



Insight

Biden FTC's Mistaken Views on Multi-sided Platforms

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Executive Summary

- The recently released Federal Trade Commission and Department of Justice draft merger guidelines take aim at mergers involving multi-sided platforms, which provide different products or services to two or more groups that may benefit from each other's participation.
- While multi-sided platforms may present difficult cases for regulators to review due to the complexity of multiple interacting markets, mergers involving platforms and one or more market participants can provide significant benefits to consumers; as a result, courts have traditionally weighed these benefits against potential anticompetitive effects when determining whether these arrangements violate the law.
- The new merger guidelines largely forgo this analysis to assume that any such merger would create conflicts of interest that necessarily raise antitrust concerns, justifying intervention from regulators to block the transaction regardless of the competitive effects.

Introduction

The new [draft merger guidelines](#) released by the Federal Trade Commission (FTC) and Department of Justice (DOJ) in July discuss the enforcement agencies' view of vertical mergers and attempt to return the state of antitrust enforcement to that of previous eras that saw industry concentration as a problem regardless of competitive effects. The American Action Forum's (AAF) Fred Ashton [wrote about the draft merger guidelines more broadly](#) and provides a high-level overview of the changes and what businesses and consumers should expect from them. This paper supplements AAF's previous work on the updated draft merger guidelines, specifically on how they would affect multi-sided platforms.

Multi-sided platforms refer to [firms that employ a business method](#) of enabling interactions between two or more groups of users. While not new, these types of businesses models have proliferated in the technology sector. Application stores connect users to applications, online marketplaces connect buyers to sellers, and search engines connect users to businesses and websites. As the draft guidelines correctly point out, interactions between the platforms and different categories of users can and often do raise competition issues. As a result, courts have traditionally weighed both the positive and negative competitive effects of a merger, not simply considered the loss of profits for rivals as a justification for blocking a transaction.

The merger guidelines are not binding law. The FTC and DOJ cannot change judicial precedent, but the draft guidelines indicate a general assumption that any mergers or interactions between firms on either side of a market raise potential "conflicts of interests" that justify scrutiny of the transaction. As a result, if the draft guidelines are implemented, the agencies will likely attempt to prohibit any transaction between a platform and market participant, regardless of their competitive effects.

This approach goes even further than recent attempts to change federal antitrust law. The [American Innovation and Choice Online Act](#)

(AICOA), bipartisan legislation targeting multi-sided platforms, would prohibit “self-preferencing” by platforms to favor their own products or services that utilize the platform. As currently drafted, this could harm competition and consumers, but unlike the draft merger guidelines, ultimately the bill wouldn’t prohibit firms from both owning a platform and a market participant on that platform. Instead, the bill would merely attempt to draw a line where the law assumes anticompetitive harms outweigh benefits. By forgoing even this most rudimentary analysis, the draft merger guidelines would leave consumers with fewer options at higher prices, as individual competitors would benefit while competition as a whole would suffer.

Draft Merger Guidelines on Multi-sided Platforms

The tenth point in the draft guidelines covers when a merger involves platforms that provide different products or services to two or more groups that may benefit from each other’s participation. As the draft merger guidelines correctly lay out, mergers involving platforms can give rise to competitive problems, such as when a firm that controls an online marketplace and participates in that market simultaneously, creating a “conflict of interest.” That firm, as the guidelines warn, can make it more costly for rival sellers to reach customers. If a platform constitutes a relevant market (meaning alternative means for connecting buyers and sellers cannot be substituted for that platform), that firm can raise prices beyond a competitive level.

Further, many of these multi-sided platforms benefit from network effects that contribute to the value of the platform. For example, an application store with a large user base attracts application developers seeking to reach that user base. As more application developers design their services for that particular store, more consumers will use the store as well. These kinds of network effects could allow for the platform to become a relevant market for antitrust scrutiny as rival platforms lack the necessary user base to sufficiently restrain monopolistic behavior.

Benefits of Multi-sided Platforms

Currently, courts review vertical mergers for multi-sided platforms by examining the [competitive effects of the merger](#). When a firm integrates vertically, it can cause anticompetitive harms, such as making it more difficult for rivals to offer products or services of equal quality or price. Yet the reason for these harms could stem from procompetitive conduct, ultimately to the benefit of consumers in the form of better services and products at lower prices. Even if a merger does produce anticompetitive harms, the procompetitive benefits may outweigh them, and therefore courts will typically allow the merger.

Take, for example, the case of an online marketplace such as Amazon. By both operating and participating in an online marketplace, Amazon has a competitive advantage over rivals. If a small seller wishes to reach customers through Amazon’s online marketplace, the seller often cannot match the price of Amazon’s own brands. Lower prices may drive the smaller seller out of business and ultimately lower competition among sellers, restricting options for consumers and allowing the remaining sellers to raise prices.

Yet lower prices for a platform’s products or services often stem from economies of scale and knowledge of the platform. As a platform can share legal teams, manufacturing, packaging and shipping, and data on what consumers wish to buy, the participant owned by the platform can design products that match the needs of consumers at a lower cost to the participant. These cost savings are passed onto consumers, lowering the cost of the products or services. As a platform such as Amazon lowers prices for its branded products, rivals must likewise find innovative new products and services to compete, or otherwise find cost savings to pass on to consumers. Overall, while some competitors cannot keep up, by integrating vertically, such platforms may

increase overall competition in the market.

Moving Past Competitive Effects?

The draft merger guidelines seemingly forgo any analysis of the procompetitive benefits of a merger involving multi-sided platforms. According to the guidelines, “the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants.” For evaluating competition on multi-sided platforms, the FTC and DOJ have looked to potential anticompetitive behavior stemming from a conflict of interest between the platform and a participant, but the guidelines simply assume that “a platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against other competitors participating on the platform, harming competition in the product market for that product or service.” In the past, the FTC and DOJ would have likely then explained that these conflicts of interest could be overcome with a showing of procompetitive justifications or a lack of ability to disadvantage rivals due to rival platforms offering alternative means of reaching consumers. This document, however, makes no such clarification.

Going Further Than Congress

Members of Congress have likewise expressed concerns about multi-sided platforms and have introduced bipartisan legislation to address perceived competitive harms. In particular, AICOA would prevent platforms from preferencing their own products and services. The legislation incorporates many of the same theories and concerns expressed in the draft merger guidelines, but rather than outlawing ownership of a platform and a participant, the bill stops short at just self-preferencing.

The draft merger guidelines take AICOA a step further. Rather than specifically targeting those situations in which a merger would result in anticompetitive harm, the guidelines instead assume that a conflict of interest will exist and therefore that a platform would self-preference its own product. Even as far as AICOA goes to prevent firms from vertically restraining trade, the draft merger guidelines indicate a willingness to prevent any vertical integration at all, regardless of the effect that will have on consumers and competition writ large.

Conclusion

The FTC and DOJ draft merger guidelines highlight the Biden Administration’s shift toward an anti-concentration antitrust policy. Many technology firms operate multi-sided platforms and generate significant consumer benefits. The draft merger guidelines would largely forgo any analysis of these benefits and instead block any and all mergers involving multi-sided platforms. This approach goes beyond current antitrust law, and even drastic proposals to change the law to better target concentration. While mergers between multi-sided platforms can and often do raise competitive concerns, the FTC and DOJ shouldn’t block them outright, but instead carefully examine the competitive effects of the transaction.