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Modern Merger Law: Dante's Inferno Revisited

Richard J. Pierce, Jr.[1]

Abstract

In this essay, Professor Pierce compares the transparent and successful operation of the Hart-Scott-Rodino decision-making process when FTC and DOJ act in accordance with the published merger guidelines, with the opaque and confused operation of that decision-making process when FTC and DOJ act in ways that are inconsistent with the guidelines. He predicts that any new guidelines that accurately reflect the policies that DOJ and FTC are actually attempting to further will be immediately enjoined. As long as FTC and DOJ continue to implement the HSR decision-making process in ways that are inconsistent with the guidelines, Professor Pierce urges firms to use the guidelines as the basis for proposing transactions and then to close any transaction that is consistent with the guidelines as soon as the agencies have completed the decision-making process even if FTC or DOJ conclude that the transaction violates the Clayton Act.

The Sherman[2] and Clayton[3] antitrust acts are so broadly worded that they can support a wide range of interpretations. The agencies charged with responsibility to implement those statutes—the FTC and the Antitrust Division of DOJ--do not have the power to issue substantive rules to implement the statutes. They do have the power, however, to issue interpretative rules and statements of general policy to provide guidance on how they will interpret and apply the statutes.

FTC and DOJ have exercised that power for decades by issuing what they call "guidelines" that describe the ways in which the agencies will interpret and apply the statutes and the policies that they plan to implement in the process of interpreting and applying the statutes. Those guidelines have been extraordinarily important in many contexts, e.g., by enabling firms to determine when and how they can engage in joint ventures that are intended to further their mutual goals in conducting research and development and by enabling healthcare providers to identify the circumstances in which they can consolidate their operations by creating Accountable Care Organizations under the Affordable Care Act.

The most important guidelines are those applicable to mergers and acquisitions. In 1976, Congress enacted the Hart-Scott-Rodino Act.[4] That statute created a new system for determining

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[1] Lyle T. Alverson Professor of Law, George Washington University School of Law.
[2] 15 U.S.C. §§1-7.
[3] 15 U.S.C. §§12-27.
[4] 15 U.S.C. §18a.

whether a proposed merger or acquisition violates the Clayton Act. Section 7 of the Clayton Act[5] can support a wide range of interpretations. Firms that intend to merge with, or to acquire, another firm must make a filing with DOJ and FTC at least 30 days before the date of the proposed merger or acquisition. DOJ and FTC meet periodically to allocate responsibility to implement the HSR between the agencies by sector of the economy. DOJ and FTC have thirty days in which to decide whether the proposed transaction would violate the Clayton Act. The statute authorizes extensions of the decisional deadline up to thirty days, but the parties to the proposed transaction often acquiesce in much longer extensions of the decisional deadline when DOJ or FTC ask for additional time to evaluate a proposed transaction.

The HSR statute created a system of agency adjudication that is unlike any other. In all other contexts, an agency adjudication closely resembles an adjudication in a court.[6] The agency provides notice of its position and the reasons why it believes that a firm is violating the law. The firm then has an opportunity to respond. The agency and the firm then present their conflicting evidence in a hearing conducted by an Administrative Law Judge. The parties then file briefs, and the ALJ issues an opinion in which she explains her decision. Either party can then appeal to the head of the agency. After considering the briefs of the parties on appeal, the agency head can either adopt the decision and reasoning of the ALJ or replace it with the agency's contrary decision, along with a statement of the agency's reasoning in support of its decision. Each step in the normal process of agency adjudication is completely transparent. Every firm that is potentially affected by the agency's decision and every potentially affected member of the public has complete access to the pleadings, evidence, decision, and reasoning process.

The HSR system of agency adjudication of disputes with respect to the legality of a proposed merger or acquisition differs completely from the normal system of agency adjudication. Every step in the decision-making process takes place behind closed doors. The process is completely opaque. The public has no way of knowing what transpired except in the rare case in which the firm that proposes to engage in the transaction decides to complete the transaction after the agency has notified the firm of its decision that the transaction is illegal. In those few cases, the ensuing litigation creates a public record that provides the public with a window into the agency decision making process that gave rise to the litigation.

The opacity of the agency decision making process is particularly problematic because of the dearth of caselaw that can be used to determine the boundaries on the potentially wide range of discretion that the agencies can exercise in the process of interpreting and applying the broad language of section 7 of the Clayton Act. The Supreme Court has not issued any decision in which it has interpreted and applied section 7 in fifty years, and major changes in the Court's

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[5] 15 U.S.C. §18.

[6] See 5 U.S.C. §§554-557. See generally Kristin Hickman & Richard Pierce, Administrative Law Treatise ch. 6 (6th ed. 2019).

approach to antitrust law over the past fifty years render the Court's old decisions of little value in predicting how the Court would interpret section 7 today.

The joint merger guidelines that DOJ and FTC issue and revise from time to time have provided much-needed transparency to the HSR decision making process. The guidelines are extremely detailed.[7] They describe every step that the agency takes in the process of deciding whether a proposed transaction has the potential to reduce consumer welfare by reducing competition in a market.

The guidelines have served two valuable purposes. First, they have allowed firms to predict with a high degree of confidence which of three actions the agency will take with respect to a transaction the firm is considering. FTC or DOJ determine that most of the thousands of proposed transactions are unlikely to have adverse effects on competition. In those cases, the agency has quickly terminated the review process and notified the firm of its decision to acquiesce in the transaction. In a much smaller number of cases, the agency has notified the firm that it needs additional data and must engage in detailed analysis of the proposed transaction to determine whether it is likely to have an adverse effect on competition. In some fraction of those cases, the agency determined that the transaction is likely to have an adverse effect on competition and notified the firm that it will seek an injunction to preclude the firm from completing the proposed transaction if the firm decides to attempt to complete the transaction notwithstanding the agency's determination that it would violate section 7 of the Clayton Act. Until recently, the FTC prevailed in most of the cases in which it sought to enjoin a transaction that it found to be a violation of section 7.

Second, the guidelines have given firms that are considering a potential merger or acquisition a detailed description of the data that the firm must collect and the analyses that the firm must complete for submission to FTC or DOJ to allow the agencies to decide whether to acquiesce in the transaction, to engage in a more detailed analysis of the transaction, or to disapprove of the transaction.

This system of agency adjudication worked reasonably well until Lina Khan became Chair of the FTC and Jonathan Kanter became Assistant Attorney General for Antitrust. On January 18, 2022, they expressed their displeasure with the 2010 guidelines and announced their intent to announce new guidelines that would significantly reduce the number of permissible mergers, but they have not yet taken that action.

Chair Kahn has made it clear in her many writings and speeches that she disagrees with every characteristic of the prior guidelines.[8] She does not even agree with the goals of the prior guidelines. She rejects the consumer welfare maximization goal that DOJ and FTC have pursued

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[7] See, e.g., Merger Guidelines (2010), excerpted in Thomas Morgan and Richard Pierce, Modern Antitrust Law & Its Origins 798-819 (7th ed. 2023).

[8] E.g., Lina Khan, The Separation of Platforms and Commerce, 119 Col. L. Rev. 977 (2019); Lina Khan, Amazon's Antitrust Paradox, 126 Yale L. J. 710 (2017).

for the last fifty years. She has emphasized the need to protect competitors from large firms that charge low prices—a goal that the enforcement agencies and the Supreme Court disavowed fifty years ago. She cannot further her stated goals by applying the 2010 guidelines.

This raises critically important questions. How does the FTC interpret section 7 of the Clayton Act under Chair Khan and what analytical steps will the FTC take to determine whether a proposed transaction is legal? Professor Daniel Sokol led a team of researchers that attempted to answer those questions by interviewing the lawyers and economists who advise firms that are considering whether to propose a merger or acquisition.[9]

The findings of the Sokol study are disturbing. The experts on the HSR process can tell that the agencies are no longer acting in ways that are consistent with the guidelines, but they have no idea what criteria or analytical tools the agencies are applying in that process. They are particularly mystified by the FTC's actions. As a result of the massive confusion and wide range of uncertainty with respect to the FTC's goals and decision-making criteria and the complete opacity of the HSR decision-making process, they are unable to provide informed advice to firms that are considering whether to merge or to acquire another firm. They cannot predict whether the FTC will disapprove of a proposed transaction. They cannot identify the criteria and analytical techniques that the FTC will use to make that decision. And they cannot tell a firm what data and analyses the firm must submit to allow the FTC to make that decision.

This appalling situation raises an obvious question. Why is the FTC providing no guidance about the way that it makes decisions with respect to the legality of proposed mergers and acquisitions? Adam White, the head of the Center for the Study of the Administrative State, has offered one answer. He believes that the FTC under Khan's leadership has decided that it is best served by maximizing uncertainty about the way it interprets the antitrust laws.

That is a plausible partial explanation, particularly in circumstances in which the FTC's new views conflict with the longstanding views of the Supreme Court. I believe, however, that the FTC is also motivated by fear of the likely judicial reaction to a new set of guidelines that reflect the actual criteria that Chair Khan is attempting to apply in the HSR decision-making process.

When FTC and DOJ last issued horizontal merger guidelines in 2010, the law applicable to judicial review was simple. Because interpretative rules and general statements of policy are not legally binding, they were not subject to judicial review.[10] That administrative law doctrine has changed completely.

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[9] D. Daniel Sokol, Marissa Ginn, Robert Calzaretta, and Marcello Santana, Antitrust Mergers and Uncertainty, forthcoming in Business Lawyer.
[10] E.g., Pacific Gas & Electric v. FPC, 506 F. 2d 33 (1974).

In 2012[11] and 2016,[12] the Supreme Court issued two unanimous opinions in which it instructed lower courts to engage in review of many agency actions at the earliest possible time. It expressed concern that individuals and firms that were being adversely affected by unlawful agency actions were unable to obtain access to judicial review until they made their way through a long and expensive agency decision-making process.

Circuit courts have responded to those opinions by changing their methods of determining whether and when an agency action is reviewable.[13] Courts now apply to interpretative rules and general statements of policy the same two-part test that the Supreme Court announced as applicable to substantive rules in its famous 1967 opinion in *Abbott Laboratories v. Gardner*.[14] An interpretative rule is subject to immediate pre-application judicial review if it raises an issue that a court can address without knowing the facts of any particular case and if delay in addressing the question would create hardship to the petitioner in the form of delay or cost before a court otherwise could address the issue.

Any new merger guidelines that reflect Chair Khan's views with respect to the circumstances in which a merger or acquisition should be permitted would be highly likely to satisfy the two-part test and be subject to immediate pre-application review. The guidelines would have no chance of surviving the review process, since Chair Khan's views on antitrust law differ dramatically from the views of the Supreme Court.

A more recent change in administrative law doctrine would doom the guidelines before the FTC could apply them in any case. When I published the 6th edition of the Administrative Law Treatise that I co-author, I characterized temporary injunctions with respect to major agency actions as "rare."[15] The 7th edition that will be published in a few months will characterize nationwide preliminary injunctions as "routine." Courts now regularly enjoin agencies from implementing an action when they make a preliminary determination that the action is illegal.[16] If DOJ and FTC issue new merger guidelines that reflect Chair Khan's views, they are likely to be subject to an immediate pre-application temporary injunction. That is why FTC and DOJ are unlikely to issue new guidelines.

That raises another important question. What should firms do when FTC and DOJ refuse to issue new guidelines that reflect the reality of their methods of implementing the HSR decision-making process? My advice is simple. Firms should use the 2010 guidelines as the basis

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[11] Sackett v. EPA, 566 U.S. 120 (2012).

[12] U.S. Army Corps. of Engineers v. Hawkes, 136 S.Ct. 1807 (2016).

[13] E.g., National Organization of Veterans Advocates v. Sec. Veterans Affairs, 981 F. 3d 1360 (Fed. Cir. en banc 2020).

[14] 387 U.S. 136 (1967).

[15] Treatise, supra note 6, at §20.2.

[16] See Richard Pierce, How Should the Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach? (forthcoming in Penn State Law Review).

for deciding whether to propose a merger or acquisition. They should refuse to acquiesce in any request to extend the decision-making deadline beyond 60 days. They should close the transaction at the end of the statutorily permissible 60-day decision-making period even if DOJ or FTC determine that the transaction violates section 7 of the Clayton Act. They should then litigate the issue in court. Given the complete disconnect between the views of the current leaders of the enforcement agencies and the courts, any firm that follows that path is highly likely to prevail in court. FTC's history of success in opposing proposed transactions in court has been replaced by a string of defeats under Chair Khan.