



DEPARTMENT OF JUSTICE

Modern Competition Challenges Require Modern Merger Guidelines

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I. Introduction

Thank you so much Chair Khan. It is truly a privilege to work alongside you and the FTC. I am so grateful for your leadership and the extraordinary work of our respective agencies. As an alum of the FTC, I could not be prouder of the amazing work that the FTC is undertaking to promote a fair and competitive economy.

Our teams are working together to support our critical shared mission. Together, we support economic liberty, progress, opportunity, and prosperity. The FTC and DOJ are fighting on the front lines to preserve competitive markets, which are essential to a vibrant and healthy democracy.¹ Chair Khan, your leadership has been invaluable and I look forward to our continued collaboration.

And ultimately, that's what today's announcement is about: strengthening our joint merger guidelines to meet the challenges and realities of the modern economy.

The Attorney General remarked earlier this month, "too many industries have become too consolidated over time."² We need to understand why, and to think carefully about how our merger analysis tools can do better to prevent this problem from getting worse.

That's why today we are launching a call for public comment to revise and strengthen the merger guidelines.

II. The importance of modernizing the merger guidelines

This initiative is incredibly important. We have lived through changes in our economy on a level that rivals the industrial revolution. The digital transformation has revolutionized not just

¹ *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958).

² Merrick B. Garland, Att'y Gen., Remarks at the Roundtable on Promoting Competition and Reducing Prices in the Meatpacking Industry (Jan. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-roundtable-promoting-competition-and>.

the goods and services we buy, but the nature of industry. Companies today cooperate, compete, invest, and invent in profoundly different ways than they did twenty years ago.

Times have changed because the advent of the digital economy has transformed industry. The digital revolution has not only impacted new markets like tech, but markets across our economy, many of which have been rebuilt from the inside out. The connections and interrelationships among companies and markets have increased by orders of magnitude. Think about what happens when you check a weather forecast or purchase your morning coffee. In seconds, whether you see them or not, you interact with dozens of distinct services that share complex interactions and business relationships. Many present an opportunity to create or exploit market power.

The supply chain no longer follows a simple upstream and downstream path—it's interconnected in complex and evolving ways. Understanding the function of markets has always been paramount to sound competition policy, and we need to ensure our tools today allow us to fully understand the markets of today.

We also see the harms of anticompetitive consolidation across the many dimensions of the modern economy. As the President's Competition Executive Order underscores, concentrated market structures can harm downstream consumers and upstream workers at the same time that they foster coordination or exclusion in adjacent markets. Everyone loses, except extractive powerful firms in the middle.

Justice therefore demands that we ensure our approach to analyzing mergers is not one-dimensional or two-dimensional, but captures the rich complexity of the modern economy. That will be how we prevent, in their incipiency, all of the harms of unlawful consolidation. Through this review, we hope to take a meaningful step forward in that effort.

III. The need for robust public engagement

I know we also share the view that we can't modernize our guidelines to fit the modern economy if we don't hear from a diverse group of stakeholders. We need to learn from market participants what is working and what is not. More and more we are hearing directly from affected stakeholders, and that's incredibly valuable. The views of consumers, workers, innovators, and others on the ground feeling the harms of market concentration present an incredibly valuable perspective for our efforts. Here is our message to entire American public: please share your views—we need your input and we care what you think.

Our review will follow a rigorous, thoughtful, and inclusive process. After this initial comment period, we plan to release a draft of the updated guidelines and seek further comment before finalizing. Along the way, we will engage frequently with state, federal, and international enforcers, partner agencies, and stakeholders. We hope to finish this year, but have much work to do along the way.

In addition to the public engagement process, I have to acknowledge the incredible staff support this project has already received and will continue to require in the coming months. We are ensuring that staff attorneys and economists at the Division and the FTC play a key role in assessing proposals and drafting potential revisions. They bring unique skill, expertise, and perspective to bear.

IV. Areas of particular interest

All of the issues raised in the call for comments are important. Without excluding any, I would like to highlight just a few areas where we are enthusiastic about learning more.

First, the statutory text of the Clayton Act prohibits mergers that “may be substantially to lessen competition, or tend to create a monopoly.”³ So often merger enforcement focuses on that first prong, but it is worth considering if we are being faithful to the full language of the Clayton Act, for instance in how we assess transactions by already dominant firms.

Second, the guidelines have bifurcated horizontal and vertical analysis, yet often transactions don’t neatly fit into these categorizations. Does the framing of horizontal versus vertical analysis itself narrow us to a two-dimensional view of modern markets that are often multi-dimensional? How should the guidelines account for these those market realities?

Relatedly, too much has been made of the purported divergence between the DOJ and FTC on the treatment of vertical mergers. The Antitrust Division shares the FTC’s substantive concerns vertical merger guidelines. Those guidelines overstate the potential efficiencies of vertical mergers and fail to identify important relevant theories of harm. Market participants and courts should understand the Vertical Merger Guidelines only in the context of the broad-based review and overhaul, which we are launching today.

Third, market realities should drive the antitrust analysis, not merely market definition. In a dynamic, multi-dimensional economy, the static formalism of market definition may not always be the most reliable tool for assessing the potential harms of mergers. We hope to learn more about additional tools that rely on direct sources of evidence, such as other indicia of market power or of head-to-head competition between merging parties, that may be more reliable in some situations. When we do focus on market definition, I also wonder whether we should do more to capture the dynamism of the economy. Stacks or clusters of component products and services

³ 15 U.S.C. § 13 (emphasis added).

often come together to drive both digital and physical supply chains—should we more thoughtfully consider competition within a market or for a market?

I could go on, as there are many important issues for us to consider.

V. Conclusion

I'll end where I began, however, with a focus on the need to strengthen our guidelines to ensure they are fit for purpose in the modern economy. Associate Attorney General Gupta explained our purpose in remarks earlier this year: to “advance[e] economic justice” to ensure that “everyone...benefit[s] from a free, fair, and competitive economy.”⁴ Competition benefits consumers, workers, entrepreneurs and innovators alike.

To fit that purpose, our merger guidelines need to be a lens on the markets that consumers, workers, and businesses actually interact with today. We need to be thoughtful about having the right tools for that job. We likewise need guidelines that are tractable and accessible. I'm eager to hear how we can better serve and protect our public. I look forward to working with our colleagues at the FTC as we embark on this historic initiative and I look forward to hearing from you.

Thank you.

⁴ Vanita Gupta, Associate Att’y Gen., Remarks at Georgetown Law’s 15th Annual Global Antitrust Enforcement Symposium (Sept. 14, 2021), <https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual>.