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FTC's Illumina Win Is A Boost For Merger Guidelines

By **Bryan Koenig**

Law360 (January 9, 2024, 3:40 PM EST) -- When the U.S. Justice Department and Federal Trade Commission recently rolled out guidelines they hope will cement far more aggressive merger enforcement, they did so armed with brand new appellate precedent that for the first time backs arguments against vertical mergers that have otherwise struggled to gain purchase in federal courtrooms.

The Fifth Circuit's Dec. 15 decision, although it found the FTC applied the wrong standard in seeking to block DNA sequencing giant Illumina's planned reacquisition of cancer testing outfit Grail, still determined that the agency had a strong basis to find anticompetitive harm from the merger. The ruling came just three days before the publication of the agencies' final merger guidelines. The day the guidelines were published, Illumina finally threw in the towel on a deal it'd been battling to save from U.S. and European challenges since 2021.

Together, the guidelines and the ruling could help steer merger enforcement that under the Biden-era Justice Department and FTC has had a mixed track record on efforts to address what leadership has described as decades of underenforcement against rampant industry consolidation. Until the Illumina ruling, those efforts had included a zero batting average in federal court challenges against vertical mergers — transactions combining companies on different points on the supply chain.

"After agency losses in the AT&T/Time Warner and United/Change vertical merger cases, the Illumina decision must have resulted in a big sigh of relief at the agencies," Alexis J. Gilman of Crowell & Moring LLP, a former FTC official, said in an email. "Another loss in a litigated vertical merger case could have been a huge blow to their enforcement efforts and seriously undermined what they are trying to lay out in the merger guidelines on vertical mergers."

The timing of the ruling and finalization of guidelines first floated in July suggest the agencies may have been waiting for the Fifth Circuit to act on Illumina's appeal. At minimum, enforcers wasted no time including references to the Illumina ruling in three footnotes in the final guidelines.

"They kind of cherry-picked out some language that is particularly favorable to the FTC. I think it may embolden them to pursue more vertical cases and test out what's articulated in the guidelines," said Brian J. Boyle of DLA Piper, which represents Illumina.

An Aggressive Approach

Aside from vertical mergers, the guidelines also make clear the agencies will maintain their recent aggressiveness in challenging mergers. The final guidelines largely stick with the aggressive stance against transactions expressed both in the draft version and in the last three years of enforcement, although perhaps in reaction to criticism that the draft was stuck in the 1950s and 1960s, the final incarnation now includes more recent precedent.

"It's consistent with what we've been seeing in practice from the agencies," said Laura Onken, an FTC alum now at Freshfields Bruckhaus Deringer LLP. "It's an effort by the agencies to provide some additional transparency into how they're looking at mergers."

Most observers saw few significant changes made between the draft and final guidelines, asserting that what differences there are amount to tweaks around the edges or a honing of the original, aggressive language.

"The guidelines are pushing for significant presumptions that even small increases in concentration are unlawful," said Michael Keeley, the head of Axinn Veltrop & Harkrider LLP's antitrust practice. The guidelines, he said further, aim to impose a high burden of proof on parties navigating merger review to show their deal doesn't harm competition.

Carl Hittinger, the national team leader of BakerHostetler's antitrust and competition practice, argued the burden will make reviews more costly to merging parties.

"You're really creating these mini hearings or mini trials — just with the merger review process," Hittinger said. And that's before any potential direct challenge.

In addition to the inclusion of more recent precedent, other changes in the final version include tweaks to how enforcers will look at deals increasing concentration in already concentrated markets. Where the draft version had treated concentration by itself as presumptively anticompetitive, the final guidelines throw in a caveat of presumed anticompetitiveness "unless sufficiently disproved or rebutted" and more strongly tie in the need for concentration to increase market power

"They're not going after concentration for its own sake," said University of Pennsylvania Law School Professor Herbert Hovenkamp. "The target is the higher prices, not the concentration."

When looking at vertical mergers in particular, the final version tones down the original presumption that control of 50% of a connected product market is enough to indicate substantial competitive harm. Instead, the final guidelines assert that enforcers will "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."

"It's not just holding market share. It's having market power," said Amadeu Ribeiro of DLA Piper.

Also watered down somewhat is the draft's treatment of a 30% market share created by a horizontal merger between direct competitors as "an impermissible threat of undue concentration." The final version replaces that language with a warning that such an increase could trigger enforcer scrutiny because "a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly," if combined with a sufficient increase in concentration.

"Broadly speaking, the final guidelines take a softer tone, in particular moving away from the strict 'no fly zones' from the draft guidelines," Will Chuchawat, co-leader of BakerHostetler's mergers and acquisitions practice, said in an email. "The final guidelines also acknowledge that their various theories of harm can be rebutted."

Vertical Challenges

While the Illumina ruling provides important backing for some of enforcers' vertical merger theories, which have become particularly aggressive in recent years, observers say it also comes with limits on those views, insisting not on the presumptions of illegality preferred by the agencies but on an intensive analysis more in line with the rule of reason standard that balances anticompetitive implications against potential benefits.

"Overall, they're still difficult cases for the government to win. But they've made some meaningful progress in the Illumina case," said Jon B. Dubrow, co-head of the mergers focus group at McDermott Will & Emery LLP.

The one area where the Fifth Circuit truly dinged the FTC was not in the draft or final guidelines: the insistence by Biden enforcers that any divestiture, licensing agreement or other remedy meant to address a merger's anticompetitive implications fully restore the exact same level of "competitive intensity" seen before the merger. Instead, the agencies left discussion of remedies out of the guidance.

"The court said that given the remedy in the case, the agency should have assessed it as part of the parties' rebuttal argument, and not waited to consider it only after concluding the transaction was unlawful," Gilman said. "Just as importantly for merging parties, the court also said that the remedy doesn't have to restore competition to precisely the same premerger state. Instead, the remedy just has to result in there being no substantial lessening of competition. That's a very significant part of the case."

In court, the insistence of restoring or sustaining competitive intensity has run into serious resistance from federal judges who look at the Clayton Act's requirement to block only those mergers that "substantially" threaten competition.

"That probably means something other than zero," said Hovenkamp, who is sympathetic to enforcers' position.

Judges have also balked at government bids to focus only on the merger without proposed fixes, forcing enforcers instead into frequent fights to "litigate the fit."

"The government is trying to get to a place where there is a very favorable standard for it. And the courts are just not going along," said Dubrow.

Agency Resources

As aggressive as the guidelines are, the willingness and desire to challenge more deals faces a more practical problem: the limits of agency resources. Enforcers have spent years arguing that **they need more money** from Congress and more leeway to extend beyond the 30-day review period they get for transactions without initiating an in-depth investigation.

The FTC's three current commissioners pointed to those struggles in a Dec. 21 statement accompanying the commission's annual report to Congress on merger filings. The commissioners, all Democrats while a pair of Republican nominees languish in the Senate, said that while they've brought a string of enforcement actions, the agency is still struggling to keep up with the "unprecedented growth in the scale, volume, and complexity of mergers."

"FTC staff work tirelessly to meet the enormous demand of enforcing the laws against unlawful mergers, but the commission has been forced to make difficult triage decisions and [forgo] meritorious investigations," the commissioners said in calling for more funding.

Hovenkamp called "triage" a good word for the position the agencies find themselves in, caught between their aggressive stance and the volume of mergers coming across their desks each month.

"Ramping up is going to be costly," Hovenkamp said.

David P. Wales of Skadden Arps Slate Meagher & Flom LLP, a former senior official at the DOJ and the FTC, isn't so sure that the agencies have been stifled in pursuing the cases they want. He said the FTC statement is inconsistent with leadership assertions that they shouldn't be judged by enforcers' mixed success in court but on the transactions that were abandoned or never proposed, deterred by administration policies.

Wales said he's not sure of those claims of deterrence. He said companies have seen the record of the Biden-era FTC and DOJ and concluded the agencies can be beaten, especially when pushing their most unconventional theories. He said companies will be willing to put enforcers to their burden of proof, "even under these new guidelines."

The guidelines aren't the only policy-level shift that the Biden-era FTC and DOJ are pushing on merger reviews. Perhaps even more importantly, the agencies are working on a rulemaking that would dramatically overhaul, and increase, the detail required for merger notifications.

"Certain smaller deals will now feel the impact that larger more complex deals do in terms of providing additional information under the still to be finalized new HSR filing requirements," Mitch Berlin, vice chair of strategy and transactions at consultancy EY Americas, said in an email. "For instance, certain types of smaller deals that were not traditionally thought to be subject to such antitrust scrutiny (e.g., PE roll-ups, small acquisitions in industries that are tending towards concentrations, small companies with innovative products) may be subject to significant scrutiny through the regulators' second request process."

A Lasting Effect?

The fact that the guidelines are so closely aligned with Biden administration enforcement policy could also help impose an expiration date on their influence.

"You can be pretty confident that, if a Republican administration takes over ... they would have a very different view of the merger guidelines than the Biden administration," said Keeley of Axinn.

The guidelines' best chance for longevity is if courts treat them as persuasive. "Then they could have a lasting impact," said Keeley, who nevertheless cautioned that a new GOP administration would still likely change the policies undergirding the guidelines.

Some questioned, however, whether judges would accept the new guidelines as they have past versions.

"It's going to be a real challenge for them. Especially for the more exotic theories," said Wales.

--Editing by Brian Baresch.
