Abstract:

The 2023 draft Merger Guidelines shift the focus of enforcement away from price results and toward increasing concentration. While they seek to use “simple and straightforward” language to reach a broad audience, they are not sufficiently sensitive to that audience’s principal concern, which is high prices. The current draft relies heavily on Supreme Court case law from the 1960s and 1970s at the expense of more recent cases in the Circuit Courts of Appeal relating merger law to antirust’s general concern about higher prices and the exercise of market power. In some cases, the draft Guidelines may even disapprove mergers that reduce prices, in conflict with Supreme Court precedent.

In other ways, the draft Guidelines usefully expand enforcement, particularly against horizontal mergers further facilitating interfirm coordination or harmful unilateral effects. The Guidelines would have a greater chance of managing their way through the federal courts if they focused on this core, where the 2010 Guidelines were underdeterrent. An abundance of economic data indicates that the basic law of horizontal mergers is underenforced, and is not offering sufficient protection against merger-induced price increases. That message must be brought home to the federal judges seeking to line up these Guidelines with the statutory language and case law.

The draft’s increased focus on supply markets, particularly labor, is well justified, but it does not adequately link the health of product markets to that of labor markets. Labor is mainly a variable cost, highly and quickly responsive to changes in product output. So a wage-enhancing policy for labor is well facilitated by a policy advocating high output and low prices for buyers.

In several collateral areas the draft Guidelines widely voice new concerns that have not been well developed in previous Guidelines. In others, however, they exhume obsolete doctrines that are difficult to defend, particularly if their application is not related to the attainment of higher output and lower prices.

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