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Comment: Proposed US merger guidelines target Big Tech with emphasis on platforms, dominance, serial acquisitions

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By Ben Brody and Serafina Smith

Merger guidelines proposed by the US Department of Justice and Federal Trade Commission last week don't call out companies like Meta and Amazon by name, but several tenets do address competition issues that arise specifically in regards to Big Tech. Proposed revisions, which include a step away from the model that mergers must fall into either the horizontal or vertical buckets, could have consequences for large platforms, start-ups and even the private equity firms that help fund much of the industry.

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A new section addressing multi-sided platforms provides a window into how the agencies expect to review Big Tech deals — and shows the novelty of the tools they plan to bring to the effort.

— Platforms —

“Platforms provide different products or services to two or more different groups or 'sides' who may benefit from each other’s participation,” the guidelines say by way of definition. They say multi-sided platforms often have a single operator that connects participants “across multiple sides,” often benefit from network effects and can create conflicts of interest if a platform also has a business line or customer relationship that operates on a particular side.

As an example of multi-sided platforms, the agencies cited operating systems for PC software in the 1990s, whose sides consisted of developers, PC makers and software purchasers. FTC Chair Lina Khan and others describe modern multi-sided platforms, such as social media sites that have users on one side and advertisers on the other.

Scholars also mention users and app providers on Apple’s mobile operating system, or publishers and advertisers in Google’s online ads operation. Uber and credit card networks are each often described as platforms, too, as is Amazon’s e-commerce website, which pairs shoppers with third-party merchants.

Acquisitions by such major companies could see increased scrutiny, especially when they would combine platforms and participants — as happened when DoubleClick, a user of the Google platform, was acquired by Google.

A senior FTC official told MLex the section on multi-sided platforms is one of the most important changes in the new guidelines.

“Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems,” the guidelines say in the introduction. “The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.”

— 'Important concepts' —

“These are some really important concepts for antitrust enforcement in the tech space, so that’s particularly valuable,” said Charlotte Slaiman, competition policy director for consumer group Public Knowledge. She said that the section appears to rely on “the most up-to-date economics.”

The guidelines also said the enforcers will “protect competition to displace the platform or any of its services. For example, new technologies or services may create an important opportunity for firms to replace one or more services the incumbent platform operator provides, shifting some participants to partially or fully meet their needs in different ways or

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through different channels."

While many antitrust legal practitioners and enforcers emphasized that the guidelines reflect practices already in effect over the last two years, the recommendation on multi-sided platforms clarifies the agencies' stance on — and will help lawyers advise clients on — deals involving big-name companies such as Apple, Google, Uber and credit card companies.

The section on platforms, however, could be too far-reaching. The guidelines say, for instance, that "Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants – i.e., around one side of the platform."

— American Express —

Yet, in the Supreme Court's 2018 decision in Ohio v. American Express, the justices ruled that enforcers measure harm and efficiencies on both sides of certain kinds of platforms as one market. The case is also the only precedent the enforcers cited in the section on platforms — and then only to try to distinguish many types of platforms from the credit card networks at issue in that monopolization case.

"It isn't at all clear to me that the agency guidelines are following faithfully the Supreme Court's decision in AmEx," said Tom Ensign, an antitrust partner at Fenwick & West, which specializes in tech companies and life sciences.

The section otherwise lacks citations to precedent that pervade much of the rest of the document. It was in part, though, an effort by the FTC and the DOJ's antitrust division to ensure that — even if the document didn't provide future enforcers and courts with relevant case law — it would establish the concept of platforms, MLex has learned. It would aim to help the agencies get beyond the traditional notions of vertical and horizontal deal geometry in their thinking.

— Dominant firms —

Certain provisions of other sections of the guidelines also appear to take particular aim at Big Tech deals, although they could apply to other industries as well. Guidelines on dominant firms, for example, apply to many Big Tech companies which, through innovations that disrupt and capture a market or create a new sector entirely, can often hold a dominant position from early on.

The guidelines warn merging parties that a 30 percent market share is the threshold for a company to hold a dominant position, and the agencies will closely examine whether any proposed merger could entrench or extend that dominance. The guidelines emphasize, however, that the threat of a monopoly that could harm competition rises as the degree of dominance increases and mergers tending to create a monopoly can also trigger a separate analysis under Section 2 of the Sherman Act.

Some lawyers who advise merging parties have said the 30 percent number will restrict deals that create efficiencies, and that figure reflects more of a policy preference than current judicial thinking on dominance.

The guidelines address this concern, however, with a citation of a 1975 case from the US Court of Appeals for the First Circuit: "Th[is] entrenchment doctrine properly blocks artificial competitive advantages … but not simple improvements in efficiency." This sentence was carefully selected to convey that the guidelines will be used only to block artificial or exclusionary competitive restraints, not any merger that may create efficiencies, MLex has learned.

But members of the antitrust bar said that whether 30 percent is truly enough to dominate a market in the way the guidelines describe — by being able to control prices, quality or other terms — could vary, as things like the transparency of prices in the market can affect the way a given industry functions.

When examining mergers by dominant firms, the guidelines say enforcers will be looking particularly for deals that increase entry barriers or switching costs, interfering with the use of alternatives — often by degrading the service of a target company that formerly worked with rivals of the acquirer — "depriving rivals of scale economies or network effects" and the elimination of "a nascent competitive threat."

— Big Tech and startups —

Together, many practitioners see the dominant-firms section of the guidelines as training the enforcers' lens right onto the deals that large companies make, especially when Big Tech buys startups.

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The guidelines themselves seem to acknowledge this: they say dominant companies may "seek to acquire firms that might otherwise gain sufficient customers to overcome entry barriers," especially when technology changes, and that the Justice Department and FTC "take particular care to preserve opportunities for deconcentration during technological shifts."

Alden Abbott, a former FTC general counsel, said a section on extending a dominant position could actually have the unintended effect of stopping a mid-size player from making an acquisition to more successfully compete with the biggest firm in a particular market.

"It creates major disincentives for innovators," said Abbott, who is now a senior research fellow at the right-leaning Mercatus Center.

Gerald Stein, a partner in the commercial litigation and antitrust and competition groups at Norton Rose Fulbright, said this guideline might also unintentionally chill innovation in tech startups and biopharmaceutical pipeline companies. A potentially ironic effect, he said, could be that new guidelines restrict dealmaking to the biggest and wealthiest companies, who will be the ones that can afford to litigate an agency challenge.

"What's happening, which is consistent with some of the other steps that the agencies have taken, is unfortunately you're having a situation where only the very wealthy parties are going to have the luxury of time and money to stand up and fight against these things in court," Stein said.

— Walled garden —

But William Baer, the former head of the DOJ's antitrust division in the Obama administration, said that if there's a good idea out there, there will "invariably" be someone willing to acquire it – but the company with the most market power is not always the best choice from a competition standpoint.

"They want to keep themselves sealed in their walled garden," Baer said, referring to Big Tech companies who may be interested in acquiring potential competitors before they can become a real threat.

"They'll buy anybody who threatens to breach the wall, right? And economically, it may make sense for them to pay more because they're going to win that competition," he said. "That's exactly the kind of transaction that the DOJ and FTC ought to be looking at."

— Serial acquisitions —

The guidelines also confirm that the competition agencies will be chasing down another common practice in tech — a series of acquisitions "in the same or related business lines." The FTC made Meta's many deals central to its antitrust case against the company, although it didn't raise that series of deals in the failed challenge to Meta's acquisition of Within.

"Mergers played a big role in how Big Tech was able to become so powerful," said Slaiman of Public Knowledge.
The guidelines say that "the Agencies may evaluate the series of acquisitions as part of an industry trend" under another pillar of the new document, which says merger enforcement should arrest "a trend toward concentration."

Robert Atkinson, president of the Information Technology and Innovation Foundation, a think tank allied with the tech sector, says this guideline "would mean that, by definition, mergers would no longer be allowed" (see here).

Together, those two sections could aim at tech, say practitioners, as well as the private equity firms that provide financing to Silicon Valley — and to many other industries, such as pharmaceuticals.

"The trend-toward-concentration section is particularly focused on the private equity business model, which I think many would say oftentimes involves private equity entities engaging in multiple acquisitions in a similar space in order to build scale and combine those assets," said Shawn Johnson, co-chair of Crowell and Moring's competition practice.

A series of smaller transactions, or roll-ups, may not have garnered the same focus from the agencies as large deals, Johnson said. But those deals "can result, over time, in significant increases in concentration in specific markets," he said.

— Additional reporting by Khushita Vasant

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