CRAVATH

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Merger Guidelines Issued by FTC and DOJ

On December 18, 2023, the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies") issued finalized Merger Guidelines (the "Merger Guidelines"), which modify the draft guidelines released in July (the "Draft Guidelines") and replace the 2010 Horizontal Merger Guidelines (the "2010 HMGs") and the 2020 Vertical Merger Guidelines. Like all previous versions, the Merger Guidelines are not binding law but reflect how the agencies apply Section 7 of the Clayton Act and other antitrust laws applicable to mergers.

The Merger Guidelines largely follow the Draft Guidelines; which, as we described in our July 20, 2023 memo, reflect the Biden Administration's aggressive approach to merger enforcement.[1] This note summarizes the new guidelines and additional changes made in finalizing them.

INTRODUCTION

President Biden called for new merger guidelines in his July 2021 Executive Order on Promoting Competition in the American Economy.[2] The Agencies issued a request for information concerning mergers on January 18, 2022. In July 2023, they issued the Draft Guidelines and sought public comment. The Merger Guidelines[3] were issued after the comment period, in which the agencies received more than 30,000 comments and held three public workshops.[4]

The Merger Guidelines embody the ongoing shift in the interpretation of the antitrust laws and their application by the Agencies to mergers, including a broad conception of competitive harms, skepticism of justifications, and a view that far more transactions violate the law. Their departure from the 2010 HMGs echo a number of recent enforcement actions, in particular by the Federal Trade Commission. The key changes they reflect from prior practice include:

- Lower thresholds for structural presumptions of harm, to capture more deals;
- Additional focus on non-economically verifiable means of identifying a lessening of competition;
- Increased emphasis on non-price harms;
- Expanded liability for vertical and other non-horizontal transactions;
- Elevating theories of lessened competition that have not been focal points of enforcement in recent decades (potential competition, nascent competitors, conglomerate mergers, labor effects, etc.); and
- De-emphasis of defenses to liability.

STRUCTURE OF THE MERGER GUIDELINES

Guidelines 1-6 represent frameworks used by the Agencies, while Guidelines 7-9 and 11 serve less as standalone guidelines and more as "plus factors", or additional factors to consider, in applying Guidelines

1-6. Guideline 10 applies the frameworks from Guidelines 1-6 to monopsony (*i.e.*, buyer) power.

The Merger Guidelines do reflect some changes from the Draft:

First, the Merger Guidelines reduce the number of guidelines from 13 to 11. The Agencies have incorporated Draft Guideline 6, which concerned vertical mergers, into Guidelines 5, concerning mergers that create firms that control products or services used by rivals, and 7, concerning mergers that involve a "trend towards concentration".

Second, in a number of ways, the finalized Merger Guidelines lighten the tone of the Draft, including expressing less categorical concern about certain kinds of mergers and de-emphasizing presumptive liability, to some extent.

And third, the Merger Guidelines devote more attention to rebuttal evidence and restore the discussions of evidence, harm assessment and market definition to the guidelines, as opposed to the appendix, as in the Draft.

The Merger Guidelines do not address remedies. Instead, they purport to speak only to "whether a merger or acquisition may substantially lessen competition or tend to create a monopoly", taking the position that the consideration of appropriate remedies is "beyond the Merger Guidelines' scope".[5] In recent litigation the Agencies have taken the position that remedies should not be considered in evaluating the legality of a transaction, though courts have not agreed.[6] The Agencies have also taken the public position that they are not inclined to negotiate remedies and enter into consent agreements with parties. In turn, some merging parties have turned to "fixing it first". In our experience, remedies have an important effect. In evaluating potential mergers, they should continue to be a focal point early in the discussion.

THE ELEVEN GUIDELINES

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

- Guideline 1 includes the two Herfindahl-Hirschman Index ("HHI")-based structural presumptions in the Draft Guidelines.
- Under the Merger Guidelines, a merger is now presumed to be illegal if one of the two indicators below is met.

Indicator	**Threshold for Structural Presumption**
(1) Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
(2) Merged Firm's Market Share[7]	Share greater than 30% AND Change in HHI greater than 100

- Guideline 1 also includes a sliding scale regarding market concentration, stating: "This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it".[8]
- As noted in our summary of the Draft Guidelines,[9] a merger may lessen competition by threatening to cause the exit of a current market participant. Guideline 1 then specifically refers to "a leveraged buyout that puts the target firm at significant risk of failure". [10] This is consistent with the Agencies' public statements about private equity and suggests that enforcers will consider capital structures when evaluating competitive effects.

- In addition, in finalizing the guidelines, the Agencies added a footnote about measuring market concentration "using the number of significant competitors in the market". This is "most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure shares in the relevant market".[11] The expanding of the methodology signals that the Agencies may only focus on the consolidation of the large or "significant" players, instead of the market overall.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms

- Guideline 2 addresses evidence of competitive effects from mergers, as opposed to increases in market concentration. This approach, a hallmark of the 2010 HMGs, is referred to as "unilateral effects" analysis.[12]
- Different from the Draft, Guideline 2 now includes an expansion of the definition of competition to include competition related to research and development ("R&D").[13] This follows the recent *Illumina/Grail* decision by the Fifth Circuit.[14] By including competition in R&D, Guideline 2 provides an alternative to potential competition (Guideline 4) for addressing competitive harms in markets that are nascent or have not yet developed into commercial markets. We expect this to be most relevant in R&D-heavy fields, like life sciences and tech.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

- Guideline 3 addresses "coordinated effects", the concern that the elimination of a competitor will enable coordination. It also applies another structural presumption, wherein the Agencies will presume that highly concentrated markets are susceptible to coordination. However, Guideline 2 removes the presumption of coordination in the Draft, which applied when evidence suggests that there was a prior attempt to coordinate or the merger would eliminate a maverick firm.[15]
- Guideline 3 makes a number of other, more subtle changes, signaling a broader view of when coordinated effects are likely to occur.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.

- Guideline 4 addresses "actual potential competition" and "perceived potential competition", consistent with the FTC's unsuccessful 2022 *Meta/Within* merger challenge.[16]
- For actual potential competition, the Agencies will look to whether there is a "reasonable probability of entry" and whether such entry "offered a substantial likelihood" of ultimately producing deconcentration or significant procompetitive effects. While Guideline 4 frames it as a "suggestion" rather than a "presumption" (as in the Draft), it states that the Agencies take a concentrated market as a reason to believe that the entry in question is likely to produce significant procompetitive effects. Importantly, Guideline 4 takes a sliding scale approach to the probability of entry by a potential competitor required to raise concern, stating "the higher the market concentration, the lower the probability of entry that gives rise to a concern".[17]
- In examining the elimination of perceived potential competition, the Agencies will consider whether a current market participant could reasonably consider the relevant merging party a potential entrant. The Agencies will also consider evidence that the potential entrant had a competitive effect on existing rivals.
- For both actual and perceived potential competition, the Agencies emphasize an "objective" standard, crediting evidence that the party has "sufficient size and resources" or is "well-situated" to enter as more important than actual plans to do so.

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.

- As noted in our analysis of the Draft Guidelines,[18] Guideline 5 is similar to the withdrawn 2020 Vertical Merger Guidelines, focusing on lessening competition through an ability and incentive to raise rivals' costs by foreclosing needed products or services or by giving a firm competitively sensitive information of a rival.

- The Merger Guidelines group that approach with the vertical merger Draft Guideline 6, which tracked *Brown Shoe*, into one.
- Guideline 5 still includes the discussion of "ability and incentive", but articulates the framework in a way that omits discussion of the capability of the merged firm to foreclose. It lists four factors: (1) the availability of substitutes; (2) the competitive significance of the related product; (3) the effect on competition in the relevant market; and (4) the competition between the merged and dependent firms.[19]
- Guideline 5 reflects the Agencies' approach to vertical concerns, echoing recent enforcement actions in *Illumina/GRAIL* and *Microsoft/Activision*,[20] broadening foreclosure to include "routes to market" and reflecting skepticism toward rebuttal evidence.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.

- Guideline 6 addresses mergers that "entrench" a dominant position or extend dominance into a related market, including by facilitating tying, bundling or conditioning. It returns to principles of entrenchment from the 1968 Merger Guidelines and cases like *FTC v. Procter & Gamble Co.*,[21] consistent with the FTC's enforcement action in the *Amgen/Horizon* case.[22]
- However, Guideline 6 does not clearly identify what constitutes a dominant position, only citing to cases like *Procter & Gamble* which involved a firm with less than monopoly power.[23]
- Unlike the Draft, the Merger Guidelines remove the rule that a market share above 30% indicates dominant power, and instead look to "direct evidence or market shares showing durable market power".[24]
- Further, Guideline 6 involves a broader array of theories (*i.e.*, raising barriers to entry to known or unknown competitors, eliminating a nascent threat, or extending a dominant position into another market). And, compared to the Draft Guidelines, Guideline 6 includes a more robust discussion of the concerns with mergers that eliminate nascent rivals to dominant firms, which the Agencies have challenged in recent years under both Section 7 of the Clayton Act and Section 2 of the Sherman Act (monopolization).[25] However, the Merger Guidelines do not clearly define what constitutes a violation under the array of theories in Guideline 6.
- That said, Guideline 6 also does include language attempting to distinguish mergers that enable a dominant player to entrench or extend its position through beneficial conduct. This reflects a softening from the prior Draft Guidelines.
- Guideline 6 also includes several examples of mergers in the technology sector that may raise entrenchment concerns.[26]

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.

- Under Guideline 7, the Agencies will consider whether the merger is occurring in an industry where either horizontal or vertical integration capable of foreclosing certain rivals is taking place. Guideline 7 serves principally as a "plus factor" in the Agencies' analysis.
- In addition, the Agencies have added language regarding the concern that the consolidation of power increases leverage for a firm, which can be used to create further consolidation. They have also added language regarding the combined competitive effects of multiple mergers.
- Of note, however: as a plus factor, Guideline 7 does not suggest that a transaction being part of a trend will be a basis on its own for a challenge.[27]

Guideline 8: When a Merger Is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

- Guideline 8 expresses a concern over series of transactions that together lessen competition, largely consistent with the position taken by the FTC in November 2022 with regard to the application of "standalone" Section 5 liability to serial acquisitions.[28]

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or To Displace a Platform.

- The Merger Guidelines' most explicit nod to "Big Tech" concerns, Guideline 9 addresses digital platforms specifically and serves as a plus factor for the first six guidelines.
- In finalizing the Merger Guidelines, additional language was included regarding concerns over platform operator self-preferencing, at issue in the FTC's pending (non-merger) litigation against Amazon. The Agencies express concerns in Guideline 9 about the challenges a participant may face in switching platforms, which then allows a platform to prioritize its own product and could have the effect of disincentivizing the production of alternative products. Further, Guideline 9 also shows concerns over platform operators depriving rival platforms of access to the platform operator's advantaged products.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers or Other Providers.

- Guideline 10 discusses the consideration of monopsony power, focusing specifically on competition for labor, one of the Administration's priorities for competition enforcement.[29]

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

- The 2010 HMGs address the acquisition of partial ownership and minority interests, with a focus on managerial influence, reduced incentives to compete and access to competitively sensitive information.
- Guideline 11 incorporates the catch-all provision that was Draft Guideline 13.

REBUTTAL EVIDENCE

The Guidelines discuss three types of separate rebuttal evidence and defenses that may be presented: (1) the failing firm defense; (2) evidence on entry and positioning; and (3) procompetitive efficiencies.[30]

Failing Firm

The description of the failing firm defense is largely consistent with past guidance and court precedent requiring (1) a grave probability of business failure, (2) that prospects of reorganization are dim or nonexistent and (3) that the acquiror is the only available purchaser. The Agencies will only consider this defense when the target is in a desperate financial situation, *i.e.*, business operations will soon cease; not simply a situation of declining sales, negative profits or even bankruptcy. Additionally, the target must demonstrate that it has made actual efforts to reorganize under Chapter 11 Bankruptcy and that it has sought in good faith "reasonable alternative offers" that would not raise competitive concerns.

Evidence on Entry and Positioning

Next, merging parties may raise rebuttal arguments that entry is on its way or that increased profits in the merged industry will induce market entry, restoring competition. To be credited, however the Agencies require that entry be (1) timely, (2) likely and (3) sufficient to counteract the negative impact on competition. To be timely, entry must both occur before any anticompetitive effects arise (which is difficult to achieve), and must be durable in that the level of competition must remain for a sustained period of time. To be likely, the potential entry must begin exerting competitive pressure once the merger is announced and the Agencies will scrutinize why the entry was not planned prior to the merger announcement. Finally, to be sufficient, entry must "at least replicate the scale, strength, and durability of one of the merging parties".[31] As part of this, Agencies will consider whether entry arguments are consistent with the rationale for merger or imply the merger would be unprofitable.

Guideline 4 makes clear that the Agencies will not make similar assumptions about the likelihood or effect of entry in the context of evaluating a defense as they will when intervening to prevent a merger they believe will prevent actual potential competition.

Procompetitive Efficiencies

The third category of potential rebuttal is procompetitive efficiencies. The Agencies have always taken a skeptical view of efficiencies, and the Merger Guidelines' view is even more skeptical. The Merger Guidelines require efficiencies be merger-specific and verifiable. To be merger-specific, efficiencies must not be achievable through any other means except the merger, and the Guidelines express the view that many benefits are achievable by contract. To be verifiable, efficiencies must be demonstrated using reliable methods and reliable evidence and not be based on subjective predictions of the firms or their agents.

The Agencies have added new requirements, the first being that the efficiencies must "within a short period of time" prevent the lessening of competition. Second, the efficiencies must be "procompetitive", meaning that they must not worsen terms for trading partners.

Unlike the withdrawn 2020 Vertical Merger Guidelines, the Guidelines do not distinguish the "Elimination of Double Marginalization" ("EDM") that inheres in vertical integration from other efficiencies, and relegate the concept to a footnote.[32] The anticipated effect is that almost no efficiencies from a merger will be credited.

ANALYTICAL, ECONOMIC, AND EVIDENTIARY TOOLS

As noted above, the Merger Guidelines restore the discussion of analytical, economic and evidentiary tools to the guidelines themselves, as opposed to an appendix.

Nevertheless, the Guidelines still shift emphasis away from the Hypothetical Monopolist Test ("HMT") within the discussion of market definition (which is now the second-to-last section of the Guidelines). First, they emphasize that substantial competition between the merging parties can demonstrate the market exists, even if "the metes and bounds of the market are only broadly characterized".[33] Second, direct evidence of market power can demonstrate the existence of a relevant market. Third, as they have re-emphasized in recent litigation and decisions, the Agencies will employ "practical indicia" associated with *Brown Shoe*. And finally, the HMT may be used as a method of defining the market.

Considering the HMT, the Agencies have expanded the traditional test of Small but Significant and Non-transitory Increase in Price ("SSNIP") to also evaluate "worsening of terms" ("SSNIPT"). The terms that may worsen can include quality, service, capacity investment, choice or innovation. It also covers settings where firms bargain and a hypothetical monopolist would have a stronger bargaining position that would lead it to extract a SSNIPT.

And finally, the Guidelines include a discussion on the calculation of market share. Under this, structural measures of market share can provide information on market power or competition, but they may not be "probative" in all scenarios. The Merger Guidelines outline that the probative value of market share is affected by (1) whether the market used to estimate them includes the products of competitive concern, (2) whether the market is broad enough "that it contains sufficient additional products so that a loss of competition among all the suppliers of the products in the market would lead to significantly worse terms for at least some customers for at least one product", and (3) whether the competitive significance is understated by the market share because the market is defined too broadly.

CONCLUSION

While the Merger Guidelines are not law, they do reflect current agency practice, which courts have looked to when applying the Clayton and Sherman Acts in merger cases.[34] As we discussed in our analysis of the Draft Guidelines, the changes made by the Agencies in crafting the Merger Guidelines rely heavily on Supreme Court merger precedent from the early 1960s to 1970s. While the Merger Guidelines rely on some more recent precedent, such as the recent *Illumina* decision, they do deviate from other appellate-level merger cases. We will need to monitor how courts interpret and apply the Merger Guidelines and the extent to which they rely upon them.

That being said, merging parties can expect continued close scrutiny of transactions, with an expansion of the theories of competition and limitation to the role of defenses.

[1] The prior memo is included as Appendix A to this note. *New Merger Guidelines and Recent Merger-Related FTC and DOJ Announcements*, Cravath, Swaine & Moore (July 20, 2023) ("Prior Memo"), https://www.cravath.com/a/web/5ogProAXRw2Yvz4W9DKW8w/81CWuS/new-merger-guidelines-and-recent-merger-related-ftc-and-doj-announcements.pdf.

[2] Exec. Order No. 14036, Promoting Competition in the Am. Econ., 86 Fed. Reg. 36987 (July 9, 2021).

[3] The Merger Guidelines can be found at: https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf (hereinafter, "Merger Guidelines").

[4] *Federal Trade Commission and Justice Department Release 2023 Merger Guidelines*, FTC (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines.

[5] Merger Guidelines at 2 n. 8.

[6] *See, e.g., Illumina, Inc. v. Fed. Trade Comm'n*, No. 23-60167, 2023 WL 8664628, at *11-12 (5th Cir. Dec. 15, 2023); *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412, at *15 (N.D. Cal. July 10, 2023) (citations omitted) ("The FTC . . . contends Microsoft's binding offer is a 'proposed remedy' that may not be considered until the remedy phase, that is, after a Section 7 liability finding. . . . [The FTC's citation] says nothing about whether the merger challenging plaintiff must address offered and executed agreements made before any liability trial, let alone liability finding; that is, whether the FTC must address the circumstances surrounding the merger as they actually exist. The caselaw that directly addresses the issue contradicts the FTC's position".); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 135 (D.D.C. 2022).

[7] The second presumption is based on the 1963 *U.S. v. Philadelphia National Bank* decision.

[8] Merger Guidelines at 6.

[9] *See* Appendix A, Prior Memo at 2.

[10] Merger Guidelines at 5 n.11.

[11] Merger Guidelines at 5 n.12.

[12] Guideline 2 now includes language that "Although a change in market structure can also indicate risk of competitive harm (See Guideline 1), an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares". *Id.* at 7. "Unilateral effects" are contrasted with "coordinated effects", addressed in Guideline 3.

[13] Guideline 2 states: "This can include competition to research and develop products or services, and the elimination of such competition may result in harm even if such products or services are not yet commercially available". *Id.* at 7.

[14] *See Illumina*, 2023 WL 8664628, at *7 n.9 (determining that the relevant line of commerce is "research and development of MCED tests").

[15] The Merger Guidelines do soften the language slightly related to the primary factors, modifying the language from "[t]he Agencies *presume* that post-merger market conditions are susceptible to coordinated interaction if any of the three primary factors are present", Draft Guidelines at 9, to "[t]he Agencies *may conclude* that post-merger market conditions are susceptible to coordinated interaction and *that the merger materially increases the risk of coordination* if any of the three primary factors are present", Merger Guidelines at 8 (emphasis added).

[16] *See Fed. Trade Comm'n v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, at 925-926 (N.D. Cal. 2023).

[17] Merger Guidelines at 10. The court in *FTC v. Meta Platforms Inc.* held recently that "the 'reasonable probability' standard" requires the FTC to prove "a likelihood noticeably greater than fifty percent" that a potential competitor will enter the market. 654 F. Supp. 3d at 927. The Agencies may seek to use the new sliding scale approach in Guideline 4 to challenge mergers where the probability of entry is below fifty percent, but market concentration is very high.

[18] *See* Appendix A, Prior Memo at 3.

[19] Interestingly, the Merger Guidelines also now move from the body of the text to a footnote the 50% threshold for the establishment of monopoly power previously included in Draft Guideline 6. *See* Merger Guidelines at 16 n. 30.

[20] *Illumina*, 2023 WL 8664628 at *8 ("[T]here are myriad ways in which [the merged firm] could engage in foreclosing behavior . . . such as by making late deliveries or subtly reducing the level of support services".); *see* Press Release, *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.*, FTC (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

[21] 386 U.S. 568 (1967).

[22] Complaint, *FTC v. Amgen Inc.*, No. 23-CV-3053 p. 2 (N.D. Ill. May 16, 2023) (alleging merger will allow Amgen to use its "portfolio of blockbuster drugs" to foreclose entry into markets that Horizon allegedly has monopoly power).

[23] Merger Guidelines at 18 n.32 (quoting *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967)).

[24] Merger Guidelines at 18.

[25] *See*, *e.g.*, Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid*, DOJ (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid; Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio*, FTC (Dec. 17, 2019), https://www.ftc.gov/newsevents/news/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; Complaint for Injunctive and Other Equitable Relief, *FTC v. Questcor Pharmaceuticals*, No. 1:17-cv-00120 p. 13 (D.D.C. Jan. 25, 2017).

[26] The Guidelines now include the following examples:

"For example, if a dominant firm merges with a complementary product that interoperates with the dominant firm's competitors, it could reduce interoperability, harming competition for customers who value the complement". Merger Guidelines at 19.

"For example, a closed messaging communication service might acquire a product that allowed users to send and receive messages over several competing services through a single user interface, which facilitates competition". *Id.*

"For example, if two firms operate in a market in which network effects are significant but in which rivals voluntarily interconnect, their merger can create an entity with a large enough user base that it may have the incentive to end voluntary interconnection. Such a strategy can lessen competition and harm trading partners by creating or entrenching dominance in this market. This can be the case even if the merging firms did not appear to have a dominant position prior to the merger because their interoperability practices strengthened rivals". *Id.* at 20.

[27] *See* Athey & Nevo, *DOJ and FTC Chief Economists Explain the Changes to the 2023 Merger Guidelines* (Dec. 19, 2023), https://www-promarket-org.cdn.ampproject.org/c/s/www.promarket.org/2023/12/19/doj-and-ftc-chief-economists-explain-the-changes-to-the-2023-merger-guidelines/?amp.

[28] Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 13 & n.73, 14 & n.82 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[29] For example, last year, the DOJ successfully blocked the proposed merger of Simon & Schuster and Penguin Random House. *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *36-37 (D.D.C. Nov. 15, 2022) ("The government has presented a compelling case that predicts substantial harm to competition as a result of the proposed merger of PRH and S & S. It has properly defined a relevant market — focused on publishing rights for anticipated top-selling books — that encompasses 70 percent of the advances that publishers pay to authors. . . . Accordingly, the Court finds that the proposed merger of PRH and S & S violates Section 7 of the Clayton Act because it is likely to substantially lessen competition in the market for the publishing rights to anticipated top-selling books".).

[30] While the Draft Guidelines included a section on "structural barriers to coordination unique to the industry", it was instead moved under the analysis of Guideline 3 in the Merger Guidelines.

[31] Merger Guidelines at 32.

[32] *Id*. at 16 n.31.

[33] Merger Guidelines at 40.

[34] *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 434 n.13 (5th Cir. 2008) ("The Merger Guidelines do not guide adjudicative decisions at the agency and court-level, because they are merely enforcement policy statements that establish standards for exercising prosecutorial discretion. . . . Enforcement policy is not binding on the agency and has no force of law".) (citations omitted).

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