

The DOJ and FTC Draft Merger Guidelines: Key Takeaways

The draft guidelines for applying US antitrust laws to merger investigations depart from prior guidance and seek to roll back decades of legal precedent on merger enforcement.

Competitive effects analyses are out; structural presumptions are in.

On July 19, 2023, the US Department of Justice Antitrust Division and the Federal Trade Commission (the Agencies) released draft Merger Guidelines (the New Guidelines) for public comment. The New Guidelines would replace the Agencies' prior guidance on merger enforcement, including the Agencies' 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The Agencies will take public comments on the New Guidelines through September 18, 2023, and will presumably finalize their guidance shortly afterward.

The New Guidelines, 18 months into the making, represent a complete rewrite of prior guidance on merger enforcement, in both structure and substance. The document is built around 13 guidelines, which describe the Agencies' analytical framework for merger review. The guidelines offer a selective history of antitrust merger enforcement, largely drawing support for their New Guidelines from cases decided 40 to 60 years ago, with only a handful of references to cases decided within the last 20 years and no acknowledgement of the Agencies' string of losses in the modern antitrust enforcement era.

The core thesis of the Agencies' New Guidelines is that Section 7 of the Clayton Act¹ creates an "expansive definition of antitrust liability" for merger enforcement, designed to "arrest incipient threats to competition" that the Sherman Act does not reach.² The Agencies therefore will apply the Clayton Act as a "preventative statute," with the New Guidelines helping to answer two key questions: "how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?"

The New Guidelines' expansive approach to merger enforcement brings in new, largely untested theories of antitrust harm and significantly lowers the standards by which the Agencies say they will presume a merger is substantially likely to lessen competition. The New Guidelines lack force of law, but they do illuminate how the Agencies currently approach merger enforcement and what types of transactions are likely to draw regulatory scrutiny.

For companies considering strategic M&A opportunities, the most significant developments in the New Guidelines are as follows:

- **The New Guidelines emphasize a structural presumption against horizontal mergers that would result in a combined share over 30% in a relevant market.** In enforcement actions, the Agencies have long relied on a 1963 holding of the US Supreme Court that horizontal transactions creating a post-merger share over 30% are presumptively anticompetitive.³ Prior merger guidelines, however, had deemphasized such raw emphasis on concentration in favor of a dynamic analysis of the relevant market. The New Guidelines represent a sharp departure from that approach, insisting that a horizontal merger that creates a firm with a combined share over 30% presents an “impermissible threat of undue concentration regardless of the overall level of market concentration.”

The New Guidelines also outline circumstances in which the Agencies believe horizontal combinations may be illegal, even absent a showing of high market shares. Specifically, the Agencies will look for “substantial competition” between the merging parties based on factors like the firms monitoring each other’s pricing, marketing, products, or plans; the impact of recent mergers, entry, and exit events in the market; customer substitution; and the impact of competitive actions on rivals.

- **The New Guidelines seek to create presumptions against strategic acquisitions by companies with 30+% market share, even if those combinations are not strictly horizontal or vertical.** The New Guidelines single out firms with a “Dominant Position” for special treatment, but define dominance in a manner inconsistent with governing law. Specifically, they interpret “Dominant Position” to mean 30% or greater market share, or other indicia of pricing power. For any company that meets the newfound definition of “Dominant Position,” the New Guidelines state that a transaction can be anticompetitive if it “entrenches” or “extends” that firm’s dominance. Per the New Guidelines, a transaction could entrench a dominant position if the deal makes it harder for rivals to assail the dominant firm’s market strength — increasing “artificial competitive advantages”⁴ by (for example) raising entry barriers or switching costs, interfering with competitive alternatives, depriving rivals of scale economies or network effects, and eliminating a nascent competitive threat. A transaction could likewise “extend” a dominant firm’s position into new markets if the dominant firm could use tying or bundling strategies to extend its market power into the market for its counterparty’s products.

Importantly, the Agencies argue that a merger can entrench or extend a dominant position *even if the deal parties do not compete or vertically intersect with one another*. This is a broader theory of harm than the FTC or DOJ has historically pursued, and it is an approach more akin to the “strengthening dominance” theories seen in Europe and other jurisdictions. Indeed, the US agencies have long criticized such theories of competitive harm, given their speculative nature and tendency to prohibit transactions that make a buyer more efficient.⁵

- **The New Guidelines roll back the clock by 40 years on when the market may be deemed “highly concentrated.”** The Agencies use the Herfindahl-Hirschman Index (HHI) to measure concentration in a market, calculated as the sum of the squared market share of each competitor in the market. Previously, the 2010 horizontal merger guidelines provided that markets with HHIs in excess of 2,500 points were “highly concentrated.” With the New Guidelines, however, the Agencies have said they will treat markets with HHIs of 1,800 points as highly concentrated — a significantly lower threshold that falls back to the concentration measures last put forward in the Agencies’ 1982 merger guidelines.⁶ To put this in practical terms, under the New Guidelines, the Agencies are taking the position that *any* market with five industry players is presumed to be highly concentrated (and

therefore suspect), regardless of how those parties' shares are spread out or the other competitive conditions in the market.⁷

- **The New Guidelines extend the definition of vertical mergers to include any transaction involving access to products, services, or customers that rivals use to compete.** Similar to its treatment of horizontal mergers, the New Guidelines seek to create structural presumptions against vertical mergers (i.e., mergers involving participants at different levels of the supply chain). They attempt to do so, even though the courts have declined to recognize any such presumption in modern vertical merger decisions. In particular, the New Guidelines take the position that, if one party has a share of 50% in the market for a good or service that is an input for the other party's competitors, then "that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition."

Beyond a structural presumption, the New Guidelines also attempt to soften the legal standard by which they must prove a vertical transaction would result in a substantial lessening of competition. In particular, the New Guidelines downplay the Agencies' burden of proving a mechanism of harm in vertical cases: "Because the merged firm may have the ability to control access to the related product in many different ways, the Agencies do not seek to specify the precise actions the merged firm would take to weaken rivals."⁸

- **The Biden Administration's focus on labor markets continues in the New Guidelines.** The New Guidelines confirm that the Agencies will consider, and include as a key investigatory issue, the competitive effects of concentration between buyers for worker talent. The New Guidelines provide little detail on when the Agencies might actually challenge a merger on labor-related grounds, but the tone and articulation of the discussion of labor markets represent a substantial shift in the regulators' approach to merger reviews versus prior administrations.
- **The Agencies are resetting the tone after recent enforcement setbacks.** With the New Guidelines, the Agencies are clearly signaling that they do not intend to engage in a substantive discussion of whether a merger's alleged anticompetitive effects outweigh procompetitive efficiencies. The New Guidelines dedicate an entire section to identifying and criticizing some of the most common defenses of mergers, including "failing firm," entry and repositioning, and efficiencies. Instead, as noted above, the Merger Guidelines provide several size- or share-based thresholds under which a merger is presumed to be anticompetitive.

The full list of the Agencies' 13 guidelines are listed below. Notably, none discuss one of the core tenants of the Agencies' prior iterations: how to analyze a proposed merger's competitive effects. By going "all in" on structural presumptions, the New Guidelines leave unanswered decades of judicial precedent that have guided both the Agencies and merging parties on when a proposed merger may or may not actually have an anticompetitive effect. Past merger guidelines have been influential in court, not least because they used economics to develop practical analytic principles with which to determine whether a transaction was likely to reduce competitive pressure in a market and thus harm consumers. The New Guidelines abandon that approach in favor of a legal brief that is heavily weighted toward the past. Whether the courts will find guidelines that purposefully ignore judicial precedent in this manner as instructive remains to be seen.

1. **Mergers should not significantly increase concentration in highly concentrated markets.** The New Guidelines lower the market concentration-based thresholds for deeming a transaction as illegal. At a high level, under the prior guidelines, a market with four equally sized firms (i.e., all have 25%

market share) would be “highly concentrated”; under the New Guidelines, a market with *five* equally sized firms would be “highly concentrated.” In other words, the New Guidelines expand the scope of markets deemed to be highly concentrated.

2. ***Mergers should not eliminate substantial competition between firms.*** This principle allows the Agencies to presume a merger to be illegal based on the closeness of competition between the companies where the Agencies believe market shares are difficult to measure or understate the companies’ competitive significance to each other. This principle provides room to maneuver for the Agencies when a transaction’s market shares do not meet with established structural presumptions elsewhere in the New Guidelines.
3. ***Mergers should not increase the risk of coordination.*** Similar to prior iterations of merger guidelines, the New Guidelines warn that mergers may increase the risk of coordination by remaining firms. Three primary factors will guide the Agencies’ analysis: (a) market concentration; (b) prior coordination or attempts in the market; and (c) whether the merger eliminates a “maverick” firm. The Agencies will also consider how transparent the market is, how competitors remain post-transaction, homogeneity of productions, pricing algorithms, incentives, and other advantages that coordination might bring in that specific market.
4. ***Mergers should not eliminate a potential entrant in a concentrated market.*** Consistent with their concern about “killer” acquisitions, the Agencies will examine whether a transaction would eliminate a potential entrant or current competitive pressure from a *perceived* potential entrant.
5. ***Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.*** This principle eliminates the distinction between horizontal and vertical mergers to focus instead on whether the merged firm controls access to products or services that its rivals use to compete. Again, the New Guidelines provide flexibility to the Agencies when a transaction does not involve traditional supply or distributor relationships.
6. ***Vertical mergers should not create market structures that foreclose competition.*** The New Guidelines define a “foreclosure share” as the share of the market that would be controlled by the merged entity and that could be used to foreclose competitors’ access to a related product or service. The Agencies will deem vertical deals that result in a foreclosure share of at least 50% as presumptively illegal. Below that threshold, the Agencies will consider a range of factors, including whether the purpose of the merger is to foreclose rivals.
7. ***Mergers should not entrench or extend a dominant position.*** In lieu of a holistic look at the market, the New Guidelines establish a single-firm market share threshold that presumes illegal any horizontal transaction that results in a market share of 30% or higher.
8. ***Mergers should not further a trend toward concentration.*** The Agencies will look at whether a horizontal transaction contributes to “steadily increasing” concentration levels and whether a vertical transaction “would ultimately result” in foreclosure concerns. The Agencies will also examine the *pace* of concentration, such as a significant jump in concentration.
9. ***When a merger is part of a series of multiple acquisitions, the agency may examine the whole series.*** The Agencies intend to address the cumulative impact of serial acquisitions, sometimes referred to as “roll-up” transactions. Companies must now consider the total impact of several deals rather than just the current transaction.

- 10. When a merger involves a multi-sided platform, the Agencies examine competition between platforms, on a platform, or to displace a platform.** The New Guidelines discuss platform competition at length, noting that, “the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants— i.e., around one side of the platform.” In other words, when reviewing a deal involving platform providers, the Agencies are emphasizing that they will look for any problems on any part of the platform or in how those platforms compete as part of the antitrust assessment. The New Guidelines also place significant emphasis on potential conflicts with platform operators that are also platform participants.
- 11. When a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers or other sellers.** The New Guidelines confirm the Agencies will consider, and include as a key investigatory issue, the competitive effects of concentration between buyers for worker talent. The New Guidelines provide little detail on when the Agencies might actually challenge a merger on labor-related grounds, but the tone and articulation of the discussion of labor markets represents a substantial shift in the regulators’ approach to merger reviews versus prior administrations.
- 12. When an acquisition involves partial ownership or minority interests, the Agencies examine its impact on competition.** The New Guidelines discuss how acquisitions of partial ownership or minority interests can violate the antitrust laws. While not new, the choice to emphasize this area suggests the Agencies are bringing a renewed focus to transactions in which acquiring persons are taking only partial control but may have an outsized influence over the operations of the acquired company.
- 13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.** The Agencies included a catch-all category to clarify that the New Guidelines are not exhaustive, and not every transaction will fit neatly into one of the above principles.

The New Guidelines present a significant overhaul of the Agencies’ published enforcement policy, though not necessarily a change in recent action. Along with the [Agencies’ proposed overhaul of the Hart-Scott-Rodino premerger notification rules](#), the New Guidelines demonstrate the Agencies’ desire for more information early in the enforcement process and overall skepticism of dealmaking. Rather than a nuanced look at a transaction that attempts to ascertain effects on consumers, prices, output, and quality, the New Guidelines reflect a more hostile antitrust environment that presumes a broader range of deals to be illegal.

But guidelines are not law. The New Guidelines merely provide written evidence of recent enforcement activity that, while aggressive, has [not always been successful in court](#). For now, the New Guidelines are simply instructive for understanding how the Agencies will analyze, investigate, and potentially litigate against proposed transactions. Whether courts accept the Agencies’ policy overhaul remains to be determined. Regardless, the Agencies will clearly continue to push for more aggressive action that necessitates early consideration of antitrust issues by all companies considering a deal in the US.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Lindsey S. Champlin

lindsey.champlin@lw.com
+1.202.637.2122
Washington, D.C.

Ian R. Conner

ian.conner@lw.com
+1.202.637.1042
Washington, D.C.

Jason D. Cruise

jason.cruise@lw.com
+1.202.637.1033
Washington, D.C.

Makan Delrahim

makan.delrahim@lw.com
+1.424.653.5421
+1.202.637.2102
Century City / Washington, D.C.

Alan J. Devlin

alan.devlin@lw.com
+1.202.637.1071
Washington, D.C.

Michael G. Egge

michael.egge@lw.com
+1.202.637.2285
Washington, D.C.

Kelly Fayne

kelly.fayne@lw.com
+1.415.646.7897
San Francisco

Joshua N. Holian

joshua.holian@lw.com
+1.415.646.8343
San Francisco

Hanno F. Kaiser

hanno.kaiser@lw.com
+1.858.509.8458
San Diego / San Francisco

Farrell J. Malone

farrell.malone@lw.com
+1.202.637.1024
Washington, D.C.

Amanda P. Reeves

amanda.reeves@lw.com
+1.202.637.2183
Washington, D.C.

Katherine A. Rocco

katherine.rocco@lw.com
+1.212.906.1215
New York

E. Marcellus Williamson

marc.williamson@lw.com
+1.202.637.2200
Washington, D.C.

Jason L. Daniels

jason.daniels@lw.com
+1.415.646.7857
San Francisco

Britton Dale Davis

britton.davis@lw.com
+1.202.654.7103
Washington, D.C.

Patrick C. English

patrick.english@lw.com
+1.202.637.1030
Washington, D.C.

Joseph A. Simei

joseph.simei@lw.com
+1.202.637.2147
Washington, D.C.

Tara Lynn Tavernia

tara.tavernia@lw.com
+1.202.637.1001
Washington, D.C.

Peter M. Todaro

peter.todaro@lw.com
+1.202.637.2380
Washington, D.C.

Matthew J. Piehl

matthew.piehl@lw.com
+1.202.637.2154
Washington, D.C.

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Endnotes

¹ 15 USC §18.

² New Guidelines, *Overview* at 2 (quoting *United States v. Penn-Olin Chem. Co.*, 378 US 158, 170–71 (1964)).

³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963).

⁴ New Guidelines, at 19 (quoting *Emhart Corp. v. USM Corp.*, 527 F.2d 177, 182 (1st Cir. 1975)).

⁵ See, e.g., William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, Nov. 9, 2001, <https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels>.

⁶ New Guidelines, at 6.

⁷ The HHI calculation for a market with 5 firms each with 20% share = $20^2 + 20^2 + 20^2 + 20^2 + 20^2$ = an HHI index of 2000, in excess of the 1,800 "highly concentrated" threshold in the New Guidelines (though below the prior threshold of 2,500).

⁸ New Guidelines, at 14.