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# Analysing the Impact of the Federal Trade Commission's Guidelines on Mergers & Acquisitions: A Critical Perspective

Jigisha Sharma
*BBA-LLB(H), Amity Law School, Noida, AUUP*

## I. SYNOPSIS

This paper critically analyzes the impact of the Federal Trade Commission's (FTC) guidelines on mergers and acquisitions in December 2023. The competition regulatory authorities plays a crucial role in regulating mergers and acquisitions to ensure fair competition and prevent monopolistic practices.

Through a comprehensive review of existing literature, case studies, and regulatory documents, this study examines the effectiveness of the FTC's guidelines in promoting competition, protecting consumers, and fostering innovation in the marketplace.

The analysis focuses on key aspects such as the criteria used by the FTC to evaluate mergers, the enforcement mechanisms employed by the agency, and the outcomes of recent merger cases. By adopting a critical perspective, this paper evaluates the strengths and limitations of the FTC's approach to regulating mergers and acquisitions. It also considers the potential unplanned consequences of the guidelines, such as stifling innovation or harming small businesses.

Overall, this study provides valuable insights into the complex interplay between regulatory policies and market dynamics in the context of mergers and acquisitions. The findings contribute to a deeper understanding of the challenges faced by regulatory agencies in balancing the competing interests of different stakeholders. The implications of this research can inform policymakers, industry practitioners, and scholars in their efforts to promote a competitive and efficient marketplace.

## II. INTRODUCTION TO MERGERS & ACQUISITIONS

Mergers and acquisitions (M&A) represent a critical aspect of corporate strategy and the broader landscape of business transactions. These strategic activities involve the consolidation of companies, either through the merger of equals or the acquisition of one company by another. M&A transactions are complex processes that can have significant implications for the companies involved, as well as for various stakeholders, including shareholders, employees, customers, and regulators[1].

The motivations behind mergers and acquisitions are diverse and can vary depending on the strategic objectives of the companies involved. Some common reasons for pursuing M&A transactions include achieving economies of scale, expanding market share, diversifying product offerings, entering new markets, enhancing competitiveness, and driving growth. By combining resources, capabilities, and market presence, companies can create synergies that lead to improved performance and value creation.

Mergers and acquisitions can take different forms, including horizontal mergers[2] between competitors operating in the same industry, vertical mergers between companies in different stages of the supply chain, conglomerate mergers between unrelated businesses, and acquisitions of distressed companies or assets. Each type of transaction presents unique opportunities and challenges, requiring careful planning, due diligence, and execution to maximize value for all parties involved.

The process of mergers and acquisitions typically involves several key stages, starting with strategic planning and target identification, followed by negotiation, due diligence, regulatory approval, integration planning, and post- merger integration. Each stage requires close coordination between various stakeholders, including executives, legal advisors, financial analysts, and regulatory authorities, to ensure a successful outcome [3].

[1] Mergers and Acquisitions (M&A): Types, Structures, Valuations https://www.investopedia.com/terms/m/mergersandacquisitions.asp

[2] Introduction to Mergers & Acquisitions - Singhania & Partners LLP https://singhania.in/blog/introduction-to-mergers-acquisitions

[3] Mergers and acquisitions - Wikipedia https://en.wikipedia.org/wiki/Mergers_and_acquisitions

[4] "Merger Review." *Federal Trade Commission*, 31 Oct. 2018, www.ftc.gov/news- events/topics/competition-enforcement/merger-review

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The impact of mergers and acquisitions extends beyond the companies involved and can have far-reaching implications for the broader economy, industry dynamics, competition, employment, innovation, and consumer welfare. While M&A transactions can create value through synergies and efficiency gains, they can also raise concerns about market concentration, anticompetitive behavior, job losses, corporate governance issues, and regulatory compliance.

Regulatory bodies play a crucial role in overseeing mergers and acquisitions to ensure compliance with antitrust laws, protect competition, and safeguard consumer interests. In the United States, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) [4] are responsible for reviewing M&A transactions to assess their potential impact on market competition and consumer welfare; in India, the Competition Commission of India (CCI) is responsible for promoting and sustaining competition, protecting consumer interests, and ensuring fair trade practices. These agencies evaluate factors such as market concentration, barriers to entry, potential anticompetitive effects, and efficiencies to determine whether a transaction should be approved or challenged.

## III. ROLE OF COMPETITION AUTHORITIES IN MERGERS AND ACQUISITIONS

Mergers and acquisitions (M&A) are critical components of corporate strategy that can have significant implications for market competition, consumer welfare, and economic efficiency. As companies seek to consolidate their operations, expand their market presence, or achieve synergies through M&A transactions, competition authorities play a crucial role in overseeing these deals to ensure that they do not harm competition or consumer interests. The role of competition authorities in mergers and acquisitions is to assess the potential impact of these transactions on market dynamics, competition, and consumer welfare, and to take enforcement actions when necessary to protect competition and prevent anticompetitive behaviour.

Competition authorities, such as the Federal Trade Commission (FTC) [5]and the Department of Justice (DOJ)[6] in the United States, are responsible for reviewing mergers and acquisitions to determine whether they are likely to substantially lessen competition or harm consumers. These agencies evaluate various factors, such as market concentration, barriers to entry, potential anticompetitive effects, and efficiencies, to assess the competitive implications of proposed transactions. By analyzing these factors, competition authorities can identify potential antitrust concerns and take appropriate enforcement actions to address them.

One of the key roles of competition authorities in mergers and acquisitions is to prevent anticompetitive behavior that could harm consumers by reducing choice, increasing prices, or stifling innovation. When companies merge or acquire competitors, there is a risk that they may gain market power and engage in anticompetitive practices, such as price-fixing, output restrictions, or exclusionary conduct, to maintain their dominance in the market. Competition authorities play a vital role in detecting and challenging such behaviour to protect competition and ensure that consumers benefit from a competitive marketplace.

Competition authorities also play a critical role in promoting market competition by enforcing antitrust laws and regulations that prohibit anticompetitive conduct. These laws are designed to prevent companies from engaging in practices that harm competition, such as collusion, abuse of dominance, or anticompetitive mergers. By enforcing these laws, competition authorities can safeguard competition, encourage innovation, and protect consumer welfare in the marketplace. Competition authorities review proposed transactions to assess their potential impact on market competition and consumer welfare. This review process involves analyzing factors such as market concentration, market shares, entry barriers, potential efficiencies, and competitive effects to determine whether a merger or acquisition is likely to harm competition. If competition authorities find that a transaction raises antitrust concerns, they may challenge it through enforcement actions, such as blocking the deal, requiring divestitures, or imposing conditions to mitigate anticompetitive effects. The Federal Trade Commission also plays a crucial role in fostering transparency and accountability in the M&A process by providing guidance on antitrust compliance and conducting investigations into potentially anticompetitive behaviour. By monitoring M&A transactions and enforcing antitrust laws, competition authorities can deter companies from engaging in anticompetitive practices and ensure that markets remain competitive and efficient for the benefit of consumers. Competition authorities also play a role in promoting competition advocacy by raising awareness about the benefits of competition[7] and advocating for pro- competitive policies and regulations. By engaging with policymakers, industry stakeholders, and the public, competition authorities can promote a competitive marketplace that fosters innovation, efficiency, and consumer choice. The role of competition authorities in mergers and acquisitions is crucial for safeguarding competition, protecting consumer welfare, and promoting market efficiency. By assessing the competitive implications of M&A transactions, enforcing antitrust laws, fostering transparency and accountability, and promoting competition advocacy, competition authorities play a vital role in ensuring that markets remain competitive and dynamic for the benefit of consumers and the economy as a whole.

[5] Mergers | Federal Trade Commission https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers

[6] Antitrust Division | 2023 Merger Guidelines - Department of Justice https://www.justice.gov/atr/2023-merger-guidelines

## IV. EVOLUTION OF COMPETITION AUTHORITY'S GUIDELINES ON MERGERS AND ACQUISITIONS

The Federal Trade Commission (FTC) is a key regulatory agency in the United States responsible for enforcing antitrust laws and promoting competition in the marketplace. Over the years, the FTC has developed guidelines and frameworks to assess the competitive implications of mergers and acquisitions (M&A) and to ensure that these transactions do not harm competition or consumer welfare. The evolution of the FTC's guidelines on M&A reflects changing market dynamics, legal developments, and enforcement priorities, as well as advancements in economic analysis and antitrust theory.

In the early years of the FTC, its approach to reviewing mergers and acquisitions was largely focused on market concentration and potential anticompetitive effects. The FTC's guidelines emphasized the importance of assessing market shares, barriers to entry, and competitive effects to determine whether a proposed transaction was likely to harm competition. During this period, the FTC relied on traditional structural indicators, such as the Herfindahl-Hirschman Index (HHI), to evaluate market concentration and identify potential antitrust concerns[8].

As the field of antitrust law and economics evolved, the FTC began to incorporate more sophisticated economic analysis into its guidelines on M&A. The agency recognized the limitations of relying solely on market shares and concentration measures and started to consider factors such as product differentiation, innovation, efficiencies, and dynamic competition in its merger reviews. The FTC also adopted a more nuanced approach to assessing competitive effects, taking into account both unilateral and coordinated effects of mergers on competition[9].

In response to legal developments and court decisions, the FTC refined its guidelines on M&A to align with prevailing antitrust standards and enforcement practices. For example, the agency updated its Horizontal Merger Guidelines in 2010 to reflect changes in antitrust case law and economic theory, including a greater focus on differentiated products, innovation markets, and potential efficiencies in merger analysis. These updated guidelines provided more clarity and guidance to businesses, practitioners, and enforcers on how the FTC evaluates mergers for antitrust compliance.

The evolution of the FTC's guidelines on M&A also reflects advancements in technology, globalization, and industry dynamics that have shaped competition in the digital age. With the rise of digital platforms, data-driven business models, and network effects, the FTC has adapted its merger review process to address new challenges posed by tech giants and digital disruptors. The agency has explored novel theories of harm, such as data privacy, network effects, and platform competition, in its assessment of mergers involving digital markets. In recent years, the FTC has increased its scrutiny of mergers and acquisitions in high-tech industries, such as social media, e-commerce, and digital advertising, to ensure that these transactions do not stifle competition or harm innovation. The agency has emphasized the importance of protecting competition in dynamic markets where innovation and consumer choice are paramount, and has sought to address emerging antitrust issues related to platform dominance, data access, and algorithmic pricing[10]. Furthermore, the FTC has collaborated with other antitrust agencies, both domestically and internationally, to coordinate efforts in reviewing cross-border mergers and acquisitions. In an interconnected global economy, where companies operate across multiple jurisdictions, cooperation between competition authorities is essential to address antitrust concerns effectively and ensure consistent enforcement of competition laws. The FTC has engaged in joint investigations, information sharing, and enforcement actions with foreign counterparts to address anticompetitive conduct that spans national borders.

Looking ahead, the FTC is likely to continue evolving its guidelines on M&A to keep pace with changing market dynamics, technological advancements, and legal developments. The agency may further refine its approach to assessing competitive effects, considering factors such as data access, platform competition, and innovation markets in merger reviews. The FTC may also explore new tools and methodologies for analyzing mergers in digital markets, such as machine learning algorithms, big data analytics, and econometric modeling.

The evolution of the Federal Trade Commission's guidelines on mergers and acquisitions reflects a dynamic and adaptive approach to antitrust enforcement in response to changing market conditions, legal developments, and technological innovations. By incorporating sophisticated economic analysis, addressing emerging antitrust issues in digital markets, collaborating with other antitrust agencies, and promoting competition advocacy, the FTC plays a critical role in safeguarding competition, protecting consumer welfare, and promoting market efficiency through its oversight of mergers and acquisitions.

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7 Mergers and Competition | Federal Trade Commission https://www.ftc.gov/news-events/topics/competition-enforcement

8 *New FTC Regulations and Policies to Know - Federal Lawyer*. 13 Sept. 2021, federal- lawyer.com/ftc-defense/2023-regulations-policies/

9 https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-issue-fiscal- year-2022-hart-scott-rodino-notification-report

10 Locke Lord QuickStudy: The Federal Trade Commission and Justice ... https://www.lockelord.com/newsandevents/publications/2024/01/quickstudy-ftc-justice-dept-merger-guide

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## V. METHODOLOGY FOR EVALUATING THE IMPACT OF FTC'S GUIDELINES

Analyzing the impact of the Federal Trade Commission's (FTC) Merger Guidelines 2023 requires a comprehensive and multifaceted methodology. This methodology aims to provide a rigorous assessment of how the new guidelines have influenced market dynamics, competition, and consumer welfare in the United States:

*1)* The first step in my methodology is to conduct a thorough literature review on antitrust laws, merger guidelines, and previous versions of the FTC's guidelines. This review will help establish a solid understanding of the historical context and evolution of merger regulation in the U.S. It will also provide insights into the key principles and objectives underlying antitrust enforcement, as well as the methodologies used in previous studies on merger impacts.

*2)* The next crucial step involves collecting relevant data on mergers and acquisitions that have occurred since the implementation of the new guidelines in 2023. This data will include information on the industries involved, the size of the merging companies, market shares, and any enforcement actions taken by the FTC. By compiling this data, we can identify trends, patterns, and potential areas of concern related to mergers under the new guidelines.

*3)* The next step is to compare the outcomes of mergers reviewed under the new guidelines with those reviewed under previous versions to identify any significant differences in enforcement actions or outcomes. By conducting this comparative analysis, we can assess whether the new guidelines have resulted in more stringent enforcement, different merger outcomes, or other notable changes in antitrust practices.

*4)* The reports suggest that the 2023 Merger Guidelines have significant implications for companies seeking to merge or acquire other businesses. The lower market share thresholds for presumptive illegality, the heightened scrutiny of "6-to-5" mergers, and the expanded scope of considerations, including labor market impacts, create a more challenging regulatory environment for merging parties.

*5)* The reports indicate that the 2023 Merger Guidelines are a **non-binding statement** and that the agencies will continue to make decisions based on the specific facts and circumstances of each case. However, the guidelines provide transparency into the agencies' decision-making process and offer insight into how they will approach merger reviews going forward.

## VI. MARKET COMPETITION DYNAMICS IN M&A TRANSACTIONS

Market dynamics in mergers and acquisitions (M&A) transactions play a crucial role in shaping competition, innovation, and consumer welfare in the marketplace. The Federal Trade Commission (FTC) plays a key role in regulating M&A transactions to prevent anticompetitive harm and promote market efficiency[11].

Market dynamics in M&A transactions are influenced by various factors, including market concentration, entry barriers, pricing behaviour, product differentiation, technological innovation, consumer preferences, and regulatory constraints. Market concentration measures the degree of competition in a market and the extent to which firms have market power to set prices above competitive levels. High levels of market concentration can raise concerns about anticompetitive effects resulting from mergers that reduce competition and harm consumers.

Entry barriers, such as economies of scale, network effects, intellectual property rights, and regulatory restrictions, can limit competition and prevent new entrants from challenging incumbents in concentrated markets. Pricing behaviour, including price signaling, price discrimination, price matching, and price leadership, can affect competition outcomes and consumer welfare in markets where firms engage in strategic interactions to coordinate pricing decisions.

Product differentiation plays a critical role in shaping competition dynamics in markets characterized by heterogeneous products, brand loyalty, and consumer preferences. Differentiated products may enable firms to compete on quality, design, features, and branding to attract consumers and differentiate their offerings from competitors. Technological innovation drives competition and market dynamics by fostering product development, process improvements, cost reductions, and efficiency gains that benefit consumers and drive economic growth.

Consumer preferences influence market dynamics by shaping demand patterns, purchasing decisions, brand loyalty, and switching costs that affect firm behaviour and competitive strategies. Regulatory constraints, such as antitrust laws, competition policies, merger guidelines, and enforcement actions by antitrust agencies like the FTC, shape market dynamics by setting rules of the game, defining permissible conduct, and deterring anticompetitive behaviour.

[11] Final Merger Guidelines Will Result in Increased Scrutiny for M&A Deals https://www.faegredrinker.com/en/insights/publications/2024/1/final- merger-guidelines-will-result-in-increased-scrutiny-for-m-and-a-deals

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The FTC's guidelines on M&A provide a framework for analyzing market dynamics in merger transactions[12] to assess their competitive effects on prices, output, quality, innovation, and consumer choice. The guidelines outline the criteria for evaluating mergers based on market shares, market concentration, entry conditions, efficiencies, potential anticompetitive effects, and consumer welfare considerations. The Federal Trade Commission considers various factors in its merger reviews, including market definition, market shares of merging firms, competitive effects of the merger, entry conditions for new competitors, efficiencies generated by the merger, potential harm to consumers, and remedies to address antitrust concerns. The FTC's guidelines aim to promote competition by preventing mergers that may substantially lessen competition or create monopoly power in markets where firms have significant market shares or face limited competition. Market competition dynamics in M&A transactions involve strategic interactions among merging firms, competitors, suppliers, customers, regulators, and other stakeholders that shape market outcomes and competitive behaviour. Merging firms may seek to achieve synergies, economies of scale, cost savings, revenue enhancements, market expansion, diversification benefits, strategic positioning, and competitive advantages through mergers and acquisitions. Competitors may respond to mergers by adjusting their pricing strategies, product offerings, marketing tactics, distribution channels, research and development investments, and strategic alliances to maintain their competitive position in the market. Suppliers may face changes in bargaining power, pricing terms, contract negotiations, supply chain relationships, and sourcing decisions resulting from mergers that alter market dynamics. Customers may experience changes in product availability, quality standards, pricing levels, service levels, brand choices, and switching costs due to mergers that impact their purchasing decisions. Regulators like the FTC play a critical role in overseeing M&A transactions to ensure compliance with antitrust laws and promote competition in the marketplace.[13] The FTC reviews mergers to assess their competitive effects on market structure, conduct, performance, and consumer welfare using economic analysis, legal standards, enforcement tools, and policy guidance. The FTC's guidelines provide a roadmap for evaluating mergers based on their potential impact on competition and consumer welfare to determine whether enforcement action is necessary to address antitrust concerns. The FTC may challenge mergers that raise significant competitive concerns or harm consumers by reducing choice, raising prices, lowering quality standards, limiting innovation, or creating barriers to entry in concentrated markets.

## VII. HOW THE FEDERAL TRADE COMMISSION'S GUIDELINES 2023 ARE DIFFERENT FROM ITS PREVIOUS GUIDELINES?

The 2023 Merger Guidelines issued by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) represent a significant shift in the agencies' approach to merger review compared to the previous 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines.

### *A. Lower Thresholds for Presumptive Illegality*

The most notable change is the significantly lower thresholds for when a merger will be presumed to be anticompetitive.[14]
Under the previous guidelines(2010 guidelines), a merger that resulted in a post- merger Herfindahl-Hirschman Index (HHI) above 2,500 and an increase in HHI of 200 or more was presumed to be anticompetitive. The 2023 Guidelines have lowered this threshold, such that a merger resulting in a post-merger HHI of 1,800 and an increase of 100 or more will now be presumptively unlawful.
Additionally, the 2023 Guidelines introduce a new market share threshold, stating that a merger creating a firm with 30% or more market share, even if the other merging party has a de minimise share, will be presumptively illegal if the merger also results in an HHI increase of 100 or more. [15] These lower thresholds mean that more mergers will be subject to a presumption of illegality and face heightened scrutiny from the agencies.

### *B. Expanded Theories of Harm*

The 2023 Guidelines also expand the theories of harm the agencies will consider when reviewing mergers. [16]
For example, the Guidelines state that the agencies may challenge mergers that enable a dominant firm in one market to entrench or extend its position in other markets, even if the merging parties do not directly compete. This is based on a novel legal theory that such mergers may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act.

12 https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

13 Global Private M&A Guide | Insight - Baker McKenzie https://www.bakermckenzie.com/en/insight/publications/guides/global-private-ma-guide

14 https://www.lockelord.com/newsandevents/publications/2024/01/quickstudy-ftc-justice-dept-merger-guide

15 https://federal-lawyer.com/ftc-defense/2023-regulations-policies/

The Guidelines also indicate the agencies will scrutinize "anticompetitive patterns" of multiple small acquisitions, even if no individual deal would violate the antitrust laws. The agencies will look at the acquiring firm's past M&A strategies, including incomplete deals, to assess the potential for competitive harm.

Additionally, the Guidelines state the agencies may challenge mergers that do not raise traditional product or service competition concerns but may nevertheless result in lower wages, reduced benefits, or other degradations of workplace quality for workers, creators, suppliers, or other providers. [17]

### *C. Reduced Reliance on "Horizontal" and "Vertical" Distinctions*

Unlike previous guidelines, the 2023 Merger Guidelines do not rely as heavily on the distinction between "horizontal" and "vertical" mergers. The agencies will now analyze both horizontal and vertical aspects of a transaction, suggesting they will increase scrutiny of vertical mergers.

### *D. Elimination of Certain Draft Guidelines*

The final 2023 Guidelines eliminated three draft guidelines that were included in the earlier proposed version:

1) Draft Guideline 6, which suggested a presumption of harm for vertical mergers resulting in a firm with a 50% or greater market share of a related product.
2) Draft Guideline 8, which addressed mergers occurring during a trend toward concentration.
3) Draft Guideline 13, which was a catchall provision indicating the guidelines were not exhaustive.

The elimination of these draft guidelines does not necessarily mean the agencies have abandoned the underlying theories of harm. For example, the discussion of Guideline 6 on vertical mergers appears to have been largely retained and incorporated into Guideline 5.

### *E. Greater Emphasis on Rebuttal Evidence*

The 2023 Guidelines place greater emphasis on the types of rebuttal evidence the merging parties can present to overcome the presumption of illegality. This includes evidence related to failing firms, entry and repositioning, and pro- competitive effects.

The agencies indicate they will carefully examine such rebuttal evidence, though they caution that "vague or speculative claims" will not be credited. These changes signal a more aggressive merger enforcement approach by the FTC and DOJ, with a lower bar for challenging transactions and a broader range of competitive concerns that will be considered.[18]

## VIII. CASE STUDY: MERGER OF DOW CHEMICALS & DUPONT, 2015

### *A. Background of the Case*

The merger of Dow Chemicals and DuPont, two of the largest chemical companies in the United States, has been a significant development in the industry with far-reaching implications for the market and competition[19]. The proposed merger which was announced in December 2015 and completed in August 2017, brought together two industry giants with complementary product portfolios and global reach[20]. The merger aimed to create a more diversified and innovative company that could better compete in the rapidly evolving chemical and agricultural markets. Dow Chemical and DuPont were the only two manufacturers of acid copolymers in the United States[21]. Dow controlled over 80% of the U.S. market, while DuPont was responsible for 19% of sales. Post- merger, the combined entity would control over 99% of the acid copolymers market in the United States . Dow Chemical and DuPont were also the only two manufacturers of ionomers in the United States, collectively responsible for all sales. The merger would have resulted in a monopoly situation for ionomers in the U.S. market. It was also found that Dow Chemical and DuPont were the only two competitors for broadleaf herbicides for winter wheat in the U.S. market. The merger would have eliminated this competition, leading to higher prices and reduced innovation for farmers[22].

16 https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive- reviews-endorsements

17 https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

18 https://federal-lawyer.com/ftc-defense/2023-regulations-policies/

19 DuPont, Dow Chemical Agree to Merge, Then Break Up Into ... - WSJ http://www.wsj.com/articles/dupont-dow-chemical-agree-to-merge- 1449834739

20 Dow Chemical-DuPont merger to have adverse effect on competition https://www.business-standard.com/content/b2b-chemicals/dow-chemical- dupont-merger-to-have-adverse-effect-on-competition-cci-117032300385_1.html

21 Dow and DuPont provide update on merger https://www.dupont.com/news/dow-and-dupont-provide-update-on-merger-20170628.html

The merger of Dow Chemicals and DuPont raised concerns among regulators, industry stakeholders, and consumer groups about its potential impact on competition in the US market. The combined entity would have a dominant position in several key sectors, including agriculture, chemicals, and materials, which could lead to reduced competition, higher prices, and decreased innovation. Antitrust authorities closely scrutinized the merger to assess its potential effects on market competition and consumer welfare.

One of the primary concerns surrounding the Dow-DuPont merger was the consolidation of market power in the agriculture sector. Both companies were major players in the agricultural chemicals and seeds market, with a significant presence in crop protection products, genetically modified seeds, and agricultural technologies. The merger raised fears that the combined entity would have excessive market share and pricing power, potentially harming farmers, consumers, and competitors.

### *B. Pre-Merger Events*

The merger was motivated by the challenging market conditions faced by both companies. Dow and DuPont had been facing stagnation due to intense price competition, subdued commodity prices, currency challenges, and bloated cost structures. Both companies had seen their revenues fall over the last few years due to low crop prices resulting in decreased demand, competitive pressure, strengthening of the U.S. dollar, and falling oil prices. This challenging environment had prompted other players to pursue inorganic growth opportunities, too.

### *C. Antitrust Investigations*

The merger was subject to antitrust investigations by the U.S. Department of Justice (DOJ), Competition Commission of India and the European Commission (EC). The investigations focused on the potential impact of the combined entity on competition in the markets for agricultural chemicals, plastics, and other products. The DOJ , CCI and EC raised concerns about the potential for the merged company to dominate these markets and limit competition.

*1)* The European Union's antitrust authority opened a full-blown investigation into the proposed merger, citing concerns about the impact on competition[23].

*2)* The U.S. Department of Justice conducted an investigation and ultimately approved the merger with conditions. The DOJ required Dow and DuPont to divest certain parts of their crop protection and material science portfolios to maintain competition[24].

*3)* The Competition Commission of India (CCI) initiated a Phase II investigation, expressing concerns that the merger was likely to have an "appreciable adverse effect on competition in India. This indicated the CCI believed the deal could negatively impact competition within the Indian market. As part of the conditional approval, Dow and DuPont agreed to implement specific remedies to address the CCI's concerns regarding the supply of certain fungicides and adhesive products in India. This suggests the merger could have led to reduced competition and higher prices for these products in the Indian market without the remedies. The CCI's investigation and remedies demonstrate its willingness to scrutinize large global mergers and take action to maintain competition in the Indian market, even when the merging parties may have proposed global markets. This sets an important precedent. The outcome of the CCI's investigation and the remedies imposed likely shaped the structure and operations of the merged DowDuPont entity in India, ensuring it did not dominate key product markets and maintained a competitive landscape for Indian consumers and businesses

*4)* The U.S. DOJ found that the merger would substantially lessen competition in the markets for acid copolymers and ionomers, as Dow and DuPont were the only two manufacturers in the U.S. The DOJ required divestitures to preserve competition in these market.

The antitrust investigations aimed to ensure the merger did not create anticompetitive effects by concentrating too much market power in certain product segments. The required divestitures helped maintain competition and protect customers from potential price increases post-merger. To address these concerns, Dow and DuPont agreed to divest certain assets. DuPont sold part of its herbicide/insecticide business, and Dow sold its plastics packaging business. These divestitures were intended to ensure that the merged company would not have a significant market share in any particular market, thereby maintaining competition.

[22] Revisiting Dow-DuPont Merger Motivation As Companies Win U.S https://www.forbes.com/sites/greatspeculations/2017/06/23/revisiting-dow-dupont-merger-motivation-as-companies-win-u-s-anti-trust-approval/?sh=6f6a9c5f6355

[23] Dow and DuPont provide update on merger https://www.dupont.com/news/dow-and-dupont-provide-update-on-merger-20170628.html

[24] Revisiting Dow-DuPont Merger Motivation As Companies Win U.S https://www.forbes.com/sites/greatspeculations/2017/06/23/revisiting-dow-dupont-merger-motivation-as-companies-win-u-s-anti-trust-approval/?sh=6f6a9c5f6355

In April 2019, DowDuPont completed the spin-off of its Materials Science Division into a new company called Dow Inc. This was the first step in the intended separation of DowDuPont into three independent public companies focused on agriculture (Corteva Agriscience), materials science (Dow Inc.), and specialty products (DuPont).

*D. Post-Merger Impact on Market*

The merger was completed in 2018, and the combined entity, DowDuPont, began operating as a single company. The merger allowed DowDuPont to navigate the challenges faced by the industry more effectively, as it eliminated redundant operations and focused on high-margin products. The merger also led to the creation of three independent, publicly traded companies: a leading global pure-play Agriculture company; a leading global pure-play Material Science company; and a leading technology and innovation- driven Specialty Products company. Each of these businesses was designed to have clear focus, an appropriate capital structure, a distinct and compelling investment thesis, scale advantages, and focused investments in innovation to better deliver superior solutions and choices for customers. The merger had a significant impact on the global market. The combined entity became a dominant player in the chemical industry, with a comprehensive array of products in agriculture, material science, and specialty products segments. This dominant position gave DowDuPont significant bargaining power over its suppliers and, to some extent, customers. The size advantage also helped the company in terms of access to funds for growth and to ward off competition[25].

*E. Impact on the Workforce*

The Dow-DuPont merger had significant implications for the job market in the agriculture and material science industries:

*1) Agriculture*

*a)* After the merger, DuPont eliminated more than 1,700 jobs in Delaware, accounting for nearly 28% of its state workforce. This restructuring was part of the cost-saving measures and efficiency improvements following the merger.

*b)* The creation of the new agriculture company, expected to generate $16 billion in annual revenue, led to uncertainties about job security and potential cuts as the companies aimed to make over $3 billion in savings post-merger. However, the company's dominant market share among the "Big Six" agriculture companies provided some stability in terms of critical mass for success.

*2) Material Science*

*a)* The merger led to the creation of a new independent Material Science company, which included DuPont's performance materials division but was based in Dow's hometown of Midland, Michigan. This restructuring may have impacted job locations and roles within the material science sector[26].

*b)* The material science business was designed to have a clear focus, appropriate capital structure, and scale advantages to better compete in the global material science market. This strategic realignment could have influenced job roles and requirements within the material science industry.

*F. Global Market Effects*

The merger had significant effects on the global market. The combined entity became a major player in the global chemical industry, with a significant presence in key markets such as the United States, Europe, and Asia. The merger also led to the creation of three independent companies, each with its own focus and strategy, which allowed them to better compete in their respective markets[27].

The merger also had an impact on the global supply chain. The combined entity's dominant position in the market allowed it to negotiate better prices with its suppliers and to improve its supply chain efficiency. This, in turn, helped the company to reduce its costs and to improve its profitability. In conclusion, the merger of Dow Chemical and DuPont was a significant event in the global chemical industry. The combined entity, DowDuPont, aimed to create a more competitive and efficient company by eliminating redundant operations and focusing on high-margin products. The merger was subject to antitrust investigations, which ultimately led to the companies agreeing to divest certain assets to address concerns about market dominance. The merger had a significant impact on the global market, with the combined entity becoming a dominant player in the chemical industry and creating three independent companies with their own focus and strategy.

[25] Dow and DuPont provide update on merger https://www.dupont.com/news/dow-and-dupont-provide-update-on-merger-20170628.html

[26] Dow and DuPont receive antitrust clearance from U.S. Department https://www.dupont.com/news/dow-and-dupont-receive-antitrust-clearance- from-us-doj-for-proposed-merger-of-equals.html

[27] Howard Ungerleider on the merger of Dow and DuPont - McKinsey https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our- insights/the-making-of-a-megadeal-howard-ungerleider-on-the-merger-of-dow-and-dupont

*G. Will the merger be blocked if the Federal Trade Commission's new guidelines on mergers and acquisitions are applied?*

If we apply the recent guidelines of Federal Trade Commission on mergers & acquisitions released in December 2023, then we will comprehend as follows:

*1)* As per Guideline 1[28]: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition. In this case, both Dow Chemical and DuPont were the major players in the chemical industry and their merger would result in market concentration . The competitive authorities therefore presume, unless sufficiently disproved or rebutted, that the merger between Dow Chemicals & DuPont that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

*2)* As per Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms. The Agencies will examine whether competition between the merging parties i.e. Dow Chemical & DuPont is substantial since their merger will necessarily eliminate any competition between them. If the agency is of the opinion that there will be elimination of any competition between them then it can block such a merger.

*3)* As per Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market. As per this guideline the Agencies will examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant. In this case, the merger of Dow Chemical and DuPont would result in increasing the barriers to entry to the market as the chemical market is concentrated ,thereby, eliminating a potential entrant and after the merger it will become highly concentrated which would also result in eliminating current competitive pressure from a perceived potential entrant.

*4)* As per Guideline 6[29]: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. As per this guideline the Agencies will examine whether one of the merging firms already has a dominant position that the merger may reinforce, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market. In this case, out of both the merging firms Dow Chemical and DuPont, Dow Chemical already had a dominant position in the market and as it merges with DuPont it would lead to the creation of monopoly in the chemical industry which would further lead to substantially lessen competition or tend to create a monopoly in another market.Therefore the competitive authorities have the power to block such a merger as per this guideline. It is also found that after merging, DuPont cut over 1,700 jobs in Delaware, representing about 28% of its workforce in the state. The establishment of a new agriculture company, projected to bring in $16 billion annually, raised concerns about job stability and potential layoffs as the companies aimed to achieve over $3 billion in savings after merging.

## IX. CONCLUSION

The Federal Trade Commission's (FTC) guidelines on mergers and acquisitions play a crucial role in shaping the competitive landscape and protecting consumer interests. Through a critical perspective, it is evident that these guidelines have both positive and negative implications for businesses, consumers, and the economy as a whole. The new guidelines represent a significant overhaul of the previous guidelines, reflecting the FTC's and Department of Justice's (DOJ) skepticism towards even low-to-moderate levels of market concentration.

This approach has led to increased uncertainty for companies pursuing mergers and acquisitions, as the agencies are taking a more hostile stance towards deals .

The guidelines aim to prevent mergers that could substantially lessen competition, harm consumer welfare, or create monopolies. While this regulatory framework is essential for maintaining fair and open markets, it also raises concerns about potential barriers to innovation, market entry, and economic growth. The guidelines focus on the merger's impact on rivals and whether the merged firm will have control over a rival's access to products, services, or technology[30]. The agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger is unlikely to substantially lessen competition.

[28] https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

[29] https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

The guidelines have been criticized for being overly broad and potentially stifling innovation and competition[31]. The increased scrutiny by the antitrust authorities could lead to a decrease in the number of mergers and acquisitions, potentially hindering the growth of companies and the overall economy. The critical perspective highlights the need for a balanced approach that considers both the benefits of competition and the potential drawbacks of overly restrictive regulations.

## RECOMMENDATIONS

[1] Enhanced Transparency: The FTC should strive to enhance transparency in its merger review process by providing clearer guidelines and criteria for assessing mergers. This transparency can help businesses understand the regulatory expectations and facilitate compliance with antitrust laws.

[2] Stakeholder Engagement: Engaging with stakeholders, including industry experts, consumer advocates, and policymakers, can provide valuable insights into the practical implications of the FTC guidelines. By incorporating diverse perspectives, the FTC can ensure that its guidelines reflect a broad range of interests and considerations.

[3] Dynamic Market Analysis: The FTC should adopt a dynamic approach to market analysis that considers evolving market dynamics, technological advancements, and consumer preferences. This flexibility can help the agency adapt its guidelines to changing market conditions and emerging challenges.

[4] Consumer Impact Assessment: Conducting thorough assessments of the potential impact of mergers on consumers can help the FTC evaluate the overall welfare effects of proposed transactions. By prioritizing consumer interests, the agency can ensure that its guidelines promote competition and protect consumer choice.

[5] Collaboration with International Partners: Collaborating with international antitrust agencies can enhance the effectiveness of the FTC's guidelines by promoting consistency in merger review processes and fostering global competition. By sharing best practices and coordinating efforts, the FTC can address cross-border competition concerns more effectively.

[6] Continuous Monitoring and Evaluation: Regularly monitoring and evaluating the impact of the FTC guidelines on mergers and acquisitions is essential for assessing their effectiveness and identifying areas for improvement. By collecting data on merger outcomes and compliance with guidelines, the agency can refine its approach and enhance regulatory outcomes.

[7] Regulatory Flexibility: Introducing greater regulatory flexibility in the FTC guidelines can accommodate unique market circumstances and promote innovation. By allowing for exceptions in cases where mergers are likely to benefit consumers or enhance competition, the agency can strike a balance between regulatory oversight and market efficiency.

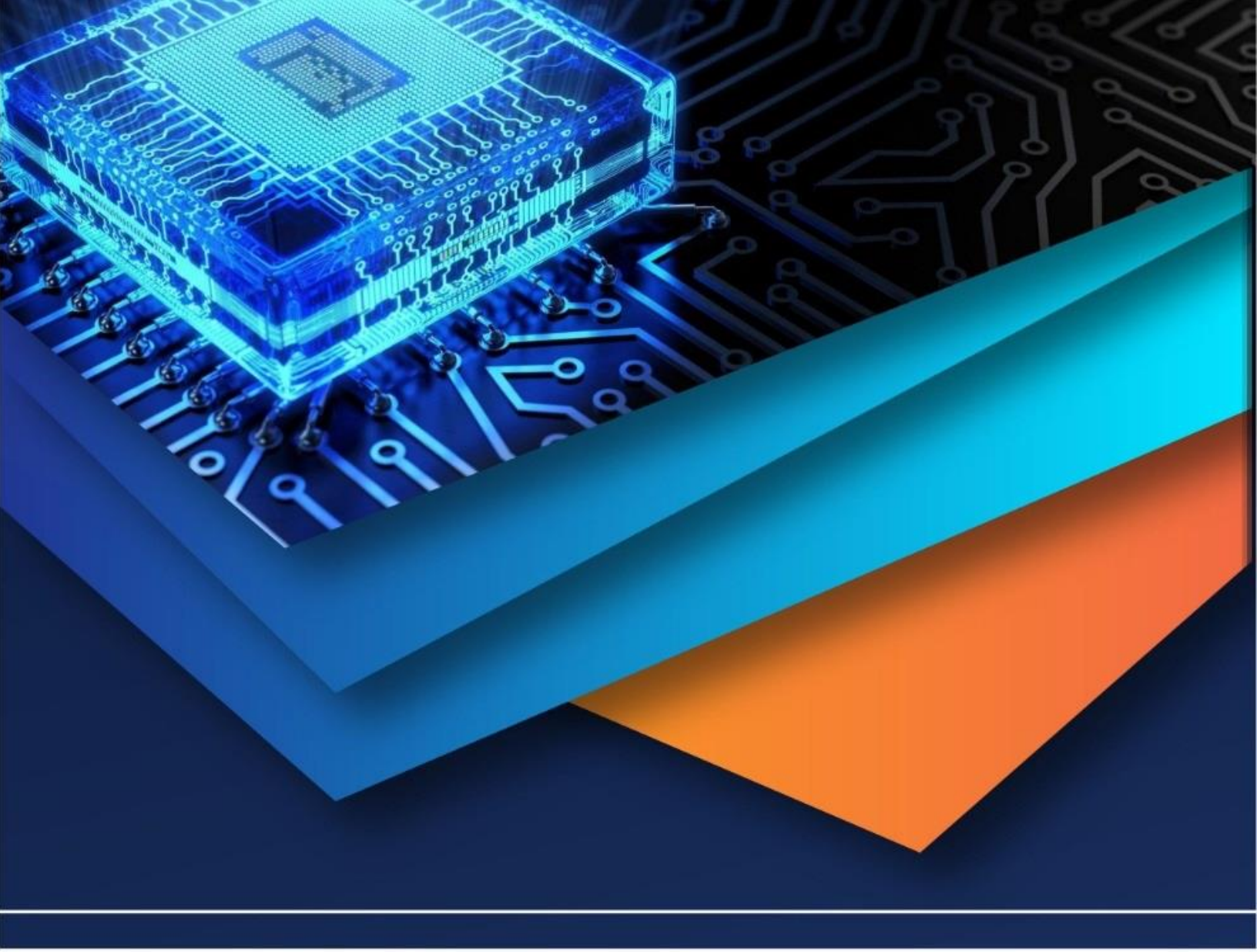
[8] By implementing these recommendations, the FTC can strengthen its guidelines on mergers and acquisitions, promote competition, and protect consumer welfare. A critical perspective on the impact of these guidelines is essential for ensuring that they achieve their intended objectives while minimizing unintended consequences. Through continuous evaluation and stakeholder engagement, the FTC can enhance the effectiveness of its guidelines and contribute to a more competitive and consumer-friendly marketplace. Moving forward, it is crucial for the FTC to continue refining its guidelines based on feedback from industry stakeholders and monitoring their impact on market dynamics. By fostering collaboration and transparency, the FTC can uphold its mission of promoting fair competition and protecting consumer welfare in an ever-evolving business landscape.

[30] https://www.skadden.com/insights/publications/2023/12/doj-and-ftc-release-final-2023-merger-guidelines

[31] https://www.globalcompliancenews.com/2024/01/10/https-insightplus-bakermckenzie-com-bm-antitrust-competition_1-united-states-doj-and-ftc- issue-final-merger-guidelines_20122023/

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