

FTC and DOJ Final Merger Guidelines Reflect Strong Enforcement Agenda

Lisl Dunlop, Axinn Veltrop & Harkrider LLP
Sandhya Taneja, Axinn Veltrop & Harkrider LLP

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After an extensive drafting and public comment process throughout 2023, on December 18, 2023, the U.S. Department of Justice, Antitrust Division (DOJ), and the Federal Trade Commission (FTC) (together, the Agencies) released [final new Merger Guidelines](#) (2023 Merger Guidelines). The 2023 Merger Guidelines reflect the Biden administration's policies and processes in reviewing proposed mergers and provide an important framework for understanding the Agencies' priorities in investigations and challenges.

Agency guidelines are not legally binding, but give important insights on the theories of harm that the Agencies consider, and have in the past been influential on the courts in merger challenges. Several of the "new" theories in the 2023 Merger Guidelines have already been seen at play in the Agencies' enforcement actions over the last few years, although several of these have not been successful. Given the departures the 2023 Merger Guidelines make from earlier guidelines, it remains to be seen how courts will view this set of guidelines. Overall, however, the Merger Guidelines signal a high bar for merging firms as they engage with the Agencies in merger investigations, and are a strong indication of the types of allegations they may face in a merger challenge.

The final 2023 Merger Guidelines have 11 individual guidelines – four guidelines addressing horizontal mergers, two that address non-horizontal mergers, and five relating to specific issues that could be relevant to any type of merger, such as markets that exhibit a "trend toward consolidation," transactions that are one of a "series of multiple acquisitions," deals involving "multi-sided platforms," transactions with potential labor market impacts, or acquisitions of partial ownership or minority interests.

Mergers of Competitors

The first four guidelines, applying to horizontal mergers, generally track the 2010 Horizontal Merger Guidelines, with some notable exceptions in the level of concentration and share required for a presumption of illegality, the expanded treatment of acquisitions of potential competitors, and the possible extension to mergers of competitors in adjacent markets (so-called "cross-market mergers").

Guideline 1. Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

The 2023 Merger Guidelines adopt lower threshold presumptions for when a horizontal merger will be considered unlawful based on market shares and the Herfindahl-Hirschman Index (HHI) market concentration ratio. (HHI is calculated as the sum of the squares of all the competitors' market shares in a relevant market).

The Agencies will presume that a transaction is unlawful if post-merger (1) the HHI is greater than 1,800 and the change in HHI is greater than 100 points; or (2) the market share is greater than 30% and the change in HHI is greater than 100 points. The HHI thresholds are considerably lower than prior guidelines - they represent a 700-point decrease from the 2010 Horizontal Merger Guidelines threshold of 2,500. Post-merger market share thresholds do not appear in earlier guidelines, and would catch relatively small acquisitions when made by an entity with close to or more than a 30% share.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

As in the 2010 Horizontal Merger Guidelines, the Agencies will also analyze how firms interact with each other to determine whether the proposed merger eliminates current competition. A recent example of a challenge brought on this basis is the FTC's suit^[1] to block John Muir's proposed acquisition of San Ramon Regional Medical Center, LLC. The complaint alleged that the transaction would eliminate head-to-head competition between the parties for inpatient general acute care for commercial insurers and enrollees in the I-680 corridor. The complaint alleged that post-acquisition, John Muir would control more than half of the inpatient general acute services in the relevant market and have a greater ability to drive up prices. A month later, in the face of FTC opposition, the parties announced termination of the deal.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

Coordinated effects--mergers that increase the risk of coordination and reduce a firm's incentive to compete--also appeared in the 2010 Horizontal Merger Guidelines. The 2023 Merger Guidelines noted that when incentives are aligned, then firms are more likely to coordinate, giving an example of "multi-market contact" to suggest potential increased coordination between rivals who compete in multiple markets. Even without a formal agreement, tacit coordination can soften competition because firms can predict how their counterparts will behave.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.

The 2023 Merger Guidelines establish a framework for challenging mergers based on an expansive interpretation of "actual potential competition" and "perceived potential competition" theories, which reflect the recent decision of the District Court for the Northern District of California in the FTC's unsuccessful challenge to Meta's acquisition of Within.^[2] Agencies will investigate mergers that eliminate a potential entrant in a concentrated market and analyze (1) whether either of the merging firms "had a reasonable probability of entering the relevant market" other than through the merger, and (2) whether the entry offered a "substantial likelihood" of deconcentrating the market.

Non-Horizontal Mergers

Guidelines 5 and 6, relating to vertical and conglomerate mergers, represent the first time the Agencies have combined horizontal and other types of mergers in a single set of merger guidelines. Guidelines 5 and 6 state broad principles that could apply both to vertical mergers--where the parties are in the same distribution channel (e.g., provider and payer)--or in different but related lines of business, such as bundling or exclusively providing one

medication in a consumer rebate program, as in Horizon/Amgen, or manufacturing different types of medical equipment for hospitals.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete

Even without a traditional vertical relationship, the Agencies are concerned with “foreclosure” strategies, where a merged firm may limit access to products, services, or routes to market (distribution channels, marketplaces, or customers) that its competitors need, potentially creating barriers to entry and restricting competition. Without countervailing evidence, the Agencies will “generally infer” that a 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.”

This theory can be seen in the DOJ’s 2022 challenge in the UnitedHealth/Change Healthcare merger. There, in addition to horizontal theories of harm, the DOJ alleged that the merger would give United access to competitively sensitive information of its rivals, and “enable United to raise the cost of its health insurance rivals.”^[3] Ultimately, the court was not convinced by the DOJ’s arguments or evidence that United would have the ability and incentive to use rivals’ competitively sensitive information and that United could foreclose rivals’ access to key inputs.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.

The Guidelines note that a merger raises concerns if it entrenches a dominant position by, for example, raising barriers to entry or eliminating a “nascent competitive threat,” or extends a dominant position by, for example, acquiring a firm in another market (a so-called “cross-market” merger). “Dominant position” is a new concept for the merger guidelines: the Agencies note they will assess a firm’s “dominant” position based on “direct evidence or market shares showing durable market power” without further specifics, although the earlier draft guidelines suggested that a 30% share may be sufficient for a finding of dominance.

Additional Guidelines

The remaining five 2023 Merger Guidelines describe specific areas of focus that can arise in either horizontal or non-horizontal mergers.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.

This Guideline notes that “the recent history and likely trajectory of an industry can be an important consideration when assessing whether a merger presents a threat to competition.” Therefore, if a transaction is taking place in an industry that is undergoing “a trend toward consolidation,” the merging parties should expect heightened scrutiny. This concern could apply to health care provider markets, many of which have consolidated over the years.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

If a merging firm has made multiple acquisitions over a period of time, then the Agencies will scrutinize the prior acquisition history to determine whether there is any “pattern or strategy” in relevant or related markets that would be anticompetitive. This Guideline would apply to “roll-up” acquisition, such as those challenged by the FTC in its case against U.S. Anesthesia Partners, Inc. (USAP) and private equity firm Welsh, Carson, Anderson &

Stowe, which alleges that the parties engaged in a multi-year anticompetitive scheme to “consolidate and monopolize” the Texas anesthesiology market.[4]

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

The Agencies will scrutinize mergers that involve “multi-sided platform” firms, in particular the conflict of interest and impact on competition where a platform operator is also a participant on the platform. Where a platform operator makes an acquisition of a firm offering products on the platform, for example, the Agencies will closely scrutinize the impact on the operator’s ability and incentives to favor its own products over those of competitors.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.

Reflecting the Agencies’ enforcement practices over the last three years, the Agencies intend to continue assessing labor market impacts when investigating and challenging mergers. The Agencies claim that labor markets “frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers” and will analyze how mergers impact “workers, creators, suppliers, and service providers.” Labor issues have become a particular focus in health care transactions, where medical employees can be significantly impacted. For example, in denying the proposed merger of Lifespan and Care New England in 2022, the Rhode Island Attorney General cited the fact that the combined system would employ 67% of the full-time registered nurses working in Rhode Island hospitals as a grounds for concern, and FTC Chair Khan and Commissioner Slaughter noted that they would have supported an FTC complaint on this basis.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

The Agencies reinforce that “partial acquisitions that do not result in control may nevertheless present significant competitive concerns.” Such concerns would include control or influence over the target through governance rights, reduction in incentives to compete, and access to non-public confidential information that may facilitate coordination. Again, we have seen enforcement action along these lines over the last few years, such as the DOJ’s 2020 challenge to Geisinger Health’s acquisition of a 30% interest in Evangelical Community Hospital in Pennsylvania.

Conclusion

The 2023 Merger Guidelines raise the bar for health care transactions in many ways. In addition to updating traditional theories of harm from mergers of direct competitors, the Guidelines address many complex forms of consolidation in the health care industry, such as vertical and cross-market mergers, roll-up acquisitions by private equity firms, and partial ownership interest. The Guidelines also reinforce the Agencies’ focus on impacts of transactions on employees. As discussed above, many of the new ideas outlined in the 2023 Merger Guidelines have already been seen in action in Agency merger challenges, such as Illumina/Grail, Horizon/Amgen, John Muir/Tenet, and most recently IQVIA/Propel Media.[5] With the FTC’s announced plans to hire more attorneys for their healthcare teams,[6] the health care industry can expect continued intense scrutiny and aggressive enforcement.

Lisl Dunlop is a Partner, and Sandhya Taneja an Associate, at Axinn, Veltrop & Harkrider LLP, a specialist antitrust law firm.

^[1] Complaint, John Muir Health v. Tenet Healthcare Corp., FTC Docket No. 9241 (Nov. 17, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/d09421jmhtenetpart3administrativecomplaintpublic.pdf.

^[2] Hailey Konnath, *FTC Calls It Quits On In-House Challenge To Meta-Within Deal*, LAW360 (Feb. 24, 2023) <https://www.law360.com/articles/1579957/ftc-calls-it-quits-on-in-house-challenge-to-meta-within-deal>.

^[3] Memorandum Opinion, U.S. v. UnitedHealth Group Incorporated and Change Healthcare, Inc., 22-cv-00481 (D. DC Sept. 19, 2022) https://www.justice.gov/d9/2023-08/415418_0.pdf.

^[4] Complaint, FTC v. U.S. Anesthesia Partners, Inc. & Welsh, Carson, Anderson, & Stowe XI, L.P., FTC Docket No. 2010031 (S.D.TX Sept. 21, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf.

^[5] *Competition in the Health Care Marketplace*, FEDERAL TRADE COMMISSION <https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance/competition-health-care-marketplace> (last visited Jan. 11, 2023).

^[6] *Health Care Antitrust Weekly: HHS Appoints Stacy Sanders as Chief Competition Officer; FTC and DOJ Set to Add Staff to Health Care Teams*, THE CAPITOL FORUM <https://library.thecapitolforum.com/docs/7bwzqej70d45> (Jan. 10, 2023).