



The Daily Dish

DOJ-FTC Merger Guidelines

DOUGLAS HOLTZ-EAKIN | JULY 20, 2023

In a dramatic departure from the standard practice of releasing significant new policies late on a Friday afternoon (thereby guaranteeing that AAF staff is writing on the weekend), the Department of Justice (DOJ) and the Federal Trade Commission (FTC) released their draft revised guidelines for mergers and acquisitions at the crack of dawn yesterday morning. It was quite the wakeup call.

Recall that these guidelines provide a framework for the public, businesses, practitioners, and courts to understand what the DOJ and FTC consider when investigating mergers. But they are just that – a framework. They are non-binding and do not have the force of law. Bluntly, the courts are free to conclude: “Interesting way to think about it. You’re wrong.”

One way to think about it is as CNBC [reported](#) it. “They include 13 points the agencies will use to decide whether to block a merger:

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.”

Of course, they just *had* to have 13. They couldn’t be a bit disciplined and have only 12? Cast a wider net and go for 14? Sigh. And I can just hear the lawyers’ conversations: “We’ll get them on an 8, a 2, and two 4s.”

Kidding aside, the list is illuminating. Think about the interaction between 1, 2, and 4. It makes perfect sense to examine whether concentration will rise in an already concentrated market, lessening competition among firms, and raising barriers to entry for new firms. Why is this a problem? Because consumers may be worse off. But *that*

is the reason to block a merger, not because of 1, 2, or 4. At the same time, consumers might be *better* off. If so, the merger should proceed regardless of 1, 2, and 4.

The problem is that the list is just that: a list. It is not a coherent set of principles about outcomes of market competition. That also means that it fails the basic point of the guidelines: telling the public and businesses what practices are problematic.

The entire exercise appears to be one of weaving together a rationale for a list of progressive pet peeves. To do so, the DOJ and FTC rely on (as Fred Ashton explains in [this video](#)) archaic and often-ignored case law rather than building on the recent efforts that incorporate economics and consumer welfare. As part of this “the past is the future” approach, concentration thresholds were lowered back to the original 1982 versions without any economic justification for the change. Similarly, the guidelines toss the economic distinction between horizontal and vertical mergers and provide a single set of guidelines for both. Finally, the guidelines broaden the notion of a “buyer” to include “buyers of labor,” thereby inserting the impact on labor (and their union bosses) as separate criteria in the guidelines.

Some of these theories in the draft guidelines were used in court cases recently lost by the FTC. It is a disappointing document that does not augur well for competition policy.