CONSUMER REPORTS COMMENTS
ON
PROPOSED NEW FTC-DOJ
DRAFT MERGER GUIDELINES

SEPTEMBER, 2023

SUMIT SHARMA, CONSUMER REPORTS

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1. Introduction and Summary

Consumer Reports (CR) is pleased to submit these comments on the Draft Merger Guidelines published by the Department of Justice and the Federal Trade Commission (DOJ, FTC, the Agencies) on July 19, 2023.[1] These Guidelines are an important undertaking by the agencies to update the 2010 Horizontal Merger Guidelines[2] and 2020 Vertical Merger Guidelines.[3]

Over the last many decades there has been a clear trend of increasing market concentration and consolidation in multiple sectors of our economy.[4] As a result, consumers often have fewer choices and leverage when shopping for a good deal. This is evident in online marketplaces but also true in other critical sectors, from agriculture to pharmaceuticals and healthcare.

We welcome the draft guidelines intent to strengthen merger enforcement and the updates to reflect new market realities.

We recommend the Agencies make more explicit in the Draft Guidelines the economic link between increasing market concentration leading to increasing market power and adverse outcomes for consumers and workers. State, within the structural presumptions and the frameworks in Guidelines 1-8 which we generally agree with, when mergers may not ordinarily affect competition. Finally, we believe the Agencies' intention is that Guidelines 1-8 are prima facie frameworks. This should be made clearer.

In our view these clarifications will help make these guidelines more durable and increase their credibility by helping the Guidelines gain wider acceptance and minimizing the gap between stated policy and the Agencies' ability to enforce against problematic mergers.

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[1] https://www.justice.gov/atr/d9/2023-draft-merger-guidelines

[2] https://www.justice.gov/media/810916/dl?inline

[3] https://www.justice.gov/media/1090651/dl?inline

[4] See Testimony to the Joint Economic Committee Regarding the Concentration of Corporate Power by Thomas Philippon, July 14, 2021. https://www.jec.senate.gov/public/_cache/files/22348c0a-8ab1-402b-90d2-40a216d8462b/testimony-philippon-v2.pdf

2. Updates that help restore the potency of merger enforcement

Many updates in the Draft Guidelines will help correct for past underenforcement against mergers. These are great additions and changes. In our opinion, these include the following:

1. **Combining horizontal and vertical merger guidelines.**

This is a useful change that reflects new market realities where the largest firms often operate complex ecosystems of interrelated products.

2. **Reaffirming the importance non-price attributes in addition to price attributes when analyzing mergers and defining markets**

This reflects the important role that competition plays in delivering not just short-term benefits of lower prices and higher output but also longer-term benefits like higher quality and innovative products that give consumers more control and the leverage of choice. It also more accurately captures the competitive dynamic post meger in online marketplaces with zero prices.

3. **The use of structural presumptions.**

The weakening of merger enforcement is at least partly responsible for increasing market concentration and consolidation in multiple sectors of our economy leading to higher prices for consumers and lower income for workers.[5] We support the use of structural presumptions to strengthen merger enforcement and to correct for previous underenforcement.

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[5] See Testimony to the Joint Economic Committee Regarding the Concentration of Corporate Power by Thomas Philippon, July 14, 2021. https://www.jec.senate.gov/public/_cache/files/22348c0a-8ab1-402b-90d2-40a216d8462b/testimony-philippon-v2.pdf
Lancieri, Filippo and Posner, Eric A. and Zingales, Luigi, The Political Economy of the Decline of Antitrust Enforcement in the United States (March 20, 2023). Available at SSRN: https://ssrn.com/abstract=4011335 or http://dx.doi.org/10.2139/ssrn.4011335

4. **Reaffirming (in Guideline 9) that the Agencies may examine the effect of a whole series of acquisitions by the same firm.**

We welcome this addition to the Draft Guidelines to cover cases where a firm makes a series of small acquisitions which may lead to substantial lessening of competition even if each individual acquisition may not do so. See for example the case of serial acquisition of Dialysis clinics.[6]

5. **Setting out (in Guideline 10) how the agencies will examine mergers involving multi-sided platforms.**

This is a much-needed update reflecting the important role large online platforms in our modern economy which are often multi-sided platforms.

6. **Clarifying (in Section III) that market definition is a tool and not an end to understand how competition presents itself in a market.**

[6] Paul J Eliason, Benjamin Heebsh, Ryan C McDevitt, James W Roberts, How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry, The Quarterly Journal of Economics, Volume 135, Issue 1, February 2020, Pages 221–267, https://doi.org/10.1093/qje/qjz034

3. Suggested clarifications

The Draft Guidelines are a much-needed reset to merger enforcement which has been an underdeterrent in many markets. There is ample empirical evidence that shows the increasing concentration in our economy and the role of merger enforcement in enabling this concentration.[7] It would be helpful to refer to such evidence to provide context for the reset.

Guideline 2 of the Draft Guidelines says:

> *"Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition."*

We agree and suggest that the importance of competition and how competition is reduced when concentration increases is also mentioned in the introduction to the Draft Guidelines.

We believe the Agencies' intention is that Guidelines 1-8 are prima facie frameworks. It would be helpful to make this clearer by adding references to and integrating parts of Section IV on rebuttal evidence into Guidelines 1-8.

In general, we agree with the use of structural presumptions and the frameworks set out in Guidelines 1-8 to identify mergers that may substantially lessen competition or tend to create a monopoly. It would be helpful if the Agencies also state within this framework when competition is not ordinarily affected to help provide better guidance to potential merging parties.

Finally, we recommend the Agencies included illustrative examples in the Draft Guidelines. These should illustrate cases for which only one guideline is relevant or sufficient to challenge a merger and cases for which multiple guidelines may be implicated. The latter would be particularly helpful for potential merging parties and judges to understand how the Agencies see the different guiding principles working together. We also recommend that the examples include online marketplaces where dominant firms have made hundreds of acquisitions over the last few decades.

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[7] Salop, S.C., Morton, F.S. The 2010 HMGs Ten Years Later: Where Do We Go From Here?. Rev Ind Organ 58, 81–101 (2021). https://doi.org/10.1007/s11151-020-09809-4

We provide some further comments below.

1. Guideline 1: Mergers and increase in concentration.

We agree with both with the use of HHI (Herfindahl-Hirschman Index) to measure threshold concentration levels and the lowering of these threshold levels compared to the 2010 Horizontal Merger Guidelines as stated in the Draft Guidelines.

However, while HHI accurately measures concentration it may not be an accurate reflection how competition presents itself in any given market. This is because HHI does not account for the number of firms or asymmetries in market shares – both of which impact competition and firm strategic behavior. An increase in concentration and high levels of market concentration are a proxy for competitive harm. Indeed, the Agencies say as much in Footnote 29 in the Draft Guidelines:

> *"The Agencies consider a threshold of a post-merger 1,800 HHI and an increase in HHI of 100 to better reflect both the law and* ***the risks of competitive harm*** *and have therefore returned to those thresholds here." (Our emphasis)*

We recommend that this text be promoted to the main text of Guideline 1 and the Agencies should further elaborate why the chosen threshold levels increase the risks of competitive harm as well how such competitive harm might present itself immediately following a merger and in the longer term.

We also recommend that Guideline 1 make clearer that the structural presumptions in Guideline 1 are subject to any rebuttable evidence as set out in Section IV of the Draft Guidelines.

2. Guideline 3: Mergers and increase in risk of coordination.

Guideline 3 rightly states that post-merger coordination can take place across all dimensions of competition, not just price, and that this risk applies to horizontal and vertical mergers. The primary factors mentioned in Guideline 3A clearly explain how these might lead to an increased susceptibility to coordinated interaction.

However, the role of some of the “secondary” factors in meaningfully increasing the risk of coordination is not clear given the same factors are also mentioned in other parts of the Guideline. In particular:

- Market concentration is mentioned as both a primary and secondary factor. It is unclear what adding market concentration to the list of secondary factor achieves.
- The difference between the elimination of a maverick, listed in the primary factors and the removal of a firm with different incentives is confusing. Mergers leading to a closer alignment one or both merging firms’ incentives with other firms in the market is relevant and is a point that could be expanded on.
- Finally, it would be useful to clarify how the competitive responses mentioned as a secondary factor that meaningfully increase the risk of coordination are different from competitive actions under “Impact of Competitive Actions on Rivals” in Guideline 2 where these actions are an indication of substantial competition between firms.

We recommend the Agencies further clarify the factors they intend to capture under the headings of “Market Concentration”, “Competitive Responses”, and “Aligned Incentives” in Guideline 3B.

3. Guidelines 5 and 6: Firms may use its control of related products or services to weaken or exclude rivals in all types of mergers.

The growing importance of fungible supply side inputs like data, logistics, and digital technologies in producing many of the goods and services in our modern economy means that mergers, especially in the online marketplaces, can increasingly implicate a variety of relationships among merging firms and its rivals. We appreciate that Guideline 5 aims to capture this complexity.

We recommend, as others have also suggested,[8] that the anticompetitive presumption in Guideline 6 for transactions where the “foreclosure share” exceeds 50% also should apply to Guideline 5, and the plus factors in Guideline 6B should be treated as relevant evidence.

[8] See Steven Salop and Jennifer Sturiale, *Vertical Merger Enforcement in the Draft Merger Guidelines*, Promarket, July 28, 2023. https://www.promarket.org/2023/07/28/steven-salop-and-jennifer-sturiale-vertical-merger-enforcement-in-the-draft-merger-guidelines/

4. Guideline 7: Mergers should not entrench or extend a dominant position.

We welcome the reaffirmation of the longstanding presumption that acquisitions by the largest corporations are anticompetitive, subject to a clear showing that they are not. The elimination of a nascent competitive threat is particularly problematic as the guideline mentions.

We recommend increasing the dominance threshold to 40% or 50%. The current 30% threshold seems too low. In particular consumers may prefer bundles of services and benefit from lower prices and innovations that a firm can offer by exploiting scale and scope economies. These scale and scope economies and consumer benefits may not be exhausted at a 30% market share.

5. Guideline 8: Mergers should not further a trend towards concentration.

Changes in technology and industry demand can lead to changes in industry concentration. For example, newer technologies might require larger factories and aggregation of production which may lead to an increase in concentration but also consumer benefits.

Here we again recommend the Agencies make explicit the economic link between increasing market concentration leading to increasing market power and adverse outcomes for consumers. Only mergers that increase concentration and lead to adverse outcomes for consumers such as higher prices or lower innovation should be covered by this guideline.