

Back to the Future: 2023 Merger Guidelines Reach into History to Support Enlarged Antitrust Enforcement Agenda

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On December 18, 2023, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) jointly released their long-anticipated final *2023 Merger Guidelines* after a notice and public comment period, during which they received more than 30,000 comments.^[1] The *2023 Merger Guidelines* largely adopt the significant changes that the draft 2023 guidelines proposed over the *2010 Horizontal Merger Guidelines*, but with a few material differences. The final *2023 Merger Guidelines* reflect the agencies’ expanded views of merger-related injuries to competition that signal more aggressive merger-control enforcement.

The *2023 Merger Guidelines* provide 11 guiding principles:

- Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.
- Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.
- Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.
- Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.
- Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete.
- Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.
- Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly
- Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.
- Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
- Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or

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- Antitrust & Competition Law
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- Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

How the *2023 Merger Guidelines* Differ from the *2010 Horizontal Merger Guidelines*

Reduced Reliance on “Horizontal” and “Vertical” Distinctions. The *2023 Merger Guidelines* reflect a dramatically reduced emphasis on the distinctions between “horizontal” and “vertical” mergers and their effects. In fact, unlike previous guidelines, the *2023 Merger Guidelines* address both horizontal and vertical merger analysis. The agencies will likely increase their scrutiny of vertical mergers accordingly.

Different Definitions of Market Concentration. The *2023 Merger Guidelines* restore pre-2010 levels of market concentration under the Herfindahl-Hirschman Index (“HHI”) as thresholds for concern, and they introduce a market-share threshold from the 1960s as an alternate standard. The 2010 standard for highly concentrated markets had been a post-merger HHI above 2500, and the 2023 standard has dropped to a post-merger HHI of above 1800 (the pre-2010 level), with an alternative test of market shares greater than 30% (the standard from *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963)). These reduced thresholds signal that the agencies will continue to scrutinize transactions where market concentration is at all concerning.

A Return to Structuralism. The guidelines that the agencies most recently used—the *2010 Horizontal Merger Guidelines* and *2020 Vertical Merger Guidelines*—did not use the term “structural,” and they declined to rely on any particular market share levels as evidence of market effects. By contrast, the *2023 Merger Guidelines* use the term “structural” 11 times and create two market-share presumptions that will guide the agencies’ analysis of whether a transaction is likely to substantially lessen competition. First, as noted, the agencies will presume that if a merger results in a firm having a 30% market share or more will lessen competition or tend to create a monopoly if it also increases the HHI by more than 100 points. Second, the agencies will generally infer, absent countervailing evidence, that a merging firm has or is approaching monopoly power if it has a share greater than 50% in a market for a product, service, or route to market that its rivals use to compete with it.

More Perceived Risks to Competition. The *2023 Merger Guidelines* reflect a variety of new concerns and a shift toward more aggressive enforcement: mergers by “already dominant” firms, mergers related to industry “consolidation,” patterns or strategies of “serial acquisitions,” and mergers that threaten to eliminate “nascent competitive threat.”

Reliance on Cases Thought to Be Obsolete. The *2010 Horizontal Merger Guidelines* and *2020 Vertical Merger Guidelines* cited no cases whatsoever. The *2023 Merger Guidelines*, however, cite numerous cases, including 26 merger cases from the 1960s that were largely thought to be obsolete under the law-and-economics approach to antitrust analysis that began in the 1970s. What remains to be seen is whether courts will embrace the agencies’ efforts to resuscitate these cases in future merger challenge cases.

What Has Changed from the Draft to the Final 2023 Merger Guidelines

Softened Language. The draft 2023 guidelines included language suggesting that the agencies were announcing clear rules prohibiting certain types of mergers, such as the phrase “mergers should not,” which appeared at the beginning of various guidelines. The final guidelines appear to soften that language, instead using the phrase “mergers may violate the law when” The formulation used in the final guidelines suggests a greater amenability to arguments and rebuttal evidence that the parties to a proposed transaction may present.

Elimination of Draft Guideline 6. Guideline 6 of the draft 2023 guidelines had appeared to say that vertical mergers resulting in post-merger market shares of 50% or more would be presumed to substantially lessen competition because rivals’ access could be foreclosed. The final 2023 guidelines eliminate Guideline 6, but the former discussion of Guideline 6 appears to have been largely retained and added to the discussion of Guideline 5. As a result, it is unclear whether the agencies have eliminated the 50% market share threshold for vertical mergers or retained and expanded it in footnote 30 by applying a 50% market share threshold to any “related product” market.

Elimination of Draft Guideline 13. Guideline 13 of the draft 2023 guidelines was a catchall provision that indicated other mergers not explicitly addressed should not otherwise substantially lessen competition or tend to create a monopoly. The elimination of Guideline 13 in the final 2023 guidelines is not substantive, because the Guideline 13 discussion has been retained in the final 2023 guidelines.

Dorsey & Whitney LLP is happy to discuss with clients how the new Merger Guidelines may impact future transactions.

[1] See Federal Trade Commission and Justice Department Release 2023 Merger Guidelines | Federal Trade Commission (ftc.gov).