Comments for the Record

Comments on FTC/DOJ Merger Guidelines

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Introduction & Summary

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) recently released a Request for Information (RFI) on updates to the merger enforcement guidelines.[1] As the nation's competition enforcers, the agencies' guidelines outline their specific procedures and the tools they use to analyze combinations between firms, ultimately determining if the effect of the merger "may be to substantially lessen competition, or tend to create a monopoly."[2] These guidelines "assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions" and attempt to help courts develop appropriate frameworks for interpreting and applying antitrust law to mergers.[3]

As the agencies change practices, updating the merger guidelines gives the antitrust community insights on how to expect the agencies to react to proposed transactions, and theoretically give guidance on the types of transactions that will draw additional scrutiny. Therefore, to the extent that the agencies are embracing different theories of competition policy, revising the merger guidelines is a timely and important venture.

At the same time, the agencies must not go beyond existing law. The merger guidelines are not substantive law, but rather an interpretation and description of the current practices in enforcing the nation's antitrust laws. Changing the merger guidelines, therefore, should not be seen by the agencies as a tool to make substantive changes, as this would require action from Congress or interpretation from the courts.

Rather than discussing the potential procedural pitfalls of the agencies in encroaching into substantive legal changes, however, these comments primarily address the policy behind the guidelines, suggesting to the agencies specific considerations they should include when evaluating transactions. Further, for the sake of clarity, "current guidelines" will refer both to the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines[4], despite recent actions to withdraw from these guidelines and offering nothing to replace them.[5]

As for policy, these comments highlight the importance of analyzing anticompetitive effects through the lens of consumer welfare, the specific considerations related to coordinated and unilateral effects of mergers, the role that defining markets should play in the guidelines, the differences between digital and physical markets, and finally why the FTC should outline specific examples of efficiency justifications for mergers.

Merger Policy Should Focus on the Harm to Consumers

The RFI begins with a general discussion of the purpose, harms, and scope of the merger guidelines. The agencies should explicitly lay out that the consumer welfare standard should guide analysis on the anticompetitive effects of mergers.

The consumer welfare standard reflects the text and purpose of the Clayton Act

The RFI asks whether the analytical framework described in the guidelines reflects the text and purpose of the Clayton Act. Inherent in the question is an implication that the most recent guidelines fail to adequately consider potential concentration of markets. Nevertheless, concentration in isolation isn't what the Clayton Act prevents.

Instead, the Clayton Act and the antitrust laws more broadly protect competition and the effect that concentration has on consumers.[6] As the 11th Circuit has explained:

"It is clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition…. Thus evidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition."[7]

In other words, concentration isn't itself a per se violation of existing antitrust law, but is instead simply another factor in evaluating whether a transaction may "substantially lessen competition."

The current guidelines contemplate that concentration itself does not necessarily invalidate a transaction.[8] Instead, the agencies considered a wide range of potential competitive harms that could stem from market concentration, as well as some discussion of potential procompetitive efficiencies that could justify the specific harms to competition. For example, the vertical merger guidelines consider how an acquisition of a supplier could allow a firm to raise the costs of a rival who also relies on that supplier, but as long as the rival could readily switch purchases to alternatives of the related product or create their own supply without any meaningful effect on the price, quality, or availability of products or services in the relevant market, this would not warrant close scrutiny.[9] Even if the acquisition would harm a competitor, however, the vertical merger guidelines explain that integration can cause significant efficiencies that benefit competition and consumers more generally, such as coordinating assets to streamline production or developing "innovative products in ways that would likely not be achieved through arm's-length contracts."[10]

Indeed, the FTC goes on to ask whether the guidelines are sufficiently clear about the situations in which mergers may be enjoined because they tend to create a monopoly.[11] Monopoly power isn't just market share or some small degree of market power.[12] Instead, antitrust law is concerned with firms when they can utilize market power to increase prices or lower output without a competitive response due to their position as a monopolist. When new entrants or small rivals exert enough pressure on a firm with significant market share, for example, the large firm may not actually rise to the level of a monopolist because the market still imposes restrictions on their behavior to extract monopoly rents.

But these determinations are inherently predictive,[13] and if market share were the only factor enforcers used to make that prediction, a wide swath of beneficial mergers would potentially be stifled in their incipiency. As the 2010 Horizontal Merger Guidelines explain, market share and concentration can be used as evidence to support that a firm has monopoly power, but this evidence alone doesn't paint a full picture.[14] That is why the merger guidelines outline other considerations such as powerful buyers, new entry, and potential effects on coordination.[15] And even then, when defining the product market, agencies employ tools such as the small but significant non-transitory increase in price (SSNIP) test to determine whether different products can act as a substitute and therefore restrain monopolistic behavior.[16]

The utilization of these different tools and considerations depends on the facts of the case, but the framework outlined in the current merger guidelines takes into account the wide array of considerations needed to determine whether a given merger would actually harm competition and consumers. The RFI, however, is concerned that the current guidelines “underemphasize or neglect” factors such as a “trend towards concentration.”[17] On the contrary, the current guidelines specifically consider the likely concentration outcomes of a merger, but rather than simply stopping the analysis there, go much further into the effect that concentration would have on a given market. And again, the guidelines encapsulate guidance from the courts, which ultimately determines the bounds of the law. While the additional analysis may make the case more difficult for the enforcement agency, an analysis of a wide range of factors beyond concentration alone ensures that only those combinations that actually harm competition and consumers face the significant scrutiny and burden of further investigation and litigation.

Effects that harm consumers should be covered by the term “lessen competition”

The RFI also asks specifically which effects should be covered by the phrase “lessen competition.” Again, current judicial interpretation ultimately dictates that outcome, but the guidelines should highlight the types of effects the agencies consider likely to harm competition. To that end, the effects that it should consider should all stem from the consumer welfare standard.

A prevailing myth is that the consumer welfare standard only focuses on price factors, but it is quite the opposite. A monopolist can cause a wide range of harms to consumers due to their ability to extract monopoly rents. The merger guidelines specifically go beyond price into factors such as capacity and output for homogenous products, innovation and product variety, or potential coordinated behavior among remaining firms post-merger.[18] These effects, however, still directly harm consumers, even if prices remain constant. As a result, enforcement agencies and reviewing courts will consider a wide range of effects when evaluating the overall impact on competition.

If the FTC and the DOJ want to include more effects in updated guidelines, they should do so. Again, the guidelines exist to provide guidance to businesses on the types of transactions that may raise additional scrutiny from the agencies. As long as the effect in question harms consumers, the agencies can and should consider outlining the effects in the guidelines so that businesses know what to prevent when contemplating mergers.

The RFI, however, specifically asks whether the merger guidelines may underemphasize or neglect other factors, such as labor markets.[19] Competition law shouldn’t focus on issues unrelated to the specific competition in the market, as almost any societal harm could be theoretically traced to some perceived issue with competition more broadly. As the old saying goes, if your only tool is a hammer, then every problem looks like a nail.

Even taking as a given that existing labor markets unfairly undervalue labor, this is not an issue that competition policy can or should address. Instead, competition policy focuses on a specific question: Can a firm harm consumers? This specific inquiry can encapsulate a wide range of effects that the current guidelines contemplate, but regulators should be wary of attempts to go beyond the courts in interpreting the antitrust laws as a catch-all to address every issue the FTC or DOJ want to target regardless of the economic impact.

The merger guidelines do not subvert congressional intent by permitting a too-broad economic investigation

The RFI also asks a variety of questions citing the inherent harms of concentration and the potential subversion of congressional intent by permitting too-broad economic investigation.[20] As the Supreme Court has explained, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[21]

There are important qualifications and subsequent Supreme Court decisions, however, that shed light onto what the actual concern was. In *General Dynamics*, the Court departed from *Philadelphia National Bank*'s seemingly per se rule against concentration, stating that other pertinent factors affecting the relevant market indicated that the merger would not substantially lessen competition.[22] The issue, the Court explained, is that even if a firm controlled sufficiently large shares of a concentrated market in the past, they aren't prohibited from acquiring rivals if there is nothing to imply an ability to continue to dominate a market in the future.[23] Underlying that logic is the assumption that concentration itself doesn't necessarily give rise to harms, but instead courts must fully examine a particular market to determine whether concentration can lead to anticompetitive harms in the future.

Alas, the presumption set in *Philadelphia National Bank* is still good law, and as it stands now shifts the burden on defendants to proffer evidence to rebut it.[24] Unsurprisingly, plaintiffs almost always cite to *Philadelphia National Bank* to state that the increased concentration is inherently anticompetitive, but this completely ignores the competitive effects of the merger: Concentration and competition are not "systematically correlated."[25] Even the 2010 Horizontal Merger Guidelines acknowledge this and forgo the specific 30 percent baseline established in the case.[26]

Instead of focusing on market structure, which holds little bearing on actual competitive effects when viewed in isolation, the merger guidelines focus on the broader effects on competition. This doesn't mean that they subvert congressional intent by permitting a too-broad economic investigation, but instead outline a focus on competition rather than concentration when determining whether a merger deserves additional scrutiny. Undoubtedly, economic investigation is required for this analysis, but as *General Dynamics* makes clear, this analysis is critical to judging the probable anticompetitive effects of the merger.

Whether a lessening of competition is substantial largely depends on the facts of the case

The RFI asks how the guidelines should assess whether a lessening of competition is substantial.[27] The FTC should be careful not to create a bright-line rule that would ossify a standard which may need to change over time and even in different markets. Inherently, the FTC is making predictive judgements on somewhat esoteric topics such as innovation. No doubt certainty would help businesses navigate the potential pitfalls in an acquisition, but enforcers must carefully examine the specific facts of each case. As a result, guidance should indicate the types of mergers that would substantially lessen competition, but not establish a pseudo per-se standard that automatically results in higher scrutiny and litigation.

Evidence of Substantial Competition Between the Merging Parties Should Not Be Sufficient to Establish the Loss of Competition in Isolation

The RFI asks about both coordinated and unilateral effects of mergers and the adequacy of the current guidelines to consider potential harms.[28] Much of the discussion focuses on coordinated effects, as the agencies worry that concentration may lead to additional coordination between rival firms. The FTC also briefly asks about unilateral effects deriving from horizontal mergers.

The guidelines should contemplate the complex competition between firms in modern economies when examining potential coordinated effects

The RFI asks a variety of questions about coordinated behavior derived from concentration in the merger. Fewer firms in a market post-merger could theoretically coordinate with one another tacitly, as overt harmful coordination violates the Sherman Act. Specifically, the RFI asks whether the guidelines adequately account for the likelihood of coordinated effects in oligopolistic markets.[29]

Both the horizontal and vertical guidelines specifically consider coordination between firms and the effect that a potential merger would have on that outcome. These guidelines provide examples of the types of concerns that the agencies will focus on, though the list is not exhaustive. Again, mergers are inherently fact-specific, and guidelines will likely not cover every potential fact pattern in which a merger will receive additional scrutiny. The agencies could continue to explore more concerns about coordination in the guidelines not currently covered, though ultimately a concern not listed doesn't foreclose the agencies from using such a concern as a reason to investigate a merger.

That said, the agencies should also consider the modern competitive dynamics of a market before attempting to make a blanket rule regarding coordination. In digital markets, for example, there may only be a couple of major competitors in a very narrow market, but these firms often compete vigorously with more firms in other aspects of their business.[30] While coordination could be a potential harm to consumers in some of these narrow markets, it is equally possible that the competitive pressures in other markets will continue to drive firms to lower prices and improve products in the more concentrated markets. While the agencies should examine mergers when an increased chance of coordination exists due to concentration, they should do so with a full picture of the wide-ranging competitive pressures rather than simply looking at concentration in one narrowly defined market.

Evidence of substantial competition between the merging parties should not be sufficient to establish the loss of competition in isolation

The RFI also asks whether "evidence of substantial competition between merging parties should be sufficient to establish the loss of competition due to merger."[31] While substantial competition between the two parties definitely serves as evidence of a potential loss of competition due to the merger, it does not directly establish loss of competition in isolation.

As the Court has explained, "companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7 not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor."[32] In other words, merger enforcement doesn't take into account past behavior or competition, but rather what the effects of the merger will be on future competition. Evidence of past behavior can support a conclusion about future behavior, but looking at past behavior in isolation without further examination of market structure, potential new entrants, and other competitive pressures in the post-merger market will give an incomplete picture to regulators.

Therefore, while evidence of substantial competition between the merging parties can support the conclusion that a merger will cause a loss of competition in violation of the Clayton Act, the agencies' work doesn't stop there. The guidelines should reflect this reality and not simply stop the analysis at the concentration of the market pre-merger. If the analysis stops at pre-merger concentration, potential competitive effects that may benefit consumers could be forfeited. Again, competition policy should prioritize protecting consumers, and agencies shouldn't stop potentially beneficial mergers because of pre-merger concentration.

The Guidelines Should Emphasize the Importance of Defining the Relevant Market

The RFI asks the overarching question of whether it is necessary to precisely define the market in every case. [33] The answer to the question is simple: yes.

Precisely defining the market allows enforcement agencies and courts to examine the actual competitive effects of a merger — after all, a monopolist must have market power to extract monopoly rents. If a large firm has multiple lines of businesses and mergers with another firm, the resulting size of the firm overall doesn't matter if in any given market, the firm doesn't possess the necessary market power to extract monopoly rents. Competitive pressures which check the behavior of firms in a market come from a variety of sources, and the market definition question can identify these sources to determine which rival products and services operate in that market.

The RFI, however, worries that the SSNIP test obscures the various types of harms in addition to price effects that may arise from mergers.[34] The point of the SSNIP test is not to determine which harms to consumers exist in a market, but rather to determine what the actual market for a product is. If consumers can simply choose widget B as an alternative to widget A, then the market includes both widget B and widget A. At the same time, if a merger between a firm that produces Widget A and a firm that produces Widget B would lead to less innovation for new widgets, even if the prices of Widget A or B don't increase, the merger may still violate the Clayton Act if that loss of innovation outweighs any potential benefits to consumers. The SSNIP test merely serves as a function of identifying substitutability of alternative products, but this is critical in identifying the competitive considerations in a given market.

Guidelines Treatment of Digital Markets

The RFI asks about digital markets and how the guidelines' analysis of mergers in digital markets differ from mergers in other markets.[35] Many scholars have noted differences in digital and physical markets, such as physical shelf space and excess inventory that the retailer must sell.[36] Regardless of potential differences, however, the underlying question of competitive pressures remains the same. The current guidelines highlight the approach regulators use when evaluating mergers, and theoretically that approach should be no different: determine the market, find the anticompetitive effects, and compare those to the procompetitive benefits. If specific structural aspects of digital markets drive agencies to evaluate different evidence, the guidelines should reflect the distinction insofar as it fits into the overarching framework.

Efficiencies Are Critical to Determining Whether a Merger Would Lessen Competition

Finally, the RFI asks about whether the guidelines' approach to efficiencies is consistent with the prevailing legal framework enacted by Congress and interpreted by the courts. The RFI highlights language from the Court which states that "[p]possible economies cannot be used as a defense to illegality," but this ignores future Court decisions that allow for efficiency defenses.[37]

As Commissioner Christine Wilson has called for, merger guidelines should "put their cards on the table with clear, consistent standards for what does and does not constitute a cognizable efficiency."[38] This would take the form of efficiency analyses of hypothetical cases with hypothetical exhibits and submissions, providing parties with a "gold standard" for parties to shoot for. Such an approach would provide much-needed clarity on the role of efficiencies in merger analysis.

Conclusion

Merger guidelines provide clarity to practitioners about the types of cases and harms that the FTC and the DOJ will closely examine when firms combine. Vigorous antitrust enforcement ensures markets work efficiently and competition continues to provide consumers benefit, and the guidelines should be updated as processes change. As the agencies consider updates, they should make sure not to lose the ultimate goal of competition policy: protecting consumers. With a careful examination of markets and competitive pressure, the agencies can ensure mergers do not lead to firms extracting monopoly rents while also ensuring that combinations that promote competition can proceed to benefit consumers.

Respectfully submitted,

/s/ _

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[1] "Request for Information on Merger Enforcement," U.S. Department of Justice & U.S. Federal Trade Commission (January 18, 2022) ("RFI"), https://www.ftc.gov/policy/studies/submit-comment-merger-enforcement-request-information.

[2] 15 U.S.C. § 18.

[3] "Vertical Merger Guidelines," U.S. Department of Justice & The Federal Trade Commission (June 30, 2020) ("Vertical Merger Guidelines"), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[4] Vertical Merger Guidelines, *supra n. 4*.

[5] "Horizontal Merger Guidelines," U.S. Department of Justice & U.S. Federal Trade Commission (Aug. 19, 2010) ("Horizontal Merger Guidelines"), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[6] *FTC v. University Health, Inc.*, 938 F.2d 1206, 1221-22 (11th Cir. 1991), https://scholar.google.com/scholar_case?case=12617393365753923655&q=%22consumer+welfare+standard%22+and+
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[7] *Id.* at 1222.

[8] *See* Horizontal Merger Guidelines at § 2.1.3; *see also* Vertical Merger Guidelines at p. 3.

[9] Vertical Merger Guidelines at pp. 6-7.

[10] *Id.* at p. 11.

[11] RFI at p. 2.

[12] U.S. Dep't of Justice, "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" 19-20 (2008), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act.

[13] *United States v. Philadelphia Nat. Bank*, 374 US 321 (1963). https://scholar.google.com/scholar_case?case=11621011923548878052&q=%22merger%22+and+%22clayton+act%22
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[14] Horizontal Merger Guidelines at pp. 2-4.

[15] *Id.* at pp. 24-29.

[16] *Id.* at pp.9-10.

[17] RFI at pp. 1-2.

[18] Horizontal Guidelines at 20.

[19] RFI at 2.

[20] *Id*.

[21] *Phil. Nat'l Bank* at 363.

[22] Douglas H. Ginsberg and Joshua D. Wright, "*Philadelphia National* Bank: Bad Economics, Bad Law, Good Riddance," 80 Antitrust L. J. 201, 203 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817962.

[23] *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974).

[24] Ginsberg and Wright, *supra* n. 23 at 204.

[25] Ginsberg and Wright at p. 204.

[26] *See generally* Horizontal Merger Guidelines

[27] RFI at p. 3.

[28] *Id*. at p. 4.

[29] *Id*.

[30] Tracy Miller and Trace Mitchell, "Dynamic Competition in Digital Markets: A Critical Analysis of the House Judiciary Committee's Antitrust Report," Mercatus Center Policy Brief pp. 5-6 (Jan. 2021), https://www.mercatus.org/system/files/miller_and_mitchell_-_policy_brief_-_response_to_house_judiciary_antitrust_report_-_v1.pdf.

[31] RFI at p. 4.

[32] *General Dynamics* at 502.

[33] RFI at 5.

[34] *Id*.

[35] *Id*. at 7.

[36] Harold Feld, "The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms," Roosevelt Institute and Public Knowledge (May 2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Case-for-the-Digital-Platform-Act-201905.pdf.

[37] RFI at p. 5.

[38] Christine Wilson, "Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies," Bates White Antitrust Webinar (June 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf