

Antitrust Enforcers Soliciting Input From Market Participants to Modernize Merger Guidelines

On January 18, 2022, the U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice's (DOJ) Antitrust Division (the agencies) launched a joint public inquiry to modernize and strengthen merger enforcement. In announcing the agencies' most sweeping effort to revise the federal merger guidelines in over a decade, FTC Chair Lina M. Khan emphasized that the federal merger guidelines must "accurately reflect modern market realities." Chair Khan further highlighted that input from "a broad set of market participants" would be "critical" to the success of this project. Assistant Attorney General Jonathan Kanter of the Antitrust Division echoed this sentiment, stressing that merger enforcement must be "fit for purpose in the modern economy."

Recognizing the importance and value of incorporating diverse perspectives from all stakeholders to inform their inquiry, the agencies are soliciting public comments on firms' experience and insight in the modern economy "that will lead to the development of merger enforcement and policy guidance." The agencies are encouraging the "public, including market participants," to share "feedback, evidence, and ideas" on a wide range of topics, which includes the following:

- Creating presumptions that certain transactions are anticompetitive (e.g., adjusting concentration thresholds)
- Mergers in the digital sector where products and services undergo rapid change
- Mergers in markets subject to tipping toward oligopoly or monopoly (e.g., resulting from significant network effects)
- Mergers involving data aggregation
- Updating the analysis of market definition and eliminating the need for a separate market definition exercise where there is direct evidence of a transaction's likely effects on competition
- Zero-price markets, negative-price markets, or markets without explicit prices
- Markets involving multihoming
- Markets involving interoperability
- Markets involving competition for attention
- Markets involving bundled or clustered products
- Two-sided and multisided platform markets
- Monopsony (buyer) power, including in labor markets
- Whether focusing on traditional distinctions between horizontal and vertical mergers fails to address modern market realities
- The potential for mergers to reduce dynamic competition, such as through emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services
- How to determine whether technologies subject to a license or acquisition either compete with or complement the licensee's or acquirer's own technologies
- Whether to explore different approaches to private equity acquisitions
- Common ownership and horizontal stockholding by institutional investors
- Whether to require a formal process and deadlines for remedy proposals

Individuals or organizations seeking more information about the agencies' efforts to revise the federal merger guidelines or about preparation of comments on any of these topics should consult with experienced counsel. The comment period is open until Monday, March 21, 2022.

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