

Ending 2023 with a Bang: U.S. Antitrust Agencies Issue Tough New Merger Guidelines

December 20, 2023

On December 18, 2023, the U.S. Federal Trade Commission (the “FTC”) and the U.S. Department of Justice’s Antitrust Division (the “DOJ”) (the “Agencies”) issued the final 2023 Merger Guidelines.¹ As Debevoise previously reported, the Agencies initially proposed the draft Merger Guidelines in July 2023.² While the Agencies purport that the Guidelines reflect the more than 30,000 comments received “reflecting the views of consumers, workers, academics, interest organizations, attorneys, enforcers, and many others across various sectors of the American economy,”³ the Guidelines largely retain the substantive overhauls reflected in the July draft. In a year in which the FTC and DOJ have issued multiple revised policy statements that collectively tighten scrutiny across many facets of competition activity, the finalization of these Guidelines demonstrates once again that the Biden administration is intent on translating rhetoric providing for stricter antitrust enforcement into an operative enforcement regime.

BACKGROUND ON THE U.S. MERGER GUIDELINES

First published in 1968, the U.S. merger guidelines have described and guided how the Agencies analyze the competitive impact of proposed mergers. Over the years, the DOJ and FTC have periodically updated the merger guidelines to reflect their updated thinking on merger enforcement. The 2023 Merger Guidelines supersede the 2010 horizontal merger guidelines and the 2020 vertical merger guidelines.⁴

¹ U.S. Dept. of Justice & Fed. Trade Comm., 2023 Merger Guidelines, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

² See Debevoise Update: A Whole New World? U.S. Antitrust Agencies Propose Tough New Merger Guidelines (July 20, 2023), <https://www.debevoise.com/insights/publications/2023/07/a-whole-new-world-us-antitrust-agencies-propose>

³ Press Release, Fed. Trade Comm., Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>

⁴ Although the FTC withdrew its approval of the June 2020 vertical merger guidelines in September 2021, they had remained in place at DOJ.

The Merger Guidelines lack the force of law. However, courts in deciding merger challenges historically have looked to them for guidance. Given the significant changes in the 2023 Guidelines, it remains to be seen whether courts will accept the new Guidelines as influential.

THE 2023 MERGER GUIDELINES: A NEW ENFORCEMENT REGIME

For the first time, the new Guidelines consolidate the vertical and merger guidelines into one document. This update is not intended to cover all of the details in the 51-page document, but the key changes are detailed below:

Retention of the Aggressive Substantive Overhaul of the Draft Version. There are only modest substantive changes from the draft guidelines released over the summer. Much of what the Agencies changed reflects stylistic and organizational adjustments. For instance, the Agencies softened the draft's language of "Mergers Should Not [Do X]" to the final's "Mergers Can Violate the Law When They [Do X]." There are now 11 guidelines instead of the originally proposed 13, with removal of the arguably vague catch-all draft guideline 13, which had addressed mergers that could "otherwise substantially lessen competition or tend to create a monopoly." The Agencies also removed draft guideline 6, which warned against vertical deals that could "create market structures that foreclose competition," but folded it into an expanded final guideline 5.

A Policy of Prevention. A foundational theme of the Guidelines is the adoption of the view that the Agencies are tasked "to arrest anticompetitive tendencies in their incipiency." With a view towards preventing harm to competition while mergers are in their formative stage, the Agencies apply the antitrust statutes within the context of "a relatively expansive definition of antitrust liability." When coupled with an expansive understanding of the aims of antitrust policy, including such new areas of interest as a merger's effect on employee wages and working conditions, the Guidelines create challenges for a business looking to justify a merger due to resulting efficiencies.

A New Organizing Framework. The Guidelines are organized around 11 principles that the antitrust agencies may use when determining whether a merger is unlawful. This retains the July draft's framework and differs from prior merger guidelines, which acted a more neutral rubric for how the antitrust agencies evaluate a merger. The organizing principles include sweeping statements such as that "Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market," "Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms," "Mergers Can Violate the Law When They Entrench or Extend a Dominant Position," "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,” and “When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.”

A Lowered Bar for When a Merger Is Presumptively Illegal. The DOJ and FTC in practice tend to seek to block horizontal mergers only if there is a “structural presumption” under the guidelines, which is triggered based on the parties’ market shares and the changes in market concentration post-merger. The new Guidelines significantly lower the bar for when the Agencies believe the presumption should be triggered and attempt to set a bright line barring mergers based on increases in concentration alone. For example, the Guidelines state that if a merger significantly increases concentration and the combined entity’s market share is greater than 30%, “these concentration metrics indicate that a merger’s effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger.”

Vague and Broad Guidance for When Mergers Otherwise Substantially Eliminate Competition. The Guidelines lay out the Agencies’ position that an analysis of existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares. While the Guidelines identify a series of indicators on how to identify substantial competition, they are vague and broad. For example, they point to whether the parties monitor each other’s marketing campaigns or facility locations as evidence of competition.

Expanded Analysis of Potential Competition. Along with an expanded treatment of the effects of mergers with potential competitors as compared to prior guidelines, the Guidelines warn that the antitrust agencies will consider whether the acquisition of a nascent competitor violates the antitrust laws. The Guidelines specifically focus on mergers as an anticompetitive mechanism during periods of technological transition, when there is a reduction to barriers to entry for new market entrants.

New Topics Addressed. For the first time, the Guidelines address topics that have been of particular interest to the Agencies during the Biden administration. Specifically:

- **Rollup Strategies.** Although the Guidelines do not mention private equity explicitly, they do state that “the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies” and “may examine a pattern or strategy of growth through acquisition by examining both the firm’s history and current or future strategic incentives.” The Guidelines also emphasize that industry trends will be scrutinized as part of an effort to “arrest anticompetitive tendencies in their incipency.” Not only will the “likely trajectory of an industry” be considered, the Agencies will examine trends toward vertical integration in light of

resulting implications for the competitive dynamics for the industry moving forward. This focus has particular application for private equity firms with portfolio companies adjacently or vertically situated to a potential target within a particular industry.

- Transactions Involving Multi-Sided Platforms. The Guidelines address mergers involving multi-sided platforms. A multi-sided platform provides different products or services to two or more groups. For example, it may provide brands a place to sell their goods and consumers a place to buy those goods. The Guidelines make clear that the Agencies want to protect competition between platforms (e.g., by preventing one platform's acquisition of another), competition on platforms (e.g., by preventing platform operators and platform participants from acquiring each other), and competition to displace platforms or their services (e.g., by preventing a platform from acquiring a non-platform service that may lessen dependence on the platform by providing an alternative).
- Protection of Labor. The Guidelines have a section focused on the impact of a deal on labor. In particular, they state the Agencies' position that any loss of competition in the labor market, which may result in lowered wages, slowed wage growth, worsened benefits or working conditions, or other degradations of workplace quality, "is not offset by purported benefits in a separate downstream product market."

HOW DEBEVOISE CAN HELP

Debevoise lawyers are well versed in pre- and post-filing U.S. merger control. We are available to advise parties regarding how the new Merger Guidelines will affect their current and future deals.

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Please do not hesitate to contact us with any questions.



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