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FTC's Shaoul Sussman Discusses Draft Merger Guidelines with Skadden

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For this month's Antitrust column, Skadden partners Kenneth Schwartz and Karen Lent interviewed Shaoul Sussman, the FTC's Associate Director for Litigation in the Bureau of Competition, to discuss the FTC's thinking behind the recently released draft merger guidelines. Read the transcript, edited for style and length, below.

By **Karen Hoffman Lent**

And **Kenneth Schwartz**

Kenneth Schwartz: Thanks so much for being here. Could you talk about your role and your background at the FTC?

Shaoul Sussman: I started at the chair's office back in the summer of 2021 when the chair joined the commission as one of her attorney advisors, and last fall I transitioned to the front office of the Bureau of Competition. I've been involved first from the chair's office and later from the bureau's perspective in working on the guidelines. I was part of a relatively inclusive drafting group.

Kenneth Schwartz: Could you describe the drafting process?

Shaoul Sussman: Early in the chair's tenure there was a decision by the commission to withdraw the 2020 vertical merger guidelines. Later that year when AAG Kanter joined the Department of Justice (DOJ), it was clear that both agencies were interested in a broader project that included the horizontal guidelines as well, and from there, it went even broader and said the feeling was that, "We should probably move away from having two guidelines, one vertical and one horizontal." This was very much also in tune with AAG Kanter's overall thinking around merger analysis, where he believes that for many years we've been wedded to two notions of horizontal and vertical, even when the mergers we're thinking about don't necessarily fit neatly into those buckets. Then a process began of casting a broader net, looking historically at merger challenges the agencies brought that didn't fit into those buckets of horizontal and vertical.

In addition, there were a lot of conversations about how we can make the guidelines work for the digital age. One thing that was common both for the chair and commissioners and the DOJ was thinking about the cases that we are currently litigating on the conduct side that involve acquisitions and really thinking about how we include more things in the guidelines that talk about platforms and platform dynamics, but also about when markets tip. For example, what acquisitions would lead not only to an increase in concentration, but really to changing the dynamic of the market in a more fundamental way? There were a lot of these converging strands, and separately from that, there were more conventional parts of the 2010 guidelines that we got feed-

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back from staff and economists and others that might be improved.

Karen Lent: One of the things you mentioned about the drafting of the guidelines was that it was a relatively inclusive drafting group. I know there's been some criticism of the guidelines that maybe they don't have bipartisan support. Could you describe that relatively inclusive drafting group? Did it include people from both sides of the aisle? How do you address those types of criticism more generally?

Shaoul Sussman: Unfortunately for the commission at this moment, we are kind of a partisan commission, not a bipartisan commission. We hope that's not going to remain the case for much longer, but inclusive, at least for us, meant involving career staff from both agencies, making sure that we include not only litigators or shop managers. The Bureau of Economics and their counterparts in the DOJ really took a significant role in thinking about the various aspects of the guidelines. Part of our process was to get feedback from folks that are on the front lines in the agencies supporting merger challenges and really getting that kind of gut check about how whatever we say in the guidelines will impact potential litigation.

Part of the criticism, I think, is that there are more recent circuit courts that we could potentially add, and they might be added to the final draft.

Karen Lent: One thing that we've noticed is that there's a lot of older case law cited in the draft guidelines, but a whole body of district court cases and even some appellate cases from the past decade that seem to be missing from the guidelines. What's your response to questions asking where are the district court cases in which the agencies haven't been successful and why are they not addressed in the guidelines?

Shaoul Sussman: That's an excellent question. To go back to how the guidelines came to be, a lot of the process that we went through was inductive. I think that the AAG mentioned that he read every circuit court opinion—the drafting team did that as well, including the very recent ones.

We also looked specifically from 2010 at every district court case. One thing that you notice once you read the cases is that there was some gap between the way that the 2010 guidelines articulated certain concepts and how they ended up being litigated. There is language around certain presumptions in the 2010 guidelines, but when you actually look at how the agencies brought cases and how the opinions are written, many of those decisions actually end up citing to those older cases. For us, it was looking at what is happening in district court litigation right now, which cases are cited, and then bringing them to the front. We felt like there was some delta between what the 2010 guidelines said and what we actually did in practice and we were trying to really narrow that gap.

The second thing we tried to do is avoid citing district court opinions when possible, and the reason was really just to make sure that we're not too selective, choosing certain good opinions for the agencies or ones where they might run against other district court cases, by limiting ourselves to circuit court opinions. Even within that rubric if there is a recent circuit court opinion, but it relies on a U.S. Supreme Court case that's older, at times we preferred to cite the Supreme Court case. When you actually go and look at the district court opinions over the last 13 years, you'd see *Brown Shoe* cited very frequently. *Philadelphia National Bank* is cited very frequently. We want to be very transparent that these are the cases we're going to cite in our briefs. We want to make sure both for practitioners and merging parties they're there when they contemplate their merger.

Part of the criticism, I think, is that there are more recent circuit courts that we could potentially add, and they might be added to the final draft. It's still a work in progress about the exact citations we're going to work into the draft, and we're very much also open to getting comments from the public saying, "hey, you forgot this very important case or you misinterpreted what this case is saying." I think there are still going to be some shifts in which cases are cited, but the thinking was to make it much more reflective of current practices. For good or for bad, that includes a lot of *Brown Shoe* and *Philadelphia National Bank*.

Kenneth Schwartz: I'll shift gears. I want to get your take on guideline 9 on serial acquisitions. Both agencies have flagged roll ups and serial acquisitions as a priority

target enforcement area. Could you unpack what an enforcement action would look like to you? What are the guidelines trying to solve for?

Shaoul Sussman: What we're looking at now and thinking about more are corporate decisions that include a longer horizon in terms of acquiring market power or acquiring market share in a certain market. Through both investigations and current matters that we are litigating, we're seeing executives or boards really looking at a longer horizon with respect to strategic acquisitions in markets and thinking about how embarking on a series of acquisitions might lead to either monopolizing or tipping the market. This is an area where we are currently laser focused both at the FTC and the DOJ and I think we will see action in this space.

We already have an example of a case that speaks to that, the *IQVIA* case we filed recently in the Southern District of New York. In that case, the complaint alleges that *IQVIA* embarked on a series of acquisitions within a space that cemented its position in an industry. What we really want to highlight and flag for companies generally is that we're very much thinking about strategies where there might be only one HSR-reportable acquisition but it follows a series of smaller acquisitions, or it might be the first in a series of acquisitions in the market. We really want to make sure that we are on top of those types of practices.

Kenneth Schwartz: If it's the first in a series, well before any suggestion of any tipping point, would you bring an enforcement action even if nothing has subsequently transpired?

Shaoul Sussman: I think that's a good question. It really depends on where the facts lead us and whether we have facts that match the law. But I would say that if the strategies are articulated clearly, if there are actions that were taken, that might be one where the acquisition might raise red flags. Since we don't have an acquisition that we challenged that involved that scenario, it's hard for me to answer in advance because we'll have to see when that acquisition comes in front of us, but at least in theory, the idea is if there is a strategy that's articulated and executed on, even if it's the first acquisition—I don't know if the agencies will ultimately challenge it, but I think it's going to be something that is going to be investigated and really depend on the facts.

Kenneth Schwartz: In that situation, what would look like strong evidence to you? What would look like weak evidence and what might be defenses or countervailing theories that would be credited by the agencies?

Shaoul Sussman: It's hard to think through these facts in the abstract, but I would say that if there is a very well-articulated strategy that involves post-acquisition conduct, saying, "well, we will acquire X, Y and Z and then we will do something that we can't do right now, and that's why we are embarking on this acquisition spree," that will probably raise more red flags than acquisitions that are not connected very strongly to a concrete strategy around post-acquisition behavior.

Karen Lent: I want to talk a little bit about guidelines 1 and 7, which have the structural presumption of market power at 30% market share. Could you tell us why the agencies are adopting 30 percent as a threshold? Do you really consider 30% dominant, or is that more of a trigger to say we should look more closely at this?

Shaoul Sussman: That's a great question. It goes back to what I was saying earlier about looking at how the government actually pled the cases when we brought them. One of the things that we notice is that it is agency practice, really going back all the way back to the 1960s without interruption. When there is a merger where the combined share of the merging entities crosses the 30% threshold, the agencies typically allege that's presumptively illegal, citing the *Philadelphia National Bank* standard. It was very important for us to make sure that this is not something that we spring on the parties during commission meetings or when the parties come to meet the AAG and the front office. If this is case law that the agencies use in practice when they challenge mergers, we wanted to be very transparent about that up front.

I know that the 30% generated a lot of attention, but at least from my personal perspective, that wasn't the part I thought would be the most controversial, because the assumption is that folks in the trenches that litigate either for the agencies or parties in transactions know that this is typically something the agencies will allege in horizontal cases if the facts support it. Even in the 2010 guidelines, the agencies said, above a certain threshold, we are going to allege that the transaction is presumptively unlawful. So for us it was kind of a straightforward,

what are the cases saying, what is the agency practice, and make sure we reflect it.

The second one I think is more interesting and I think it's newer in a sense, or it's kind of old that is becoming new again, this idea of dominance. Something that I personally wasn't aware of and was very interested in, reading all the older circuit courts and Supreme Court cases, is this idea of dominance in US antitrust law. The 30% threshold in the entrenchment context and this idea of a dominant firm really comes from those older Supreme Court and circuit court opinions. For that one, I think that saying, "this is old law, right?" is a criticism that is fair. And we'll see how those theories of entrenchment fare in court. The entrenchment idea and dominance is really the agencies signaling that they want to resurrect these older lines of cases because we think they are relevant and have something very interesting to say about the digital era.

The HSR form is really thinking about past acquisitions and getting a bit more of a history of the parties within the relevant markets.

Karen Lent: Are you taking the dominance standard from any Section 2 cases?

Shaoul Sussman: That's the other very interesting part. It's not from Section 2 cases. It's from a line of cases that starts with *Procter & Gamble*, which is a 1967 Supreme Court decision, and a number of circuit court opinions up to the early 1980s. We surveyed all the entrenchment cases and we saw all these courts are in agreement that a merger of a target in a market with 30% market share is a merger that gives rise to the entrenchment theory. And in Commission and federal court opinions, we saw that the agencies lost the cases where market shares were lower than 30%.

Karen Lent: Was there a discussion about trying to square that with the idea of dominance in a Section 2 case?

Shaoul Sussman: This is an area where even at the time, it was very interesting to see, because these ideas about monopoly maintenance really emerge in Section 2 case law. *Grinnell* is decided a year before *Procter & Gamble*. Really the way that it is reconciled in the couple of decades from the mid-1960s to the 1980s is by saying Section 7 is about incipiency, it's about the risk of creating a monopoly in the market moving forward. If we see that a firm that is acquired by someone could cement its 30% and become even more dominant, that's trending towards that monopoly level of Section 2. What we're concerned about is taking that market share and extending it to the next level towards monopoly.

The agencies haven't brought entrenchment cases since the early 1980s. *Amgen*, a case that the FTC brought earlier this year, is the first case where we alleged an entrenchment count, so we haven't seen how courts will react to that case law. [Editor's note: The FTC announced a proposed consent order with Amgen on Sept. 1, 2023.] At least in the guidelines, we wanted to just reflect the existing case law, and there is a TBD about what the future of this case law would hold.

Kenneth Schwartz: As part of your process, did you look to any international cases or consult with any international regulators?

Shaoul Sussman: We did have a couple of conversations with practitioners abroad about their guidelines. It's no secret that the British, for example, revised their guidelines very recently. On the EC, it's a bit older, but there's still a lot of agency practice. For us it was very interesting to hear from European regulators where the U.S. agencies haven't brought conglomerate cases for a very long time and the Europeans had a bit more recent experience in conglomerate cases. We had some of those conversations, but ultimately the way we ended up drafting the guidelines is by looking at what happened in U.S. courts, the good, the bad, and the ugly, and synthesizing that as the guidelines. On other fronts, especially on the economic side, there was much more engaging in dialogue, for example, thinking about market definition or tools that economists use. These are much more international and have much more of a broader applicability.

Kenneth Schwartz: How do you envision these guidelines working with the new HSR rules? Were they taken into consideration together?

Shaoul Sussman: Both projects percolated through the agencies at the same time. I personally had the privilege to work on both, but there are a number of folks in the agencies that worked on both, and naturally things you do in one context kind of bleed into the other. One example

is serial acquisitions that we talked about previously. The HSR form is really thinking about past acquisitions and getting a bit more of a history of the parties within the relevant markets. There you could see how there is a relationship between thinking about serial acquisitions and the types of information we would be interested in. Another which we haven't discussed yet is labor. The front offices at DOJ and the commissioners feel very strongly about labor markets, so there is much more emphasis on information regarding labor markets in the form, and there is an entire guideline within the new guidelines that is dedicated to thinking about labor harms.

Kenneth Schwartz: On labor, what kind of labor case are you looking for? How should clients think about that?

Shaoul Sussman: I would think about labor harms very much through the lens of some of the traditional and maybe less traditional theories of harm in consumer markets. For example, there are two hospitals that merge and the HHI for nurses in the relevant market is going to increase significantly. That would be an acquisition where the agencies are going to be very concerned with potential harm to labor. There are unique characteristics to labor markets, but I think conceptually we are going to think very much about labor markets using similar analytical lenses. I would say it's pretty similar to how we would think about it in the conduct sense. If there's restraint that might affect consumers, we have the recent opinion from the Seventh Circuit and Easterbrook saying we can apply the same tools in the context of labor as for conduct. Another example of this in practice is the Simon & Schuster challenge, where it was basically a five to four horizontal theory, but really the main group that was going to be negatively impacted, according to DOJ, was authors.

Kenneth Schwartz: What's the state of play of efficiencies and other affirmative defenses at the agencies today?

Shaoul Sussman: That's an interesting question. I think, looking at our guidelines, we really wanted to make sure that any efficiencies that are claimed really link to competition. I don't think the guidelines signal a significant departure from current application. We're still open to hearing about efficiencies and what efficiencies a transaction might bring to a market, but what we are really looking for is a link between those efficiencies and how competition plays out in the market.

The *St. Luke's* case the FTC litigated before the U.S. Court of Appeals for the Ninth Circuit in 2015 is a good example. If there are two parties that are smaller in a market and their combination will allow them to compete more effectively against the larger players in that market, that is actually showing that making those two firms more efficient will contribute to increased competition. That is an example that is cited in our efficiency section and really the way to think through efficiency.

Karen Lent: You said a few times that in the guidelines, you really wanted parties to understand this is what you'll be citing in your briefs. More broadly, as we come to the end here, is that what you want parties to take away from the new guidelines? What would you say you want merging parties to be thinking about as they consider acquisitions in the context of these new guidelines?

Shaoul Sussman: Both the Chair and the AAG make this point repeatedly when they discuss the guidelines where they wanted to make the guidelines more approachable. Part of it is being more approachable just to the general public, but I think also we wanted to make them much more approachable to executives and people in the C Suite where they could ask their counsel, "Do we hit this *Philadelphia National Bank* case that they're mentioning?" or "I don't know what entrenchment is, so tell me more about this theory. Does this implicate our merger?" It goes back to this point about making it more clear that those might be the vectors the agencies will ask about in their second request, so let's think about this in advance and what are the implications for our deal.