Reading (New and Old) Tea Leaves: U.S. Agencies' Request for Information May Give Insights into the Future of Merger Review

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I. Introduction

2022 promises to be a significant year for merger review in the U.S. The Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") announced plans to modernize and strengthen the current framework for merger review through examination of the horizontal and vertical merger guidelines.

The agencies have stated that they intend for this examination to both "*reflect current learning about competition based on market realities*" *and* "*faithfully track the statutory text, legislative history, and established case law around merger enforcement.*" Addressing changes in technology, new business models, and novel theories of harm, while at the same time staying true to existing law and practices, will present challenges as they consider changes to the guidelines.

To confront these challenges, the FTC and DOJ issued a Request for Information ("RFI")[1] to solicit public input. The sheer length and level of detail of the RFI, covering 15 issues[2] with almost 100 questions, suggest that the agencies will consider "*current learning*" and "*market realities*" from a variety of dimensions, and will expect input from familiar and new stakeholders in the antitrust world: market participants, government entities, economists, attorneys, academics, unions, workers, farmers, ranchers, businesses, franchisors and franchisees, and consumers.

In this article, we consider these dimensions and 'read the tea leaves' of the RFI to see what can be gleaned about how the merger guideline revision process may unfold. What is clear from the RFI is that to achieve their dual goals, the agencies will leave no stone unturned in their efforts to simultaneously preserve past practices and adapt them the present.

II. Traditional Tools and Concerns: A Familiar Brew

The broad reach of the RFI suggests that several areas of traditional merger analysis are in for additional scrutiny and potential revision. Some, like non-price effects and market definition, have already been the focus of active debates among practitioners; others, such as remedies, may require efforts to standardize with other non-U.S. authorities.

First, the RFI suggests that **structural aspects (consolidation)** and **non-price effects** may be considered more central to merger reviews in the future. The RFI clearly emphasizes that guidelines should go beyond short-term price effects and instead focus on the "*longer-term or non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers*."[3] According to some commentators, the RFI appears to place more weight on the second prong of the Clayton Act—*i.e.*, "*tending to create a monopoly*"—as opposed to issues of "*substantial lessening of competition*," which were traditionally more prominent in enforcement.[4] The question may be whether the revised guidelines will create a path by which concerns about increased consolidation, perhaps when accompanied by other longer-term concerns, will be sufficient to reject a merger in the absence of identifiable price effects.

Other commentators have noted that elements such as head-to-head competition between merging parties may play a more important role as indicia of anticompetitive effects rather than modeling changes in price.[5] For example, in so-called "zero-price" markets (*e.g.*, markets where goods or services are provided to some consumers for free), the analyses of effects must focus on quality.[6] This focus on quality is consistent with earlier proposals for changes to the guidelines, such as the small but significant non-transitory decline in quality (SSNDQ) test,[7] although implementation challenges remain significant.

While efforts to focus on quality have been welcomed by many commentators, some of the assumptions underlying these initiatives have sparked debate even within the FTC, with some commissioners supporting the RFI but wishing to clarify the important difference between hurting competitors and hurting the competitive process:

> "The question appears to assume that difficulty for rivals equates to harm to competition. But mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm. We hope that comments provide a means to distinguish the two."[8]

Second, the RFI openly questions the importance of **market definition**: is it necessary to precisely define the market in every case?

This opening is welcomed by many who have long advocated less reliance on market definition, and more emphasis on theories of harm, anticompetitive strategies, and direct evidence of harm or anticompetitive conduct.

The RFI seems to also suggest a will to redesign market definition from a practical implementation standpoint—for example, by inferring a market from direct evidence of probable harm or intense competition with respect to particular products or customer segments. Rose and Shapiro[9] have argued that future horizontal guidelines:

> "*can do more to explain how and why the Hypothetical Monopolist Test ("HMT"), embraced by the courts for decades as a method to define relevant markets, often leads to quite narrow markets.*" They also recommend that the agencies "*shed the idea that the HMT is a precise algorithm that leads to a single, correct relevant market*,"[10] and advise that "*[b]uilding relevant markets around an overlap of concern focuses attention on the direct loss of competition that will result from the merger.*"[11] (emphasis added)

However, Gregory Werden[12] has argued that "*[m]erger assessment needs the relevant market and needs [it] more than any other area of antitrust. [...] Focus on market structure made the relevant market the central issue. [...] Direct evidence of actual harm from a merger might obviate market definition, but direct evidence of actual harm cannot define the relevant market.*"

Third, although little is explicitly stated in the RFI regarding vertical mergers, the recent withdrawal of the Vertical Merger Guidelines ("VMGs") by the FTC[13] may have already signaled an upcoming overhaul of those standards and concepts. The RFI suggests that the agencies may not feel its current approach to vertical mergers brings sufficient skepticism to the potential anticompetitive effects or that presumptions of pro-competitive price effects are inappropriate.

Whether an overhaul is necessary is a different question. Notably, in the weeks leading up to the issuance of the RFI, the FTC successfully prevented two vertical mergers: Lockheed Martin/Aerojet Rocketdyne and Nvidia/Arm.[14] In their non-party motion in the *Illumina/Grail* case, Zanfagna, et al.,[15] warned about the FTC's "*false and dangerous presumption: that vertical mergers are inherently anticompetitive if the merged firm may possibly have the ability, but not necessarily the economic incentive, to disadvantage potential future rivals.*"

The RFI also appears to question whether "*mergers generally or often fail to realize cognizable* ***efficiencies***." Some commentators view this as a challenge to the value of efficiencies, both in a factual and a legal sense. They also see a connection with potential public-interest concerns (*e.g.*, whether merger-related capacity reduction efficiencies might relate to reductions in "*resilience of supply chains*").[16] In reaction to the FTC's withdrawal of the VMGs, Shapiro and Hovenkamp[17] labeled the agency's standpoint on efficiencies "*baffling*,"[18] and asked: "*When the FTC investigates vertical and horizontal mergers will it now take the position that efficiencies are irrelevant, even if they are proven? If so, the FTC will face embarrassing losses in court.*"[19] Abbott has added that the efficiency-related questions of the RFI, such as the requirement to "*show with certainty that cognizable efficiencies could not have been achieved through alternative means[,] [ask] the impossible*."[20] But the current HMGs already provide for a similar standpoint, *i.e.*, to consider that any claimed efficiency should be merger-specific: "*The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies*."[21]

In particular, it seems possible that the **elimination of double-marginalization** ("EDM") in the context of vertical mergers will be examined closely in the future guidelines.[22] Shapiro and Hovenkamp[23] have commented in detail on the FTC's withdrawal statement and warned about the application of EDM to focus solely on single-product monopolies. The authors look at the conditions considered in the withdrawal statement: "*one single-product monopoly buying another single-product monopoly in the same supply chain, where both charge monopoly prices pre-merger and the product from one firm is used as an input by the other in a fixed-proportion production process*."[24] But in their view, "*EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions*."[25] They do, however, consider that "*merging parties bear the burden of establishing EDM, just as they bear the burden of establishing all efficiencies in horizontal as well as vertical mergers*."[26]

The FTC and DOJ are also seeking input to modernize current policy on **remedies**. The RFI seems to ask whether behavioral remedies may no longer be sufficient, and whether structural remedies may be required. Some commentators interpret this move as a display of preference for litigation ex ante, as opposed to an inquiry related to remedies.[27] Other commentators consider this trend "*reminiscent of the European Commission's regimented remedy process*."[28] This is likely to take on particular importance in technology and digital transactions, given the pace of innovation characterizing these industries.

III. New Concerns: A Fresh Brew

Along with revisiting some traditional tools, the RFI points to at least two areas in which current market realities and more novel theories of competitive harm may play a role in the merger review process: innovation and labor.

While innovation and nascent competition have long been referenced in the guidelines, the RFI suggests that an increased focus on these issues is necessary. Specifically, it asks for precise methods to assess whether a nascent competitor could grow into a plausible competitor, and to assess what degree of probability should be sufficient to condemn a proposed acquisition, implying that "*the hard part in potential competition cases is not understanding them, but proving them*."[29] The fact that a transaction is at the pre-commercial phase means, to some commentators, that its unwinding may potentially be very dangerous for the viability of the innovation.

The *Illumina/Grail* case has been flagged by experts[30] as an example of the risks of stifling innovation:

> "*An imprudent attempt to unwind the transaction, based on an inapt economic theory, could easily deter innovative companies like Illumina from creating early-stage spinoffs or acquiring startups similar to GRAIL, solely to escape the punitive antitrust sanctions. [...] Third, a complete analysis must account for the procompetitive efficiencies likely to be achieved[...] This is true especially for markets that are still mostly pre- commercial, where the full effects of a merger on other market participants are particularly difficult to predict. Unwinding the merger may even have the negative effect of delaying the downstream product market from developing to commercial viability*."[31] (emphasis added)

Other authors concur on the fact that post-merger the development of Grail's cancer-detection research would not benefit from Illumina's size and resources.[32] In contrast, Rose and Shapiro agree with the presumption of the RFI, arguing that "*mergers can cause an immediate harm to innovation even if the actual product-market competition that they eliminate is nascent*, i.e., *will not arise for some time and is probabilistic*," and that "*[s]topping incumbent firms from acquiring nascent competitors is particularly problematic in innovative markets, where such mergers can threaten both the competitive process by which firms contest future sales and the innovation pipeline*."[33]

In addition, the RFI strongly suggests that **labor** will be a key area of interest for the agencies in their evaluation of the guidelines, with Section 9 of the RFI dedicated almost entirely to monopsony in labor markets. This focus is already reflected in current cases, as antitrust attorneys received queries from the FTC regarding unionization and franchising, among other topics, as early as mid-2021.[34] Non-compete and no-poach agreements are also receiving particular attention, as seen by some commentators in the DOJ probe into Raytheon Technologies,[35] among others. The issue of monopsony power arising from consolidation has been widely studied through an antitrust lens,[36] with concrete proposals such as those from Rose and Shapiro to extend Section 12[37] of the Horizontal Merger Guidelines (HMGs) to include a "*section or subsection that makes explicit the inclusion of labor market harms and describe how the Agencies will assess that possibility*."[38]

IV. Conclusion: Strong or Weak Tea?

As the agencies gather feedback, it will be interesting to see how the information generated by the RFI will shape the debate.

Once the new guidelines are drafted, the agencies plan to hold another comment period, with the aim of finalizing them by the end of 2022. To the extent that non-price dimensions are receiving attention in antitrust circles, it is unclear at this stage whether thresholds will be clearly identified for implementation, and whether they will concretely override more traditional price concerns. Only time will tell, for example, whether concerns on labor concentration or attempts to block mergers without requisite market definition analyses will carry enough weight in courtrooms.

We appreciate that the agencies have set for themselves an ambitious goal: to balance efforts for a renewed vision with a commitment to existing case law and tested market outcomes. Of course, the RFI can't tell us the answer to the most important question: Once the guidelines change, how will the practices of lawyers and economists in merger review change to address this balancing act?

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The views herein do not purport to represent the views of Analysis Group or its consultants.

Endnotes

1 U.S. Department of Justice and U.S. Federal Trade Commission, "Request for Information on Merger Enforcement," January 18, 2022, available at https://www.justice.gov/opa/press-release/file/1463566/download. Hereinafter, "the RFI."

2 The full list is: Purpose, Harms and Scope, Types and Sources of Evidence, Coordinated Effects, Unilateral Effects, Presumptions, Market Definition, Potential and Nascent Competition, Remedies, Monopsony Power and Labor Markets, Innovation and IP, Digital Markets, Special Characteristics Markets, Barriers to Firm Entry and Growth, Efficiencies, and Failing and Flailing Firms.

3 *RFI*, page 5, paragraph 6-h.

4 Weiner, et al., "Revising the Horizontal and Vertical Merger Guidelines: A New Approach for Antitrust?," *Steptoe Antitrust & Competition Blog*, February 9, 2022, available at https://www.steptoeantitrustblog.com/2022/02/revising-the-horizontal-and-vertical-merger-guidelines-a-new-approach-for-antitrust/.

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6 "In these situations, a group of products satisfies the HMT if a hypothetical monopolist controlling that group of products would significantly lower quality. Here "quality" can refer to any non-price dimension of the product valued by consumers, such as policies that protect consumers' privacy by limiting if or how data generated by their transactions will be used." Source: Rose and Shapiro, "What Next for the Horizontal Merger Guidelines?," February 21, 2022, available at https://faculty.haas.berkeley.edu/shapiro/updatingHMGs.pdf.

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10 *Id*.

11 Rose and Shapiro, "What Next for the Horizontal Merger Guidelines?," forthcoming, *Antitrust Magazine*, Spring 2022, available at https://faculty.haas.berkeley.edu/shapiro/updatingHMGs.pdf.

12 "Submission of Gregory J. Werden in Response to Request for Information on Merger Enforcement," pp. 21–23. Note that the third point is made in the context of the Horizontal Merger Guidelines.

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15 U.S. Federal Trade Commission, "Motions of Non-Party Antitrust, Patent, and Law-and-Economics Scholars and Jurists for Leave to File Brief as Amici Curiae Supporting Respondents," October 22, 2021, available at https://www.ftc.gov/system/files/documents/cases/d09401_-_motion_of_non-party_antitrust_patent_and_law-and_econimics_scholars_and_jurists_for_leave_to_file_brief_as_amici_curiae_supporting_rspondents_-_public.pdf.

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18 The precise citation that the authors refer to is: "In particular, the 2020 VMGs contravene statutory text, improperly suggesting that efficiencies or 'procompetitive effects' may rescue an otherwise unlawful transaction." Source: U.S. Federal Trade Commission, "Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the FTC's Approval of the 2020 Vertical Merger Guidelines," September 15, 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596392/remarks_of_chair_lina_m_khan_regarding_the_proposed_rescission_of_the_ftcs_approval_of_the_2020_vmgs.pdf.

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