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ALERT MEMORANDUM

DOJ and FTC Announce Plan to Revamp Merger Guidelines

January 18, 2022

On Tuesday, January 18th, FTC Chair Lina Khan and DOJ Antitrust Division Assistant Attorney General Jonathan Kanter held a joint press conference in which they announced ambitious plans to review and update the Merger Guidelines, targeting a release of new guidelines before the end of 2022. The most recent guidelines updates occurred after an 18-month collaboration between the agencies during the Trump Administration, which focused on revising guidance related to vertical mergers (guidance from which the Biden Administration FTC promptly withdrew). Previously, the Horizontal Merger Guidelines were revised in 2010 after a lengthy process run by the antitrust agencies.

During the press conference and following Q & A, the agencies outlined the process they intend to follow. The agencies have released a Request for Information to the public with comments due on March 21, 2022. After the agencies review the responses, they intend to release proposed revised guidelines for comment. Following a comment period, the agencies intend to provide final revised Merger Guidelines. Chair Khan and AAG Kanter indicated that they hope to complete this process in 2022. Both the agency heads and staff in the following Q & A stressed that no decisions have been made, and that they envision a thorough fact-gathering and analytical process similar to the process used in the prior revisions of the guidelines.

While it's just the beginning of the process, some points of emphasis stood out:

- The new guidelines may combine horizontal and vertical merger analysis into a single set of guidelines. Notably, while the DOJ is not yet withdrawing from the Vertical Merger Guidelines, AAG Kanter expressed skepticism about those Guidelines and suggested that they may receive limited weight in internal review and may not reflect how DOJ litigates cases with vertical issues.
- Areas of particular interest included:
  - Multiple references to labor markets, labor issues, and the effect of mergers on labor, as well as to monopsony power more broadly.

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- o Chair Khan specifically questioned whether cost savings that result from layoffs or from reducing capacity should be considered cognizable efficiencies.
- o There were multiple references to farmers and the effect of past merger policy on agriculture.
- o There were multiple references to supply chain issues, including the "brittleness" of the supply chain that allegedly results from concentration in the economy.
- o Chair Khan also specifically referenced "private equity roll-ups" as an area for assessment during the review process.
- o AAG Kanter called out the section of the Clayton Act that refers to mergers that "tend to create a monopoly" as an area for potential development. Some discussion suggested that this might involve some sort of assessment of whether sheer company size, separate and apart from market power, might be considered for a role in the guidelines.
- o AAG Kanter also emphasized the role of technology in the economy and thus in the guidelines; not just technology firms, but the ubiquitous role of technology across all industries.
- o Chair Khan and AAG Kanter also discussed potentially looking beyond market definition, and suggested that market definition might be too constraining in assessing merger effects and the agencies will consider ways that market power might be demonstrated through direct evidence rather than market shares. Both also emphasized assessing harms in a broad and wholistic way, including looking beyond impact on end consumers.

More details are available here.

We are monitoring this closely and are happy to assist with any questions. Please feel free to reach out to your usual Cleary antitrust contact, or to any of the Cleary antitrust team members listed above.

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