

US antitrust enforcers lay down plans to block Big Tech mergers

Federal antitrust enforcers released new draft guidelines for evaluating anti-competitive mergers Wednesday, redoubling their aggressive scrutiny over digital markets.

The rules, proposed by the Justice Department and Federal Trade Commission, direct enforcers to examine mergers by online platforms more broadly than ever before. The proposal doesn't explicitly name tech companies like Amazon, Meta, or Google, but many of the rules implicate parts of their merger and business strategies.

"We are updating our enforcement manual to reflect the realities of how firms do business in the modern economy," FTC Chair Lina Khan said in a statement Wednesday.

Specifically, the rules set a new focus on "multi-sided" platforms, or online companies that offer different products or services that "may benefit from each other's participation." This would include companies that run a platform but also use it to sell their own products, like Amazon Basics.

The rules also go on to include more expansive evaluation of large digital companies that could choose to purchase nascent competitors as a means of entrenching their market dominance. In 2020, the FTC sued Meta on similar grounds, accusing the Facebook owner of buying up smaller companies like Instagram and WhatsApp to squash the competitive threat they posed to its business. Litigation in that case is ongoing.

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While the rules are nonbinding and do not change current law, they would serve as a framework for antitrust enforcers investigating proposed mergers. The public has until September 18th to submit comments on the proposal before the agencies finalize the rules.

“As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy. Simply put, competition today looks different than it did 50 – or even 15 – years ago,” Assistant Attorney General for Antitrust Jonathan Kanter said in a statement Wednesday.

The original merger guidelines were published in 1968 and have been updated and revised several times since. In 2021, Biden’s FTC voted to revoke 2020 vertical merger guidance made under former President Donald Trump, saying it relied on “flawed economic theory” regarding the competitive benefits of such mergers.

Historically, antitrust enforcers have taken a softer stance against vertical mergers, but the new draft rules say that some of these deals could be harmful to consumers. A merger is considered “vertical” when it combines companies that operate along different parts of the same supply chain. A recent example would be Microsoft’s proposed purchase of Activision Blizzard, which the FTC failed to stop earlier this month.

The FTC and DOJ have long evaluated mergers based on how they impact prices, or the consumer welfare standard. By addressing digital markets, where services often cost very little or nothing in the first place, the rules could signal a change in approach away from the long-running standard. It’s still

unknown how courts will accept this shift in strategy. Last week, Republicans on the House Judiciary Committee accused Khan of bringing losing cases to force Congress to amend antitrust law.

Tech lobbying and trade groups have already criticized the proposal for including language directly targeting digital platforms, saying it could force US businesses abroad.

“As technology and AI infuse more sectors of the economy, creating a special set of regulations that apply only to specific companies doesn’t make good legal or economic sense,” Matt Schruers, Computer and Communications Industry Association president, said in a statement Wednesday.

Progressives have backed similar changes to antitrust regulation in the past. In a statement Wednesday, Sen. Elizabeth Warren (D-MA) said, “Giant corporations and their armies of lobbyists will cry foul at the prospect of more competition, but this action by the Biden administration is welcome news for American small businesses, workers, and consumers.”

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