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DoJ and FTC Issue Final Merger Guidelines

Final Merger Guidelines Consistent with July 2023 Draft Merger Guidelines Break Sharply from Longstanding Antitrust Policies

In July 2023, the Antitrust Division of the U.S. Department of Justice (the "DoJ") and the Federal Trade Commission ("FTC") issued Draft Merger Guidelines (available here) for public comment. As discussed in our prior memorandum to clients (available here), the Draft Merger Guidelines articulated a policy more adverse to mergers than policies in place at the DoJ and FTC since 1982, in keeping with public statements by the Biden Administration. On the same day that the DoJ and FTC issued the Draft Merger Guidelines, the President's Council of Economic Advisers issued a statement (available here) praising them.

Although many commenters criticized the Draft Merger Guidelines, the DoJ and FTC yesterday issued Final Merger Guidelines (available here) which largely track the Draft Merger Guidelines. (A blackline showing the changes is available here.) A few of those changes and their implications are noted below:

- ***Dominance.*** The Draft Merger Guidelines called for heightened scrutiny of mergers involving "dominant" firms, which the Draft Merger Guidelines defined as firms with "at least 30 percent market share." Dominance is an established feature of European competition law, but has not previously been a feature of U.S. antitrust law, and finds no support in judicial decisions analyzing mergers. The concept of dominance was established in a 1978 judgment by the European Court of Justice, where the court defined "dominance" as "a position of economic strength enjoyed by an undertaking which enables it to prevent economic competition … by affording it the power to behave to an appreciable extent independently on its competitors, its customers, and ultimately of its consumers."[1] Although the analysis is always informed by the facts, European competition law applies a rebuttable presumption of dominance to firms with a market share of 50% or greater. In the Final Merger Guidelines, the DoJ and FTC retained the concept of "dominance" but have removed the reference to a 30% share, leaving ambiguous what level of market share creates a "dominant" firm from the perspective of the DoJ and FTC.
- ***Vertical mergers.*** One of the most striking aspects of the Draft Merger Guidelines was a standalone guideline (Guideline 6) asserting that any vertical merger involving a firm with a 50% or greater market share presumptively raised a competition concern. Although the DoJ and FTC deleted Guideline 6 from the Final Merger Guidelines, they retained the substance of it in a new

footnote (Footnote 30) and its accompanying text, in which they assert that there will be a "sufficient basis" to challenge a vertical merger whenever one of the parties is a monopolist, which they define as any firm with a market share greater than 50%.

- ***Technology markets.*** The Draft Merger Guidelines included multiple statements supporting more rigorous analysis of mergers involving technology companies. The Final Merger Guidelines build upon that concern by including an expanded discussion of nascent competitive threats and mergers involving platforms. The Final Merger Guidelines go so far as to assert that mergers with "short-term benefits" should be questioned if there is the possibility of "longer term" harm—a reversal of the position in the 2010 Horizontal Merger Guidelines that "[d]elayed" competitive effects should be "given less weight because they are less proximate and more difficult to predict."

Finally, none of the Draft Merger Guidelines, the Final Merger Guidelines, or the press releases accompanying them expressly mentions the DoJ's 1995 Bank Merger Competitive Review guidelines, on which the DoJ called for public comment in December 2021 (see here). The page of the DoJ's website listing guidelines and policy statements (available here) continues to link to the 1995 Bank Merger Competitive Review guidelines (and notes that the relevant webpage was updated on December 18, 2023), suggesting that the Bank Merger Competitive Review guidelines remain in place, at least for now.

ANALYSIS

Unsurprisingly, especially in view of the White House's immediate endorsement of the Draft Merger Guidelines, the Final Merger Guidelines deviate little in substance from the Draft Merger Guidelines, reflecting the Biden Administration's ongoing effort to reshape merger law.

It is uncertain whether courts will rely on the Final Merger Guidelines when construing the antitrust laws in future merger litigation. Guided by the analytical rigor of prior guidelines, courts have embraced the consensus framework that existed under the Reagan, Bush, Clinton, Bush, Obama, and Trump Administrations, even though the guidelines are not binding and lack the force of law. The Final Merger Guidelines depart from, or even ignore, many decisions based on that consensus framework, relying instead on either older precedents or theories that have not prevailed in court. Court acceptance or rejection of the Final Merger Guidelines will be an important development to watch in the coming years, as will potential revision of the Final Merger Guidelines by future Administrations. The range of the potential outcomes of these developments will be important for merging parties to take into consideration when planning mergers and acquisitions and negotiating deal terms with counterparties, including those related to timing, obligations to accept regulatory-imposed conditions, obligations to litigate, control of strategy, and reverse termination fees.

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ENDNOTES

[1] Case 27/76, *United Brands* v. *European Commission*, 65.

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