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A Look At Public's Divergent Views On New Merger Guidelines

By **Ana McDowall and Andrew Sfekas** (June 6, 2022, 2:46 PM EDT)

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The comment period recently ended for the joint request for information issued by the Federal Trade Commission and the U.S. Department of Justice that sought input on merger enforcement. The RFI, which was released in January, indicated the potential for a broad-reaching review of merger enforcement, with 91 questions in 15 topic areas.

The agencies launched this request after a year of policy actions, particularly at the FTC, that seemingly signal dissatisfaction with the merger enforcement status quo.

In September 2021, the FTC withdrew the recently adopted vertical merger guidelines, largely because the majority of the commission believed it gave too much credence to pro-competitive efficiencies. The FTC also ended a preclearance process that expedited approval of some smaller mergers.

Further, comments by members of the current administration indicate a belief that lax merger enforcement has led to anti-competitive concentration across the U.S. economy. Thus, some expect this RFI to be a precursor to substantial change in enforcement.

The RFI generated substantial interest, with over 1,900 comments from academic economists, practitioners, industry groups and concerned citizens.[1] We conducted a review of comments, focusing on in-depth submissions by academics, attorneys and industry groups.[2]

The comments indicate there are significant divisions in views about how to revise the guidelines — to the point that the agencies could choose any number of divergent paths that would find support in the comments.[3]

A significant contingent of academics, practitioners and industry groups urge caution; they favor continuing the approach taken in previous updates to the guidelines, focusing on specific clarifications and the addition of advances in economic frameworks and tools that have become standard practice for merger litigation.

More drastic changes, they suggest, risk undermining the credibility and usefulness of the guidelines. But other comments support a bolder approach in enforcement, and they view changes to the

guidelines as an important part of that approach.

For example, this could mean the inclusion of new, potentially untested, theories of harm — or even a return to an earlier age of antitrust in which structural analysis takes precedence over direct evidence of competitive effects.

Purpose of the Guidelines, and Risks of Major Overhaul

In its first set of questions, the RFI seeks input on the purpose and scope of the guidelines. Several commenters note that the tone of these questions suggests that the agencies plan to revise the guidelines to allow for substantially greater merger enforcement.

Several commenters argued strongly for a cautious approach to revision. The primary purpose of the guidelines, they argue, should be to provide transparency around the tools and methods the agencies use to review and litigate mergers — and not to set out untested theories of harm.

In particular, several attorneys suggest that the guidelines follow case law, rather than lead it — the agencies should first test new theories by bringing cases before encoding them in the guidelines.[4] Many point out that the guidelines' usefulness rests on their credibility with courts and, on this, the 2010 guidelines have been successful — courts have often endorsed them in cases.[5]

Radical change aimed at increasing enforcement levels could undermine the guidelines and reduce their effectiveness for enforcement.[6]

Other commenters, while not explicitly arguing that the guidelines should serve a different purpose, proposed to include theories of harm that have not been proven in court, and would therefore depart from such a cautious approach to revision.

For example, several comments suggest including discussion of theories involving common ownership by investors — which some economic studies have suggested could decrease competition, but which has not yet been tested in courts.[7]

Several commenters also propose including analysis of cross-market mergers, where some economic evidence has suggested that geographically distant health systems could gain market power after merging, but where, again, no case has been brought.[8] Inclusion of these theories would push the guidelines beyond what has been established in case precedent.

This division on the purpose of the guidelines may reflect fundamental divisions regarding the underlying facts. Economists are divided on whether concentration has actually increased, with recent research supporting either finding.

Practitioners, additionally, are divided on whether merger enforcement has grown more or less strict. Some commenters argue that while there exist anecdotal cases of mergers that were cleared and turned out to have anti-competitive effects, a systematic analysis shows that merger enforcement has increased over the last several decades.[9]

Others propose that there is clear evidence, in retrospect, that mergers have been allowed that lessened competition and caused competitive harm.[10]

Structural Presumptions

Several comments address the RFI's questions about whether there should be additional screens for mergers that should be presumed anti-competitive, with a considerable range of recommendations.

Presumptions can play two roles in merger enforcement.

First, they signal to industry participants a set of transaction characteristics that are likely to trigger the attention of the agencies — or conversely, under what conditions a deal may be safe to pursue.

Second, they have historically tended to be part of the evidence of competitive effects.

On this latter role, some economists and practitioners appear concerned that the breadth of presumptions being contemplated in the RFI could signal a move away from detailed economic analysis of competitive effects, toward simpler structural analyses.

The toolkit for evaluating competitive effects has developed significantly in the last 30 years and structural presumptions, especially those based on size thresholds — as opposed to changes in share or concentration — are now understood to have limited value in informing about the merger's impact on competition.[11]

However, returning to the first role of presumptions, presumptions also provide simple rules to triage the large number of mergers being notified, given the agencies' resource constraints. In this role, there is some sympathy for changing presumptions in line with where the agencies view a need for stricter enforcement.[12]

In particular, one screen that receives support from economists and practitioners is for acquisitions by a firm with more than 50% share in a market of another firm in the same market.[13] This presumption is consistent with the agencies' goal of curbing the market power of dominant firms, and is relatively well grounded in economic theory.

Other metrics get less traction. For example, some view factors such as "whether the transaction involves … a maverick firm, the closest competitor, or a nascent competitor" as impractical; these comments, from James Rill and Gregory Werden, argue that presumptions should focus on objective, quantifiable tests that are well accepted by courts, rather than on subjective assessments.[14]

Others view several of these alternative screens as a step backward, a return to metrics that are largely uninformative about the competitiveness of a market and have been superseded by more informative metrics — e.g., the number of significant competitors and changes in the Herfindahl-Hirschman Index, respectively.[15]

Nonhorizontal Effects

The RFI has relatively few questions on nonhorizontal effects. The main question addressed in comments is whether the traditional distinctions between horizontal and vertical mergers still make sense in light of modern economic trends.

Every comment we reviewed addressing this question argues that these two types of competitive effects from merger are indeed distinct.[16] Mergers today may involve more complex firms and

relationships between firms, but the nature of the potential horizontal and vertical harms, and the frameworks for evaluating them, remain distinct.

It is telling, for example, that while several comments support a presumption on acquisitions by leading firms of horizontal competitors (even very small ones), none of those comments advocate for a more general presumption on any acquisition by a leading firm.

On whether vertical and horizontal guidance should be combined into a single set of guidelines, those who address this tend to favor separation.[17] Many raise the concern that there is less consensus around vertical theories and that bringing the two together involves a risk of harm to the credibility of the horizontal piece.[18]

Given the relatively limited consultation on vertical effects this RFI invites, it may indeed make more sense for the agencies to focus on horizontal effects at this stage.

Finally, the comments highlighting concerns about vertical (or complementary) mergers favor the inclusion of additional theories of harm that are uniquely non-horizontal. For example, commenters note the possibility of raising entry barriers through data aggregation.[19]

They discuss that entry barriers could also be raised through acquisitions of complementary products — such as, in digital markets, by acquiring products that help make platforms interoperable with other platforms and degrading interoperability for rival platforms.[20] The question remains whether these newer theories should be first tested by bringing cases.

Dynamic Competition

Both the RFI and recent agency actions suggest a concern that past enforcement has not captured the ways in which mergers affect dynamic competition — a notable example being the FTC's monopolization complaint that Meta Platforms Inc. allegedly stifled competition by acquiring innovative competitors.[21] Some comments mirror this view.[22]

However, several comments foresee difficulties in spelling out the analytical approach for dynamic effects in the guidelines. These theories often involve longer time horizons and, in some cases, more speculative judgments.

Several comments warn that winning cases will require concrete evidence of probable and imminent harm, according to the legal standard encoded in Section 7.[23] Given these technical hurdles, the agencies may do better, again, bringing cases and building case law, rather than tying themselves to a particular framework in the guidelines that may not play out well in front of courts.

Digital Markets

The RFI seeks input on whether the guidelines should specify approaches to markets with special characteristics, particularly digital markets. Stakeholders from a few industries appear to be particularly engaged with this consultation process. For example, comments from the general public focus on the technology (145 mentions), health (355 mentions) and agriculture (490 mentions) industries.

However, a stronger public focus on these industries doesn't mean their economics are different. Economists generally believe that the guidelines should remain industry-agnostic and focus on economic

principles, while the evidence in any individual case should consider the circumstances in the particular industry.[24]

Comments generally argue that the 2010 horizontal merger guidelines already provide sufficiently flexible tools to address these features.[25]

Several comments request that the guidelines clarify how the agencies intend to approach certain economic features, such as zero-price markets, that are more common in certain industries.[26] However, the prevailing view is not that guidance need not be exclusive to a particular industry.

Labor Effects and Monopsony Power

The RFI asks how the guidelines should treat monopsony power, particularly in labor markets, with questions on how market definition and presumptions should be adapted.

Several commenters argued that enforcement of labor monopsony cases should increase — particularly through the challenge of mergers that raise monopsony concerns, but not monopoly concerns.[27]

The DOJ has brought several merger cases in which monopsony arguments played a role.

These cases include, notably, the attempted mergers of Anthem Inc. and Cigna Corp., and UnitedHealth Group Inc. and PacifiCare Health Systems Inc. The latter even included a condition in the consent decree addressing a market with only monopsony concerns.

Several commenters also have specific recommendations for revising the guidelines to increase enforcement, though those recommendations come with risks. For example, some commenters encourage the adoption of presumptions for monopsony markets, with suggestions that are generally below the levels for product markets.[28]

However, the economic evidence regarding the level of concentration that may cause competitive harm is unclear, and may even suggest that large changes in concentration are needed to have a noticeable wage effect.[29]

Adding thresholds before the economic research is more clearly established could lead to a loss of credibility, if these thresholds are ultimately disproven by future economic studies.

Conclusion

If the goal of the agencies is to shift toward a stricter regime for merger enforcement, some comments may point to some potential paths to achieve that. However, the comments highlight important risks to an aggressive reform agenda, with the ultimate risk of devaluing the role of the guidelines.

The agencies need to consider, first and foremost, whether the guidelines remain a description of current agency practice, or a more encompassing statement of theories the agencies may want to attempt, even if they ultimately do not succeed.

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[1] In total, 5,825 comments were submitted; after a review process, the agencies posted over 1,900 of them.

[2] Given the large volume of comments, we identified "in-depth" comments by retrieving comments that included attachments and were hence likely to have more substantial feedback for the agencies.

[3] We use the term "Guidelines" generally to mean either horizontal merger guidelines or vertical merger guidelines.

[4] See comments by James F. Rill et al.; and American Bar Association – Antitrust Law Section.

[5] See comments by D. Daniel Sokol & Carl Shapiro; Gregory Werden; Jeffrey Macher et al. (The Georgetown Center for Business and Public Policy); and William Anderson (Business Roundtable).

[6] See comments by D. Daniel Sokol & Carl Shapiro; Neil Campbell & William Wu; and John Asker, Kostis Hatzitaskos, Bob Majure, Ana McDowall, Nathan Miller & Aviv Nevo.

[7] See comments by Steven Salop; Fiona Scott Morton; and Martin Schmalz.

[8] See comments by Leemore Dafny & Nancy Rose; and the Attorneys General of California, New York, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and Wisconsin ("23 State Attorneys General").

[9] See comments by Jeffrey Macher et al. (The Georgetown Center for Business and Public Policy); and Alden F. Abbott.

[10] See comments by Carl Shapiro & Nancy Rose; Peter C. Carstensen & Robert H. Lande; and Philip Weiser & Douglas Peterson.

[11] See comments by Gregory Werden; Alden F. Abbott; and John Asker, Kostis Hatzitaskos, Bob Majure, Ana McDowall, Nathan Miller & Aviv Nevo.

[12] See comments by 23 State Attorneys General; Carl Shapiro & Nancy Rose; and Small Business Rising.

[13] See comments by Gregory Werden; Carl Shapiro & Nancy Rose; and Steven Salop. Notably, this does not extend to transactions by leading firms of acquisitions in complementary markets.

[14] See comments by James Rill et al.; and Gregory Werden.

[15] See comment by Gregory Werden.

[16] See comments by D. Daniel Sokol & Carl Shapiro; Gregory Werden; Steven Salop; and Jeffrey Macher, John Mayo & Mark Whitener.

[17] One exception is the comment by Fiona Scott-Morton, who favors combining horizontal and vertical effects into a single document.

[18] See comments by Gregory Werden; D. Daniel Sokol & Carl Shapiro; Steven Salop; Jeffrey Macher et al. (The Georgetown Center for Business and Public Policy); James Rill et al.; Richard Epstein; and AT&T.

[19] See comments by Lesley Chiou et al.; and Brijesh Pinto & David Sibley.

[20] See comment by Fiona Scott Morton.

[21] FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate | Federal Trade Commission.

[22] See comments by David Teece (the Project on Big Tech, Dynamic Competition and Antitrust at the BRG Institute); Carl Shapiro & Nancy Rose; Richard Gilbert & Michael Katz; 23 State Attorneys General; the Attorneys General of Colorado and Nebraska; and Public Knowledge.

[23] See comment by Gregory Werden.

[24] See comments by Gregory Werden; Jeffrey Macher, John Mayo & Mark Whitener; Lesley Chiou, Nathaniel E. Hipsman, Jeffrey T. Prince & Sachin Sancheti.

[25] See comments by Brijesh Pinto & David Sibley; and Gregory Werden.

[26] See comments by Philip Weiser & Douglas Peterson; 23 State Attorneys General; AT&T; and Carl Shapiro & Nancy Rose.

[27] See comments by American Medical Association; Global Antitrust Institute; and the Attorneys General of California, Maryland, District of Columbia, New York, Connecticut, Illinois, Delaware, Iowa, Hawaii, Maine, Massachusetts, Oregon, Minnesota, Pennsylvania, Nevada, Rhode Island, New Jersey, Washington, New Mexico, and Wisconsin.

[28] See comments by Service Employees International Union, International Brotherhood of Teamsters, Communications Workers of America, United Farm Workers, & Strategic Organizing Center; and American Medical Association.

[29] See comment by Global Antitrust Institute.