navigating transaction reviews and challenges.

That includes stating that deals create an "impermissible threat of undue concentration" if they give the combined firm a more than 30% market share. And they generally assume that any vertical deal giving a company control of 50% of a related market "is a sufficient basis" to determine a deal may substantially harm competition.

The draft guidelines also return to the lower allowable concentration threshold, as measured by the Herfindahl-Hirschman Index, of previous guidelines and not the higher threshold introduced by the 2010 version. There is a limit, however, to just how new the changes are.

"We all knew they were lower" during recent years, said Freshfields Bruckhaus Deringer LLP partner Justin Stewart-Teitelbaum, a former FTC attorney. Now, the guidelines give context to exactly how much lower the concentration threshold is.

Whether courts accept the lower threshold remains an open question. Just because the agencies treat a deal as crossing a red line does not guarantee that courts will agree.

"The reality is that courts have not been viewing a 30% combined market share as irrefutable evidence of a substantial lessening of competition," Milbank's Schaeffer said.

In addition to technology platforms and Big Tech in general, the guidelines seem especially concerned with private equity firms. The draft targets so-called rollup strategies in which private equity and others buy up relatively small pieces of a market one at a time.

Amy Wollensack, a transaction partner at Akin Gump Strauss Hauer & Feld LLP who specializes in private equity deals, nonetheless said she doesn't anticipate the new guidelines generating any more interest in the area than has already been occurring.

"The analysis is the same," Wollensack said. "It's just an additional data point and something our clients should be looking at."

A critic of the guidelines and the Biden-era agencies, International Center for Law & Economics chief economist Brian Albrecht, sees in the draft a general shift away from the previous guidelines' assurance that companies doing deals outside concentrated markets needn't worry.

"Now the language is flipped," Albrecht said, putting the burden on the merging companies and not a cost-benefit analysis of the deal.

Also important in the draft is a specific focus on the competition for labor and a more holistic approach to mergers that often looks broadly at competitive impacts without dividing them between horizontal tie-ups involving direct competitors and vertical or other transactions connecting companies on different points of the supply chain. The agencies have especially struggled in going after vertical deals in recent years, having lost every such case in front of a federal judge.

Kanter similarly acknowledged the less-differentiated line between horizontal and vertical deals during a Federalist Society event Thursday.

"Not everything presents as vertical or horizontal," Kanter said. "Increasingly, the market characteristics we're confronting on a daily basis are often multisided and multidimensional."

One item noticeably absent from the draft is any repudiation of the consumer welfare standard that has undergirded U.S. antitrust enforcement for the last four decades. Biden-era enforcers, including Kanter, have tried hard to move away from the standard that generally weighs anticompetitive conduct on how it impacts consumer prices. But they did not use the draft to continue that shift.

"We did not need to get into that doctrinal debate here," Kanter told the Federalist Society.

Also absent, Stewart-Teitelbaum of Freshfields, noted, is any discussion of remedies to merger concerns. The agencies have taken a hard line against most divestitures and other behavioral fixes, only for judges to often push back on enforcer assertions that fixes need to preserve competition exactly as it was before a deal.

"The case law is not on their side in terms of remedies not being sufficient," agreed Freshfields' Laura Onken, a former FTC attorney.

A Question of Age

One of the chief criticisms to emerge from the antitrust bar as it digests the proposed new guidelines is the age of the precedent on which the FTC and DOJ are relying. Most of the cases cited are decades old and few were issued in more recent years. Critics argue the agencies are simply ignoring the more recent cases that haven't gone their way.

Sticking with older cases in guidelines meant to address the modern economy, Skadden's Rancour said, "creates a tension from the outset."

Schaeffer said the draft asks courts to go back to foundational merger precedent. "And don't think about how those precedents have been interpreted recently by courts," or with newer economic thinking, she said.

The agencies for their part see no issue with the age of the precedent on which the draft guidelines rely, arguing the guidelines are consistent with the full body of antitrust law.

"You have to cite … old cases. Because that's what exists," Kanter said Thursday, arguing there simply aren't that many merger cases to cite. He also asserted that the cases in the guidelines are the same ones on which courts have relied in recent years.

Kanter pointed specifically to the DOJ's recent loss at the Third Circuit when an appellate panel on July 13 refused to revive the government challenge to U.S. Sugar Corp.'s completed acquisition of Imperial Sugar Co. There, Kanter said, the DOJ caught flak specifically for relying too much on its latest guidelines, issued in 2010, instead of the 1962 Supreme Court precedent in Brown Shoe v. United States.

"The principles in these cases are valid law," Kanter said.

Richard A. Powers, a Fried Frank Harris Shriver & Jacobson LLP partner who served as acting Antitrust Division head before Kanter took the job, but had virtually no involvement in the new draft, similarly said the guidelines "appear to be very grounded in case law."

"Cases don't expire because it's been a long time," Powers said. "A court has to explicitly overrule those."

In fact, the agencies and supporters note, the draft is the first time that case law has actually appeared in merger guidelines. Grounding the guidelines in that way, Powers said, in some ways may actually limit them. "It can't become some broader philosophical document," he said.

According to the anonymous DOJ official, the agencies simply chose to focus the guidelines on decisions issued by appellate courts, which tend to be older even as they carry more weight.

As enforcers try to turn their track record around, the official said that having guidelines that structure merger analysis around binding case law and modern economics will help build cases that'll resonate with courts.

"The DOJ achieved its most recent victories by combining the law and sound economics," the official said.

Kanter said during the Federalist Society event that the guidelines aren't "tactical in nature." Instead, he

said, the guidelines are merely meant to reflect agency practice. He noted that cases generally come down to the specific facts anyway.

"The more we are following the law, the more likely that it is that we will build a case, or bring a case, that reflects the law," said Kanter, who also argued that the guidelines are rooted in the most modern available tools for economic analysis.

Convincing Judges

Perhaps the biggest open question is whether the draft guidelines will carry the same weight in court as their predecessors. While merger guidelines are not legally binding, they have historically enjoyed widespread citation by judges who lean heavily on their structural presumptions and other features.

"Courts have historically been deferential to the guidelines and have relied on the guidelines. That's an open question at this point, with respect to these proposed guidelines," said Guryan of Simpson Thacher.

Powers argued that the case law in which the draft is grounded will help give them weight with judges.

The agencies' outside supporters are also hopeful the new guidelines will be adopted in court.

"They're building on existing precedents and existing laws, and they're not turning everything topsy-turvy where you might think it might be ignored," said Anna Aurilio, senior director of campaigns at the Economic Security Project.

According to Schaeffer, an important part of how the last 40 years of antitrust philosophy developed, under the so-called Chicago School approach, was through the appointment of judges who supported that approach.

"I don't think [this administration] enjoys the same widespread adoption of its philosophies in the current judiciary. Probably the opposite," she said, pointing to the highly conservative Supreme Court. But a successful shift in antitrust law requires both judicial philosophy and successful cases, she argued. "Your philosophy needs to be in the DNA of the judges who are going to interpret and apply the law, in order for your philosophy to become the law."

--Editing by Jill Coffey.

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