Comment: Lack of merger-friendly case law in FTC-DOJ merger guidelines could spur court skepticism despite extensive citations

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The draft guidelines from the Federal Trade Commission and Department of Justice were written with an objective to bolster court cases (see here), but how the courts will receive the new guidance is still to be determined, with some practitioners expecting its weight to be limited.

That's because they say the case law is incomplete, with more than half of the cases from the 1960s and 1970s — which is when the Supreme Court considered the majority of antitrust cases. The guidelines cite only seven antitrust cases from the past decade.

A senior FTC official said the team drafting the guidelines looked at every single litigated merger case where there was a federal court appellate decision or a Supreme Court decision, and so the guidelines reflect that.

But some important recent merger-friendly decisions didn't reach the appellate courts because the agencies either decided to not pursue an appeal of a district court decision or because there was a settlement.

And even though the case law from appeals courts and the Supreme Court is still binding, several practitioners criticized the reliance on old cases while ignoring the legal and economic developments of the past 40 years.

"That's just ideological stupidity," wrote A. Douglas Melamed, scholar-in-residence at Stanford Law School and former acting assistant attorney general in charge of the DOJ Antitrust Division, in a Twitter post. "If they want to persuade judges and others of the soundness of their new approach, the way to do it is to engage seriously with the recent cases. Citing only supportive material is like writing a brief and ignoring the other side's arguments."

— View from the courts —

"The value of the guidelines, I think, is really derived from their acceptance and adoption by the courts. And I think that the courts have widely repeatedly cited the 2010 merger guidelines because they're viewed as reasonable and trusted," said Shawn Johnson, the co-chair of the antitrust practice at Crowell & Moring. "I think that there's a real question mark about whether the agencies will be able to walk into court and convince them to reject, effectively, the guidelines and the standards that the courts have cited hundreds of times because [the agencies] issued a new set of guidelines that they believe reflects this particular administration's view on antitrust enforcement and enforcement priorities."

Former Assistant Attorney General William Baer, who oversaw the DOJ's antitrust division during the Obama administration, said he expects the courts to incorporate the new guidelines in much the same way as the previous ones were implemented.

"The courts in the past have incorporated the DOJ, FTC merger guidelines into their analysis and I expect that to continue," Baer said.

— New and old —

Although the guidelines are not binding on the courts, Baer sees them as "appropriately tethered to legal precedent" and said they "incorporated current economic thinking in a way that would enable the business community and ultimately the courts to appreciate the risk of economic harm from certain kinds of M&A activity."

There were parts of the guidelines that, despite having never appeared in such a document before, are relatively well-grounded in both new and old case law, such as a section addressing buyer power, which highlights competition issues in the labor market – an issue that was covered in the unanimous 2021 Supreme Court decision against the National Collegiate Athletics Association and in favor of college athletes.

However, other segments of the guidelines failed to account for or counter significant case law that tends to help merging parties in merger trials. Ignoring cases that merging parties are likely to address when advocating their own cause and refusing to engage in that debate via the guidelines may have been a tactical error on the part of the antitrust agencies.

David Gelfand, senior counsel at Cleary Gottlieb and former deputy assistant attorney general at the antitrust division, said the reason the 2010 guidelines have gained some acceptance is because they represented an incremental improvement in the articulation of how the law works. “They were actually based on real evidence and real case law and that's what courts are going to look at,” he said. “This one will have zero influence on most courts. This is simply a statement by a one-party administration that they wished the law was different.”

Joshua Wright, a former Republican FTC commissioner and professor at George Mason University, even suggested that antitrust law professors should continue to teach the 2010 guidelines framework and the cases that apply it to their students. “Litigators will need to persuade courts that approach is sounder on economics and law, rather than a wishlist of policy preferences,” he said in a tweet.

Lazar Radic, senior scholar for competition policy at the business-allied International Center for Law and Economics and an adjunct professor of law at IE Law School, said in a tweet it was ironic to modernize merger enforcement with cases that are 40 years old “while ignoring anything more recent that doesn’t fit the administration’s pre-determined narrative.”

— ‘A little Botox’ —

However, Katie van Dyck – senior legal counsel at the American Economic Liberties Project, a progressive antitrust think tank – characterized this argument posed by detractors of the guidelines as “a red herring” in a series of Twitter posts.

“These attacks are silly and ignore, or perhaps don’t know about, some very obvious reasons for antitrust decisions skewing ‘old,’” she wrote, noting that the Justice Department and FTC could appeal straight to the Supreme Court from district court until the mid-1970s. “The result — more than 80 percent of Supreme Court cases dealing with § 7 came before that date.”

Van Dyck also said agency enforcement withered at that time. “Bottom line: The cases the agencies rely on today are still cited frequently by both sides, regardless of their age. They may need a little Botox to catch up to today’s market realities, but they’re still good law.”

Charlotte Slaiman, a former FTC attorney who is now competition policy director at consumer group Public Knowledge, said: “Courts should look to the new guidelines for the most up-to-date understanding of competition law and economics.” Slaiman also called them “a watershed moment for antitrust enforcement and the American economy.”

Proponents and defenders of the new draft guidelines argue that the old judicial decisions referenced within it express timeless ideas which apply just as well today as when they were written, and say that those cases provide a solid intellectual framework that clarifies antitrust issues in even the most rapidly changing and technically oriented industries.

— Potential competition, entrenchment of dominance and efficiencies —

John Kwoka, former chief economist to FTC Chair Lina Khan and one of the contributors to the guidelines, said the new draft guidelines address perennial antitrust issues that were given short shrift in prior versions. He also suggested the guidelines incorporate significant insights from recent economic research. According to Kwoka, the guidelines were intentionally designed to address sectors of and practices within the economy where competition problems typically arise but which were not as thoroughly scrutinized in the past.

Economic concepts that were barely touched on in prior iterations of the guidelines such as potential competition, nascent competitors and entrenchment of dominance were consciously highlighted within the document, Kwoka says, adding that a key goal of the guidelines was to “help guide the courts.”

Alden Abbott, a former FTC general counsel, conceded that many of the cases are still on the books as binding precedent, but he said they’re fundamentally out-of-step with how the courts, and the Supreme Court in particular, tend to view mergers and merger law since the 1970s.

Abbott, who is now a senior research fellow at the right-leaning Mercatus Center, characterized the jurisprudence that the new proposals invoked as “old Supreme Court decisions, very old precedent, very little new economics dealing with consumer welfare.”

“I think that’s going to undermine the agencies when they go into court,” he said. “Judges wouldn’t like the magnitude of the changes and the shifts in underlying theory.”

“The judges are going to say, this is really a change from what we understood the enforcement posture to be,” Abbott said, adding the judges will be concerned that “the agencies are not taking a measured approach.”
Abbott also praised prior guidelines for recognizing a role for mergers in the economy. “Here, there’s almost no such recognition about the potential benefits,” he said. “It’s: Here are 1,001 ways mergers may be bad.”

— Law and economics —

Makan Delrahim, who headed the Justice Department’s antitrust division during the Trump administration and initiated a revamp that led to the prior guidelines, testified before Congress yesterday that the guidelines have value when they are rooted “both in the law and the accepted economic thinking.”

“If they do not, they do not have any value, because the courts will say that this is aspirational,” he said at a hearing on enforcement of vertical mergers (see here).

He said he hadn’t fully digested the guidelines before his appearance but lauded the fact they took in both horizontal and vertical deals. But he said he hopes the enforcers put more updated case law in after comments roll in.

Decisions that the agencies don’t like “do not go away in future litigation,” he said. “Litigants will cite them. They’re precedent.”

At the end of the day, the guidelines are merely guidelines, and the way courts choose to enforce them could change the merger enforcement landscape. Just because the agencies have outlined presumptions in this document, for example, doesn’t mean merging parties won’t litigate those theories, or call economists to rebut the agencies’ claims on the stand.

“Not only will the parties attack the facts that the agency is relying on, but [they] could attack the actual theory that they’re relying on,” said Gerald Stein, a partner in the commercial litigation and antitrust and competition groups at Norton Rose Fulbright.

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