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The 2023 Merger Guidelines: What Are They Good For?

January 2024

tl;dr

Background: In July 2023, the Federal Trade Commission (FTC) and the U.S. Justice Department (DOJ) Antitrust Division jointly released new draft merger guidelines, to much fanfare and even more controversy. Five months later, the agencies published the final 2023 Merger Guidelines. Many of the same controversies remain.

But... It is appropriate to raise the questions of what exactly the guidelines are and what they are intended to accomplish. According to the DOJ, the merger guidelines "are a non-binding statement that provides transparency on aspects of the deliberations the Agencies undertake in individual cases under the antitrust laws." According to the FTC, the guidelines "describe factors and frameworks the agencies utilize when reviewing mergers and acquisitions."

KEY TAKEAWAYS

AGENCY GUIDANCE DOCUMENTS OFFER A WINDOW ON AGENCY POLICY AND PROCESS

The merger guidelines are an example of agency guidance, which is itself a type of "soft law." Soft law is not really law at all. It doesn't prohibit anything or require anything—not with the force of law. "Guidance" or "guidelines" are not federal regulations. And courts are not required to interpret, apply, or even consult them.

But guidance documents can nonetheless be extremely useful. Laws and regulations are not algorithms. They always require at least some degree of interpretation—sometimes a great deal. Guidance documents can provide a window into how agencies interpret the laws they are charged to enforce.

This is especially true in antitrust law, whose core provisions are written broadly and do not require (or perhaps even permit) implementing regulations. Those laws have been given some detail in federal case law, but the application of that case law to new facts and circumstances also requires interpretation. The case law also continues to develop in response to actions brought by, among others, the FTC and the DOJ.

Moreover, useful explanations of the law can vary tremendously depending on the intended audience. Hence, guidance documents may be styled "guidance for consumers" or "guidance for industry." Other potential audiences include the judiciary and, not least, agency staff.

MERGER GUIDELINES AS AN EXAMPLE OF 'PERSUASIVE AUTHORITY'

Prior iterations of the merger guidelines have been more than just a transparency document. They've had at least some influence on the courts, which often cited, *e.g.*, the 2010 Horizontal Merger Guidelines as "persuasive

authority." In brief, "persuasive authority" might be anything a court thinks informative that's not binding on the court.

Judicial opinions can cite other judicial opinions in support of their reasoning. Depending on the relationship between the courts, those other opinions are either "binding" or "persuasive" authority. Lower courts, such as the federal district courts, are bound to follow the holdings of higher ones, such as their own federal circuit courts of appeals or the U.S. Supreme Court.

Opinions published by other district courts or courts in other circuits might be cited as persuasive authority–opinions that the courts consider informative, even though they are not bound to follow them. Courts can also cite to secondary sources, like law-review articles or noted treatises, as persuasive authority; that is, they can cite expert opinions they may consider more or less informative.

Agency guidelines are not binding, but they might be deemed persuasive (or not—it's up to the court).

2023 GUIDELINES ABANDON CONSENSUS, PROVIDE SCANT GUIDANCE

Prior editions of the guidelines could be persuasive—and often were—because courts thought they provided a useful synthesis of established law, economic learning, and agency experience. While they were not simply backward-looking reports summarizing prior decisions, they did reflect at least a rough consensus in the antitrust community.

As Luke Froeb, D. Daniel Sokol, and Liad Wagman put it, earlier merger guidelines encouraged a dialogue "between potential plaintiffs and potential defendants and between attorneys and economists that moved antitrust law and policy forward to promote competition and innovation." The new guidelines do not so much continue that dialogue as they seek to dictate the terms of a new one. And they replace a rough consensus with none.

There are many points of contention. For one, despite several decades of literature de-emphasizing the role and reliability of structural presumptions (such as measures of market share) in antitrust analysis, the new merger guidelines rely heavily on simplistic, and even stronger, structural presumptions than did the prior guidelines. More fundamentally, central to established antitrust law is the fact that mergers can be either harmful *or* beneficial (or benign). Antitrust enforcers are only supposed to block the bad ones.

The 2023 Merger Guidelines give very short shrift to the simple notion that mergers may confer benefits, as well as costs. While the guidelines sketch a number of ways in which the agencies might deem mergers to be anticompetitive, they do not provide staff, industry, or the judiciary any guidance at all on the basic question of how to parse the good from the bad.

Which brings us back to the original question: what are guidelines for? Perhaps not for this.

For more on this issue, see the "Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines," as well as several entries in Truth on the Market's *symposium on "The FTC's New Normal.*

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