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Locke Lord QuickStudy: The Federal Trade Commission and ?Justice Department Release Final 2023 Merger Guidelines ?

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The Federal Trade Commission and the Justice Department jointly issued the 2023 Merger Guidelines on December 18, 2023, which describe the factors and frameworks the agencies will utilize when reviewing mergers and acquisitions. The 2023 Merger Guidelines modify the draft guidelines released on July 19, 2023, and replace both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The 2023 Merger Guidelines are not themselves legally binding, but provide transparency into the agencies' decision-making process. The FTC vote to approve the 2023 Merger Guidelines was 3-0.

The 2023 Merger Guidelines identify the procedures and enforcement practices the agencies most often use to investigate whether mergers violate the antitrust laws, and set forth several different analytical frameworks (referred to as "Guidelines") to assist the agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. Guidelines 1-6 describe the distinct frameworks the agencies use to identify whether a merger raises prima facie concerns (i.e., whether the effect of the merger may be to substantially lessen competition or tend to create a monopoly). Guidelines 7-11 explain how to apply those frameworks in several specific settings. The agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not threaten to substantially lessen competition or tend to create a monopoly. The 2023 Merger Guidelines identify rebuttal evidence that the agencies consider, and that the merging parties can present, to rebut an inference of potential harm.

FRAMEWORKS (GUIDELINES 1-6)

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

A merger is presumptively unlawful when it creates or further consolidates a highly ?concentrated market or creates a firm with a significant market share as follows:?

- The post-merger Herfindahl-Hirschman Index ("HHI") is greater than 1,800, ?with a change of more than 100; or
- The merged firm would have a market share of more than 30%, with an increase ?in the HHI of more than 100.?

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

If there is substantial competition between merging parties prior to the merger, then the ?merger will eliminate competition between the merging parties and may substantially lessen ?competition. Factors the agencies will examine to identify substantial competition include:?

- The parties' strategic deliberations or decisions in the regular course of ?business;?
- Prior merger, entry, expansion or exit events;?
- Customers' willingness to switch between different firms' products;?
- The impact of competitive actions on rivals. Considering the impact that ?competitive actions by one of the merging firms has on the other merging firm; ?and
- The impact of eliminating competition between the firms.?

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

A merger may substantially lessen competition when it meaningfully increases the risk ?of coordination among the remaining firms or makes existing coordination more stable or ?effective.?

<u>Primary Factors</u>. The agencies will conclude that a merger materially increases the risk ?of coordination if <u>any</u> of the three primary factors is present:?

- Highly concentrated market.?
- Prior actual or attempted attempts at coordination.?
- The elimination of a "maverick" competitor.?

<u>Secondary Factors</u>. The agencies will also consider whether secondary factors ?demonstrate that a merger may meaningfully increase the risk of coordination, even absent the ?primary risk factors. These secondary factors include market concentration, market ?observability, competitive responses, aligned incentives and profitability or other advantages of ?coordination for rivals.?

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

<u>Actual Potential Competition</u>. The merger between a current and potential market ?participant could harm competition by eliminating the possibility that the potential entrant ?would have entered into a concentrated market in the future. To determine whether a merger ?eliminates a potential entrant into a concentrated market, the agencies will examine:?

- Whether one or both of the merging firms had a reasonable probability of ?entering the market; and
- Whether that entry offered a substantial likelihood of ultimately producing ?de concentration of the market or other procompetitive effects.?

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Perceived Potential Competition. The acquisition of a firm that is perceived by market ?participants as a potential entrant can substantially lessen competition by eliminating or ?relieving competitive pressure. To determine whether the acquisition of a perceived potential ?entrant may lessen competition, the agencies will consider:?

- Whether a current market participant could reasonably consider a firm to be a ?potential entrant; and
- Whether that potential entrant has a likely influence on existing rivals.

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

When a merger creates a firm that can limit access to products or services that its rivals ?use to compete, the agencies examine the extent to which the merger creates a risk that the ?merged firm will limit its rivals' access, gain or increase access to competitively sensitive ?information or deter rivals from investing in the market.?

The Risk that the Merged Firm May Limit Access. The agencies will assess whether the ?merged firm has both the ability and incentive to limit access to the products by examining ?four factors:?

- The availability of substitutes for the product.?
- How important the product is to the dependent firms and the extent to which ?they would be weakened or excluded from the market if their access was limited.?
- The importance of the dependent firms for competition in the market.?
- Competition between the merged firm and the dependent firms.?

Additional factors the agencies may consider in making this assessment include barriers ?to entry and exclusion of rivals, prior transactions or prior actions, information contained in ?business planning and merger analysis documents and market structure, including the degree of ?vertical interaction in the market and the trend toward vertical integration.?

Visibility Into Rivals' Competitively Sensitive Information. The agencies will assess ?whether the merged firm would gain or increase visibility into rivals' competitively sensitive ?information, use that visibility to undermine competition from a rival or facilitate coordinated ?interaction among firms in the market.?

Mergers that Threaten to Limited Rivals' Access and Thereby Create Barriers to Entry ?and Competition. When a merger gives the merged firm the ability and incentive to limit ?rivals' access or gives it increased visibility into its rivals' competitively sensitive information, ?the merger may create barriers to entry or dissuade rivals from entering the market or ?expanding their operations.?

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

When a party to a merger already has a dominant position, the merger may entrench or ?extend that dominant position into new markets. The agencies will assess whether a merging ?party has a dominant market position based on direct evidence or market shares showing ?durable market power.?

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Entrenching a Dominant Position. A merger involving a firm having a dominant ?position may entrench its dominant position by creating or enhancing barriers to entry or ?expansion by rivals through increasing the costs associated with changing or switching ?suppliers, by interfering with the use of competitive alternatives or depriving rivals of scale ?economies or network effects. Further, a firm having a dominant position may entrench its ?dominant position by acquiring a nascent competitive threat.?

Extending a Dominant Position into Another Market. The agencies will also examine ?whether a merger could enable a firm with a dominant position in one market to extend that ?dominant position into another market using the factors described above.?

HOW TO APPLY THE FRAMEWORKS IN SPECIFIC SETTINGS

7. 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.?

A trend toward consolidation can be an important factor in understanding the risks to ?competition presented by a merger. The agencies will closely examine industry trends in ?applying the frameworks in Guidelines 1-6, including the trend toward consolidation, the trend ?toward vertical integration, whether the merging parties, by consolidating, gain bargaining ?leverage over their transaction partners and whether there are multiple simultaneous mergers or ?a succession of mergers by different players in the same industry.?

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

If an individual transaction is part of a firm's pattern or strategy of multiple ?acquisitions, the agencies consider the cumulative effect of the pattern or strategy. The ?agencies may examine a pattern or strategy of growth through acquisition by examining a ?firm's history and current or future strategic incentives.?

9. 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 consider the distinctive characteristics of multi-sided platforms when ?applying the frameworks in Guidelines 1-6.?

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

A merger between competing buyers of labor (including workers, creators, suppliers and ?service providers) can substantially lessen competition for their labor.?

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

Acquisition of partial ownership or other minority interests may influence decision-?making at the target firm or another firm in ways that may substantially lessen competition. ?The agencies have concerns with “cross-ownership” (when one firm holds a non-controlling ?interest in a competitor) and “common ownership” (when individual investors hold non-?controlling interests in firms that have a competitive relationship). The agencies focus on three ?principal effects:?

- A partial acquisition can lessen competition by giving the partial owner the ?ability to influence the competitive conduct of the target firm.?
- A partial acquisition can lessen competition by reducing the incentive of the ?acquiring firm to compete.?
- A partial acquisition can lessen competition by giving the acquiring firm access ?to non-public, competitively sensitive information from the target firm.?

CAVEAT

The 2023 Merger Guidelines contain an unnumbered caveat that the guidance is not exhaustive ?of all the ways mergers can threaten competition and list examples of other mechanisms not ?covered by the guidelines discussed above that would be problematic, such as a merger that ?would enable the firms to avoid a regulatory constraint, exploit a unique procurement process ?or dampen the acquired firm’s incentive or ability to compete. The 2023 Merger Guidelines note in the ?preamble that the factors contemplated in the guidance neither dictate nor exhaust the range of ?theories or evidence the agencies may introduce in merger litigation and that the agencies ?follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.?

REBUTTAL EVIDENCE

The parties to a proposed transaction may present evidence to rebut an inference of ?potential harm for the agencies to consider. Common types of rebuttal and defense evidence ?the parties could present include:?

Failing Firms. When one of the merging parties is in a weak or weakening financial ?position, the parties may assert the “failing firm” defense. This defense applies when the assets ?to be acquired would imminently cease playing a competitive role in the market even absent ?the merger.?

There are three requirements of this defense:?

- The “failing firm” faces the grave possibility of a business failure, based on ?evidence that the firm would be unable to meet its financial obligations in the ?near future.?
- The prospects for reorganization of the “failing firm” are dim or nonexistent.?
- The buyer is the only available purchaser.?

Entry and Repositioning. Under this rebuttal, the merging parties assert that a reduction ?in competition resulting from a merger will induce entry or repositioning (the movement of ?assets from other markets into the market in question) into the market, preventing the merger ?from substantially lessening competition. The agencies will assess whether entry induced by ?the merger would be timely, likely and sufficient in magnitude, character and scope to deter or ?counteract the competitive effects of concern.?

Procompetitive Effects. The merging parties may raise a rebuttal argument that the ?procompetitive effects of the merger show that there is no substantial lessening of competition ?in the market. The agencies will not credit vague or speculative claims. The agencies will ?examine if each of the following is present:?

- The merger must produce substantial competitive benefits that could not be ?achieved without the merger.?
- The benefits must be verifiable, and have been verified, using reliable ?methodology.?
- Efficiencies merely benefitting the merging firms are not sufficient. The ?benefits must prevent the risk of a substantial lessening of competition within a ?short period of time.?
- Any claimed benefits must not result from the worsening of terms for the ?merged firm’s trading partners.?

For further information or to discuss the 2023 Merger Guidelines and how they may affect a contemplated transaction, please contact the authors.

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