

Fact Sheet – 2023 Draft Merger Guidelines for Public Comment

Today, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are jointly releasing the *2023 Draft Merger Guidelines* (Draft Guidelines) for public comment.

1. Under U.S. antitrust law, the DOJ and FTC review proposed transactions in order to prevent anticompetitive mergers and acquisitions.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) imposes a mandatory reporting and waiting period for certain transactions. The agencies have authority to investigate all mergers (including those that are not subject to HSR or have already closed) for potential violations of the Clayton Act. Following an investigation, the agencies can challenge the legality of a merger under Section 7 of the Clayton Act and/or other applicable antitrust laws.

2. The agencies publish merger guidelines to help the public understand how the agencies assess the potential for a merger to harm competition.

Merger guidelines increase transparency and awareness by explaining how the agencies undertake substantive merger review. The Department of Justice published the first merger guidelines in 1968 and since then the agencies have worked collaboratively to update the guidelines periodically to reflect changes in the law and market realities. The Draft Guidelines build on decades of agency expertise to reflect significant advancements in the law and fundamental changes in our economy.

3. The Draft Guidelines focus on the words of Congress and Supreme Court precedent.

The Draft Guidelines are built around statutory text and relevant case precedent. Notably, these are the first merger guidelines to cite case precedents. The document draws extensively on Supreme Court and appellate cases to ensure it is rooted in the law.

4. The Draft Guidelines directly address the potential for harm to all market participants and any dimension of competition, including for workers.

Since 1982, the merger guidelines have devoted increasing attention to mergers that reduce competition among buyers, including employers as buyers of labor services. The Draft Guidelines build on this principle and explain that the agencies will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction.

5. The Draft Guidelines recognize the growing importance of platform competition.

Platform markets present distinct competitive considerations from the traditional market structures of the 20th century economy, as they often present high entry barriers and are likely to tip in ways that entrench dominant firms. The Draft Guidelines describe the distinctive characteristics and considerations that arise when platforms are part of an acquisition.

6. The Draft Guidelines include the concentration thresholds for mergers between competitors reflected in relevant court precedent and restore decades of agency practice dating back to 1982.

The first merger guidelines to reference a threshold based on a market concentration index were the merger guidelines issued in 1982. Subsequently, courts routinely cited to the guidelines and these concentration thresholds. In practice, the agencies tended to challenge mergers that greatly exceeded these thresholds to focus their limited resources on the most problematic transactions. The 2010 Horizontal Merger Guidelines therefore adopted more permissive thresholds based on this agency practice, rather than on changes in the law. The Draft Guidelines restore a threshold of a post-merger 1,800 Herfindahl-Hirschman Index (HHI) alongside an increase in HHI of 100 to better reflect both the law and the risks of competitive harm.

7. The Draft Guidelines are the result of a rigorous and inclusive process.

The Draft Guidelines follow a public comment period that yielded over 5,000 comments, orders of magnitude more than in prior updates to the guidelines. Drafting the guidelines was a collaborative effort that depended heavily on the input and work of many career attorneys and economists at both agencies. There was an extensive internal comment and feedback process to obtain input from all attorneys and economists at both agencies. The drafting teams were led by Dr. Susan Athey and David Lawrence at the DOJ, and Dr. Aviv Nevo and Ken Merber at the FTC.

8. The Draft Guidelines are built around 13 core “guidelines” that reflect the most common issues that arise in merger review.

The Draft Guidelines set forth a clear and digestible framework at the outset to help the reader assess whether a merger raises common issues. The document then provides more in-depth analysis and tools that may apply to each category. Given the complexity of the modern economy, a single merger may implicate multiple guidelines.

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets. Concentration refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The Agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the Agencies presume that a merger may substantially lessen competition based on market structure alone.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms. The Agencies examine whether competition between the merging parties is substantial, since their merger will necessarily eliminate competition between them.

Guideline 3: Mergers Should Not Increase the Risk of Coordination. The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would

suggest.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market. The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete. When a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition. The Agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a “clog on competition...which deprives rivals of a fair opportunity to compete.”

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration. If a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm’s pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers. Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The Agencies therefore apply these Guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The Guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

9. The agencies are seeking public comment on the Draft Guidelines.

The public is encouraged to comment on the Draft Guidelines during a 60-day comment period. The comment period will close on September 18, 2023, after which the agencies will review the comments received and finalize the new Merger Guidelines.