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OPED: MERGER GUIDELINES - 1960'S MANIFESTO STYLE

The proposed merger guidelines would set antitrust analysis back by decades.

BY DEAL CONTRIBUTORS

The following article was written by Craig A. Waldman, a partner at Jones Day in Washington and practice leader of the firm's antitrust and competition law group.

The U.S. Federal Trade Commission and Department of Justice recently proposed new merger guidelines. In their guidelines, the agencies have historically attempted to provide a roadmap for how they assess mergers and acquisitions. This version has prompted strong reactions in the antitrust and business communities. That's largely because these guidelines wind the antitrust clock back by diminishing the role of modern antitrust economics and are more manifesto than guidelines.

Jones Day's Craig Waldman

For starters, the guidelines largely dispense with modern techniques used to separate beneficial and harmful deals. If adopted, they would set antitrust analysis back considerably both by abandoning the view that market share is a starting rather than ending point and by ignoring the importance of assessing the likely effects of a proposed merger on price, output and innovation. To take one example, if the guidelines are taken literally, a company with a 30% share could have a hard time merging with a firm with a share as low as 2%.

The new guidelines also seem to take issue with the longstanding and fairly uncontroversial recognition that vertical mergers — those that combine companies at different levels of the same supply chain--are more likely than not to be beneficial to customers. The new guidelines purport to create new presumptions of illegality that are rebuttable.

They also make clear that the agencies will not credit some typical deal efficiencies, which could in theory create quasi-per se illegality on vertical deals. The agencies double down on their general skepticism about deals by suggesting that they will discount - and maybe even dismiss - evidence from the parties even if provided under oath.

The agencies' effort to use case law to defend the guidelines' approach is also noteworthy. This isn't only unusual; the included citations are largely to older cases and articulate broad concepts where the devil is always in the details in antitrust.

The use of these cases ignores a robust body of more recent case law that supports a less interventionist approach. While the agencies have long taken advantage of market share presumptions in court, they have required more in their own internal investigatory assessments before they even get to litigation.

The issue is not simply how aggressive the agencies plan to be. The guidelines in large part fail to guide. They lack detail on the analytical process staff will take and thus do not give the public a roadmap to enable sound corporate planning.

For most of their theories of harm, the agencies simply lay out the myriad (13!) pathways that they could take to block a transaction. Importantly, the guidelines nowhere set forth the first and fundamental step in any analysis, which is to articulate the ultimate question that a review is trying to answer.

For decades, the agencies have been clear that the end point of their analysis was whether a transaction would lead to higher prices or cause another anticompetitive effect that harms consumers.

These guidelines are far from clear on the point. For instance, they take issue with serial acquisitions but fail to say whether the concern is that one of the serial deals will be the tipping point after which customers are harmed or that there is something inherently wrong with a buyer undertaking multiple acquisitions.

Past guidelines also have been criticized for not being prescriptive enough. But the lack of clarity in this draft is exponentially more significant than in prior guidelines. Maybe they aren't intended to be guidelines after all but a manifesto setting out a view of where antitrust has gone wrong all these years and presenting a platform to fix it.

Some deals should doubtless be challenged, but over-enforcement can harm the very competition the agencies desire to protect and undermine a significant driver of economic growth. While it's true that the agencies' current practice reflects aspects of the draft guidelines, time will tell how far they will push the boundaries and use the guidelines to do so.

Most procompetitive deals, I suspect, will be fine. From a purely practical perspective, the agencies cannot challenge every deal technically caught in the buzzsaw of the guidelines' novel theories. Inevitably, some beneficial deals will be challenged, and parties may have to go to court to prove that the agencies' theories do not hold water. Going to be interesting, if nothing else.

The views set forth above are the personal views of the author and do not necessarily reflect those of the firm. They should not be construed as legal advice on any specific facts or circumstances. ■

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