FTC rewrites rules on Big Tech mergers with aim to ease monopoly-busting

Enlarge / Lina Khan, chair of the Federal Trade Commission.

reader comments

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Antitrust enforcers released a draft update outlining new rules today that officials say will make it easier to crack down on mergers and acquisitions that could substantially lessen competition in the US.

Now the public has 60 days to review the draft guidelines and submit comments to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) before the agencies' September 18 deadline. A fierce debate has already started between those in support and those who oppose the draft guidelines.

Over the next two months, the FTC hopes to gain widespread public support for what the FTC has positioned as commonsense updates as tech mergers have recently raised complex legal questions. In a press release, FTC Chair Lina M. Khan said that the merger guidelines "contain critical updates" and were "informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs."

"With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy," Khan said.

The draft outlines 13 guidelines that "agencies may use when determining whether a merger is unlawfully anticompetitive under the antitrust laws," the FTC's press release said.

According to an FTC fact sheet, these are "the first merger guidelines to cite case precedents" and are built to "reflect the most common issues that arise in merger review." The 13 guidelines are:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

When an agency is attempting to decide if a merger or acquisition should be blocked, the first eight guidelines help agencies “to assess the risk that a merger’s effect may be substantially to lessen competition or to tend to create a monopoly.” The next four guidelines help agencies understand the “issues that often arise” when assessing any of the first eight guidelines. The last guideline explains how to consider mergers and acquisitions “that raise competitive concerns not addressed by the other guidelines.”

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The draft guidelines also include appendices that describe “evidentiary and analytical tools” that agencies have used to detect anticompetitive measures in the past, as well as overviews of several types of rebuttals and legal tests invalidating defenses commonly raised by companies.

In drafting the guidelines, the FTC said that the agencies focused on “three core goals.” First, they strove to uphold legal precedent, then to increase transparency and accessibility of guidelines, and finally to make meaningful updates and “provide frameworks that reflect the realities of our modern economy and the best of modern economics and other analytical tools.”

The FTC’s press release included a statement from Attorney General Merrick B. Garland, who cautioned that “unchecked consolidation threatens the free and fair markets upon which our economy is based.”

“These updated Merger Guidelines respond to modern market realities and will enable the Justice Department to transparently and effectively protect the American people from the damage that anticompetitive mergers cause,” Garland said.

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