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Legal Sidebar

The 2023 Merger Guidelines: Analysis and Issues for Congress

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In December 2023, the Department of Justice (DOJ) and Federal Trade Commission (FTC) finalized the 2023 Merger Guidelines (the Guidelines), which outline the agencies' analytical approach to merger review. The Guidelines represent a major departure from the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, signaling a more aggressive approach to merger enforcement. This Legal Sidebar analyzes the finalized 2023 Guidelines and discusses related considerations for Congress.

The 2023 Merger Guidelines

The DOJ and FTC began efforts to revise previous merger guidelines in January 2022, when they launched a public inquiry aimed at "strengthening enforcement against illegal mergers." As part of that inquiry, the agencies issued a request for information on several topics, including the purpose and scope of merger review; threats to potential and nascent competition; monopsony power and labor markets; and the unique characteristics of digital markets.

In July 2023, the agencies released new draft guidelines for public comment. The draft guidelines addressed many of the issues from the January 2022 RFI and were summarized in a previous Legal Sidebar, which also provided background information on merger law. The finalized Guidelines largely track the July 2023 draft, with some modifications.

In addition to discussing several topics that were absent from previous guidelines, the finalized Guidelines appear to evince a broader philosophical shift in merger enforcement that is consistent with recent enforcement trends and public statements from the leadership of the DOJ's Antitrust Division and the FTC. Some of the key features of the finalized Guidelines—which reflect the agencies' enforcement policies but do not bind courts—are discussed below.

Shift in Emphasis from Market Power to Market Structure. The 2023 Guidelines appear to adopt a different normative benchmark from previous guidelines. The "unifying theme" of the 2010 Horizontal Merger Guidelines (HMGs) was that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." The 1992, 1984, and 1982 guidelines contained similar language. The July 2023 draft guidelines did not include this emphasis on market power, focusing instead on the more general notion of harm to "competition." This change is consistent with the position that

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antitrust should focus on harms to the "competitive process" rather than economic welfare—a view advanced by some proponents of antitrust reform. Often, the "competitive process" theory is taken to denote an emphasis on the intrinsic value of deconcentrated market structures.

The traditional criticism of this approach is that it provides little guidance on the resolution of concrete cases; unless deconcentration always trumps welfare considerations, enforcers and courts need some standard for deciding which value prevails in specific fact patterns. Several commentators highlighted this point in analyzing the draft guidelines, arguing that the DOJ and FTC did not clearly explain how they proposed to operationalize the concept of harm to "competition."

In response to this criticism, the finalized Guidelines included the following language:

> Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

While this clarification references market power, it preserves the July 2023 draft's primary emphasis on "competition." According to the new language, increased market power can *result from* mergers that substantially lessen "competition," but the focus remains on "competition" as an independent concept. As discussed below, several parts of the finalized Guidelines suggest that the agencies regard market structure as a central consideration in analyzing possible harm to "competition."

This is a meaningful departure from the 2010 HMGs, which downplayed the significance of structural factors relative to previous guidelines. To the extent that the new Guidelines prioritize deconcentration over economic welfare, they also diverge from how courts have construed the Sherman Act, which the Supreme Court has characterized as a "consumer welfare prescription." While the Court has not issued a merits opinion in a merger case since 1975, some lower courts have likewise interpreted the Clayton Act as focusing primarily on economic welfare. It thus remains to be seen whether courts will follow the DOJ and FTC in giving market structure independent normative significance.

Concentration Thresholds and the Structural Presumption. In keeping with their heightened attention to structure, the finalized Guidelines lower the concentration thresholds at which the agencies regard horizontal mergers (i.e., mergers between competitors) as triggering a presumption of illegality. While the 2010 HMGs indicated that this "structural presumption" would be triggered by mergers resulting in a Herfindahl-Hirschman Index (HHI) exceeding 2,500 and an HHI increase of more than 200, the 2023 Guidelines lower those levels to a post-merger HHI exceeding 1,800 and an HHI increase of more than 100. The HHI is calculated by squaring the market share of each firm in the relevant market and summing the results.

The lowered concentration thresholds in the 2023 Guidelines revert to the levels employed by the 1992 Merger Guidelines. Under these thresholds, the agencies regard "7-to-6" mergers (i.e., mergers in markets with seven firms of roughly equal size) as presumptively unlawful. Under the 2010 HMGs, by contrast, the structural presumption was triggered by a 5-to-4 merger, but not by a 6-to-5 merger.

The 2023 Guidelines also provide that the structural presumption is triggered by transactions that would create a firm with a market share exceeding 30% while increasing the market's HHI by more than 100. These triggers for the presumption did not appear in the 2010 HMGs. The 30% figure is derived from the Supreme Court's 1963 decision in *United States v. Philadelphia National Bank*. That decision, however, did not address HHI changes and instead grounded the presumption in a combination of the 30% threshold and a "significant" increase in market concentration. The Court did not specify a minimum value for a "significant" increase in concentration, but the HHI increase in that case was roughly 600. The discrepancy between this figure and the Guidelines' use of the lower trigger of 100 has prompted some to question whether the Guidelines' approach is firmly rooted in existing doctrine.

These additional triggers for the structural presumption are somewhat similar to the "Leading Firm Proviso" from the 1982 Merger Guidelines. That clause indicated that the DOJ was likely to challenge mergers between a leading firm and any firm with a 1% market share, provided the leading firm had a market share of at least 35% and was approximately twice as large as the second-largest firm in the market. The 1992 Merger Guidelines dropped this proviso, but some commentators have supported the restoration of a similar principle for firms with a market share of at least 50%.

In addition to expanding the reach of the structural presumption, the 2023 Guidelines do not include two safe harbors from the 2010 HMGs. While the 2010 HMGs indicated that the agencies ordinarily would not challenge mergers involving an HHI increase of less than 100 or mergers resulting in an HHI below 1,500, the 2023 Guidelines do not contain those safe harbors.

Vertical Mergers. Modern analysis of vertical mergers (i.e., mergers between firms in the same supply chain) has focused on whether a merged firm would have the ability and incentive to foreclose rivals' access to inputs or customers. Regulators have assessed incentives to foreclose because foreclosure is not always a rational strategy; an integrated firm considering whether to deny inputs to rivals must weigh anticipated gains from reduced downstream competition against the losses that would accompany lower sales by its upstream division. While the Guidelines accept the modern "ability and incentive" framework as one possible means of demonstrating competitive harm, they also indicate that market structures that merely *allow* a merged firm to limit access to a related product may constitute an independently sufficient basis for blocking a merger.

On this front, Guideline 6 in the July 2023 draft would have adopted a presumption of illegality for vertical mergers that produce a foreclosure share exceeding 50%. The finalized Guidelines do not include Draft Guideline 6, but some of the material from Draft Guideline 6 has been transferred to Guideline 5, which addresses foreclosure more generally. The relevant material in Guideline 5 indicates that, if a merger would allow a firm to approach or attain monopoly power over a "competitively significant" related product, "those factors alone are a sufficient basis to demonstrate that the dependent firms do not have adequate substitutes and the merged firm has the ability to weaken or exclude them by limiting their access to the related product." Guideline 5 then states in a footnote that the agencies will "generally infer, in the absence of countervailing evidence," that a firm "has or is approaching monopoly power in the related product if it has a [market] share greater than 50%."

In support of the 50% trigger, Guideline 5 cites language from the Supreme Court's 1962 decision in *Brown Shoe Co., Inc. v. United States*. There, the Court indicated that a foreclosure share that "approaches monopoly proportions" would violate both the Clayton Act and the Sherman Act. To the extent that the Guidelines' reference to this language in *Brown Shoe* is meant to derive a structural presumption from current doctrine, there are several reasons courts may be skeptical of the Guidelines' argument.

First, while modern cases continue to cite *Brown Shoe* for certain principles related to market definition, other aspects of the decision have been abandoned. As a result, modern courts may not embrace the quoted language as authoritative. In a 2023 concurring opinion, for example, one FTC Commissioner argued that *Brown Shoe*'s more general framework for evaluating vertical mergers is no longer good law. (A Fifth Circuit decision affirming the FTC's order in the case declined to resolve whether *Brown Shoe*'s multi-factor approach to vertical deals remains valid.)

Second, the relevant passage from *Brown Shoe* may not support the agencies' position. While the Guidelines use the term "foreclosure share" to mean "the share of the related market to which the merged firm could limit access," some observers read the cited language from *Brown Shoe* to require evidence regarding the likelihood of *actual* foreclosure as a result of a defendant's post-merger conduct.

Third, recent vertical merger decisions have not endorsed a structural presumption. In *United States v. AT&T*, the district court and the D.C. Circuit indicated that there is no structural presumption in challenges to vertical mergers. (The DOJ stipulated to this proposition before trial.) In July 2023, a district court reached the same conclusion in rejecting the FTC's challenge to Microsoft's acquisition of Activision.

Accordingly, as a statement of existing law, the Guidelines' possible adoption of a structural presumption for vertical mergers is open to question. Such a presumption may, however, be intended to move the law in a more restrictive direction. As a matter of policy, this type of presumption also has the support of some economists.

In addition to potentially adopting a structural presumption for vertical cases, the Guidelines depart from the 2020 Vertical Merger Guidelines (VMGs) in their treatment of the elimination of double marginalization (EDM). EDM refers to the phenomenon whereby vertical integration may lower prices by allowing a downstream firm to access inputs at cost rather than paying a markup. The 2020 VMGs contained extensive discussion of this issue and stated that vertical mergers "often" benefit consumers because of EDM. The July 2023 draft guidelines, in contrast, did not mention EDM. The finalized Guidelines have added language addressing EDM in a footnote, which explains that EDM is a "common rebuttal argument" in vertical cases and that the agencies evaluate EDM arguments under the same framework used to assess other claims of procompetitive efficiencies. This diminished emphasis on EDM relative to the 2020 VMGs appears to reflect skepticism regarding the frequency with which vertical integration results in merger-specific EDM and the pass-through of related benefits to consumers.

Potential Competition. The 2023 Guidelines give more attention to the elimination of potential competition than the 2010 HMGs. Guideline 4 references the two categories of potential competition that have been recognized in the case law: "actual potential competition" and "perceived potential competition." The former involves the prospect that a firm may enter the relevant market in the future absent a merger, while the latter refers to existing competitive pressures that result from the perception that a firm may enter the market. (The case law on potential competition is discussed in this CRS Report.) In addressing actual potential competition, the Guidelines identify "reasonable probability of entry" as the applicable analytical standard, but do not reduce that phrase to a specific numerical value. Some courts have employed that language and construed it to require a probability of entry that is noticeably greater than 50%. Others have used different language, demanding evidence that entry was "likely" or would "probably" occur. Another has adopted a stricter standard requiring "clear proof" of entry. Actual potential competition thus remains an area of considerable doctrinal uncertainty that may receive clarification if the DOJ and FTC pursue more cases grounded in that theory.

Mergers That Entrench or Extend a Dominant Position. Guideline 6 indicates that mergers may be illegal if they entrench or extend a dominant position. "Dominance" is a concept in European Union competition law, but does not have an established meaning in U.S. antitrust doctrine. Guideline 6 indicates that the agencies evaluate dominance "based on direct evidence or market shares showing durable market power." The July 2023 draft identified a 30% market share as a factor that would justify a finding of dominance. The finalized Guidelines, however, do not include this clarification, leaving some uncertainty as to the precise boundaries of "dominance." Mergers risk entrenching a dominant position, the agencies explain, if they raise barriers to entry or involve the elimination of nascent competitive threats. The Guidelines also state that a merger risks extending a dominant position into another market if the merger would lead a firm to leverage its position by tying or bundling separate products. The material on the suppression of nascent competitive threats wades into an evolving area that could prove particularly significant in technology markets. While some monopolization cases—most notably, the D.C. Circuit's 2001 *Microsoft* decision—have dealt with nascent competition, there is little merger case law on the issue.

Trends Toward Consolidation. Both the July 2023 draft guidelines and the finalized Guidelines discuss mergers that contribute to a trend toward consolidation. The July 2023 draft framed such mergers as implicating a standalone theory of illegality, stating that mergers "should not" further a trend toward concentration. Relatedly, the draft's section on procompetitive justifications indicated that efficiencies are not cognizable if they accelerate a trend toward concentration or vertical integration. These types of concerns with consolidation trends were dropped from the merger guidelines in 1982, but continue to receive some acknowledgment in the case law.

The finalized Guidelines adopt a less restrictive approach toward mergers in consolidating markets than the July 2023 draft, removing the relevant caveat from the section on procompetitive justifications and abandoning the proposition that consolidation trends represent a standalone theory of illegality. Instead of prescribing that mergers "should not" contribute to a trend toward consolidation, Guideline 7 explains that increasing levels of concentration or integration are "highly relevant" factors in evaluating a merger's competitive effects. The change suggests that a trend toward consolidation may help buttress a theory of harm that is grounded in other parts of the Guidelines, but will not constitute an independently sufficient basis for challenging a merger.

Multi-Sided Platforms. Guideline 9 addresses mergers involving multi-sided platforms, explaining that such transactions can implicate competition *between* platforms, competition *on* platforms, and competition to *displace* a platform. The agencies venture into new legal territory in addressing the second category—competition on platforms. Here, the Guidelines indicate that the agencies will "carefully examine" mergers between a platform operator and a platform participant for possible "conflicts of interest" that may lead the operator to favor its own products or services over those of other platform participants. These types of "conflicts of interest" have been the subject of legislative efforts to reform the competition laws governing tech platforms. Challenges to mergers based solely on such concerns may, however, face difficulties under existing law, and the Guidelines do not cite any legal authorities for the proposition that possible self-preferencing (as opposed to foreclosure) can render a merger unlawful.

Labor Markets. The Guidelines break new ground vis-á-vis previous guidelines by explicitly addressing labor markets. Guideline 10 suggests that mergers involving competing employers may often warrant heightened scrutiny because of the high costs of switching jobs, search frictions, job-specific investments, geographical limitations on worker mobility, and other factors that contribute to employers' market power. These unique features, the agencies contend, mean that competition concerns may arise at lower levels of concentration in labor markets than they would in product markets. The Guidelines also reject the proposition that downstream benefits in product markets—for example, lower consumer prices—can justify mergers that harm competition in labor markets. This repudiation of "out-of-market" efficiencies is consistent with the Supreme Court's approach to that issue in *Philadelphia National Bank*. Some commentators, however, have argued that a normative benchmark focused on consumer or total welfare—as opposed to "trading partner welfare" or the "competitive process"—would allow for consideration of downstream efficiencies in cases involving buyer power. The Guidelines' discussion of labor markets thus implicates foundational issues regarding the intended beneficiaries of the antitrust laws and trade-offs involving those beneficiaries.

The agencies' recent enforcement records reflect their new focus on labor markets. In 2022, the DOJ blocked Penguin Random House's acquisition of rival book publisher Simon & Schuster based on the theory that the deal would allow the merged firm to pay lower advances to authors. The FTC has also challenged Kroger's proposed acquisition of rival supermarket operator Albertsons based in part on the transaction's alleged effects on unionized grocery workers.

Serial Acquisitions. The Guidelines indicate that, when a merger is part of a series of acquisitions, the agencies may evaluate the competitive effects of the entire series, rather than focusing only on individual transactions. This principle may be especially relevant to industry "roll-up" strategies and serial acquisitions by large tech companies. The former—which involve private equity firms or other financial buyers acquiring and then combining multiple small firms within the same industry—have recently attracted increased scrutiny. In September 2023, the FTC challenged a private equity firm's acquisitions of various anesthesiology practices in Texas under the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

Rebuttal Evidence. The Guidelines identify several factors that could rebut evidence of a substantial lessening of competition, including the weak financial position of one of the merging firms (the so-called "failing firm" defense), the prospect of entry by other firms, and procompetitive efficiencies. Each of these factors was also present in the 2010 HMGs. In other respects, the Guidelines appear to take a more restrictive approach to rebuttal evidence than the 2010 HMGs. For example, in explaining that cognizable efficiencies must be merger-specific, the Guidelines state that efficiencies will be considered only if they "could not" be achieved absent a merger. The 2010 HMGs adopted the less demanding requirement that credited efficiencies be "unlikely" without a merger. The 2023 Guidelines also do not mention the possibility that powerful buyers may constrain a merged firm's market power—a consideration that was included in the 2010 HMGs and has been recognized by some courts.

Considerations for Congress

The finalized Guidelines are consistent with the enforcement philosophy that the DOJ's Antitrust Division and FTC have adopted under their current leadership. They also highlight some issues—like nascent competition and multi-sided platforms—that have figured prominently in policy debates but raise relatively novel issues for merger law.

As discussed, at several points, the Guidelines appear intended to implement a more restrictive approach to mergers within the antitrust agencies, as opposed to merely synthesizing existing doctrine. Whether the Guidelines have a broader impact on merger law remains to be seen. The Guidelines are not legally binding and do not receive judicial deference, but some courts have treated previous guidelines as persuasive authority.

Congress has the authority to weigh in on either side of these issues. Several bills in the 117th Congress would have tightened merger law with new presumptions and *per se* rules. Those proposals are discussed in this CRS Report. Alternatively, Congress may favor a less restrictive approach than the one reflected in the Guidelines. It could seek to advance such an approach through legislation or its oversight activities.

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