TECHNOLOGY
POLICY
INSTITUTE

Comments Filed with the Federal Trade Commission on the Matter of "Draft Merger Guidelines"

Thomas Lenard, Scott Wallsten, and Sarah Oh Lam

September 2023

2000 L Street NW ● Suite 500 ● Washington, DC 20036
Tel: (202) 828-4405 ● Email: info@techpolicyinstitute.org ● www.techpolicyinstitute.org

Before the
U.S. Federal Trade Commission
Washington, D.C. 20580

In Re: Draft Merger Guidelines	))))))	Regs.gov No. FTC-2023-0043

Comments of

Thomas Lenard,[i] Scott Wallsten,[ii] and Sarah Oh Lam[iii]

September 18, 2023

I. Introduction 1
II. The Guidelines Make Merger Enforcement Less Predictable 2
A. The 2010 Guidelines Focused on Consumer Welfare; The Draft Guidelines Ignore It 2
B. The Agencies' Plan to Consider Every Group Affected by a Merger is Incoherent 3
C. The Discussion of Platforms Allows the Agencies to Consider Almost Any Business to be a Platform and Ignores Benefits of Platforms 3
D. The Draft Guidelines Provide No Safe Harbors 5
III. The Agencies Provide No Evidence Supporting a Change in Concentration Thresholds 5
IV. The Agencies Demand Rigorous Evidence From Firms in Rebuttals, but Do Not Require it of Themselves 9
V. Conclusion 10

---

[i] Ph.D., Senior Fellow and President Emeritus, Technology Policy Institute
[ii] Ph.D., President and Senior Fellow, Technology Policy Institute.
[iii] J.D., Ph.D., Senior Fellow, Technology Policy Institute.

The views expressed here are those of the authors and do not necessarily reflect those of TPI's staff, board of directors, or board of academic advisors.

I. Introduction

In the 2010 Horizontal Merger Guidelines, the Department of Justice and the Federal Trade Commission ("Agencies") attempted a balanced approach to merger enforcement by noting the Guidelines "seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[1] The 2023 Draft Merger Guidelines[2] acknowledge no such balance, favoring more aggressive merger enforcement.

The Draft Guidelines, as the Agencies emphasize, include numerous legal citations to appellate and Supreme Court decisions as well as to the statutes themselves. However, neither the Draft Guidelines nor any accompanying document cites the economics literature. The economics is important because, unlike the legal literature, economic analysis evaluates the effects of mergers and merger enforcement. Changes in policy, particularly such a significant one, should be based on evidence showing that expected changes would yield net benefits to consumers or a net improvement in economic welfare overall. The Agencies, however, present no evidence or analysis suggesting that the Draft Guidelines would produce net benefits for consumers relative to the Guidelines they would replace.

The Guidelines suffer from several problems:

1. The Guidelines are overly broad and vague, making merger enforcement more arbitrary and less predictable. Guidelines should create a coherent policy framework that helps companies and government think through potential mergers and how they will be evaluated. Rather than provide clarity, the proposed Guidelines would make merger policy less predictable by allowing the Agencies to pick and choose which criteria to use when deciding whether to challenge a proposed merger.
2. The Guidelines' stated purpose is to deter or block mergers that may lessen competition, putting the focus on competitors instead of consumers. But the purpose of competition is to produce benefits for consumers (or customers). Merger policy should be guided by how consumers would be affected by changes in prices, output, quality, choice, and innovation. None of the Guidelines mention consumers. The Guidelines should

[1] *2010 HMG* at 1.
[2] https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [hereinafter "2023 Draft Guidelines"].

acknowledge that merger policy should primarily be about how mergers affect consumers.

3. The Guidelines include new concentration thresholds for presumptively anticompetitive mergers, but the Agencies cite no evidence that the new thresholds would yield any net benefits.
4. The proposal does not recognize that mergers can also be competitively neutral or beneficial. The overly broad Guidelines may deter or block more pro-competitive than anti-competitive mergers that would harm consumers.

For these reasons, the Agencies should reject the current Draft Guidelines and create guidelines that a full review of the evidence suggests would benefit consumers.

II. The Guidelines Make Merger Enforcement Less Predictable

The Draft Guidelines note that the Clayton Act "prohibits mergers and acquisitions where 'in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'"[3] Arguably, a key purpose of the Guidelines is to put structure around the word "may" in the Act. The Agencies themselves note in the second sentence that the Draft Guidelines "are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers."[4] In other words, they should provide clarity and predictability, enabling affected parties to better predict when the agencies will challenge a proposed merger and when they will not. These proposed Guidelines fail to help any of those parties understand what "may" means to the Agencies.

A. The 2010 Guidelines Focused on Consumer Welfare; The Draft Guidelines Ignore It

As economics and antitrust enforcement have become more integrated, enforcement has focused on the effects of competition on consumers and economic welfare more generally. Merger analysis as a result has focused on the effect on prices and output, consumer choice, quality, and innovation, and generally has discounted competitors' complaints.

[3] *2023 Draft Guidelines at 1.*
[4] *2023 Draft Guidelines* at 1.

The Draft Guidelines seemingly reject this approach. Notably, not a single Guideline mentions consumers. Instead, the Draft Guidelines state, the Agencies will take into account the welfare of many market participants, including competitors. But competition is good because it is good for consumers, not because policy cares about competing firms, *per se*. The guidelines implicitly assume that mergers that harm competitors necessarily harm consumers, but that is not true. A merger that harms competitors can benefit consumers.

B. The Agencies' Plan to Consider Every Group Affected by a Merger is Incoherent

Traditional merger analysis, while rarely simple, at least focuses on understanding how a merger would affect consumers. The new Draft Guidelines reject that premise by focusing on the merging parties' rivals (Guidelines 1, 2, 4, 13), the effects on labor markets (Guideline 11), and more.[5] The problem is that mergers do not necessarily affect all of the mentioned groups, let alone consumers, in the same way.[6]

Given the different effects of a merger on different parties, in order for the Agencies' discussion to be meaningful they must explain how they intend to weigh the interests of competing parties. The Draft Guidelines contain no such discussion.

Different weights are likely to affect outcomes, and with no guidance Agencies could choose weights (including different weights for different mergers) that lead to whatever outcome they desire, making merger policy more subjective and less predictable.

C. The Discussion of Platforms Allows the Agencies to Consider Almost Any Business to be a Platform and Ignores Benefits of Platforms

The 2023 Guidelines include a section on multi-sided platforms (Guideline 10). The Agencies discuss "competition *between* platforms, competition *on* a platform, and competition to *displace* the platform…."[7] and the many ways they believe platform mergers would be anticompetitive. However, the discussion has two problems: It would allow the Agencies to consider almost any business to be a platform and does not recognize the many benefits that also flow from the attributes that concern them.

---

[5] The Draft Guidelines also note, for example, that minority ownership will affect its investigations (Guideline 12), as will concentration trends (Guideline 8).

[6] If they did, presumably the Agencies would not have discussed them and stuck with the consumer welfare focus.

[7] *2023 Draft Guidelines* at 23.

The Agencies cite the 2018 *American Express* case which involved a "special type of two-sided platform,"[8] but otherwise do not express limits to a broad investigative intent on digital platforms. Rather, they express an intent to "seek to prohibit a merger that harms competition within a relevant market" toward "any product or service offered on a platform" to "any group of participants" in "any line of commerce."[9] This approach has already backfired in the *Meta/Within* case[10] when the court decided that the FTC wanted to extend the relevant market beyond its reasonable interpretation.

The Guidelines offer little guidance on what would and would not be considered a permissible merger when "relatively small accretions of power" could be achieved by a dominant platform.[11] This, as well as other parts of this section suggest the Agencies would be skeptical about any acquisition by a large platform that might improve its services because doing so might disadvantage a competitor.

For example, data is important in the digital economy, but acquisitions involving data would be discouraged by the admonition that "acquiring data that helps facilitate matching, sorting, or prediction services may enable the platform to weaken rival platforms by denying them that data."[12] This would be a disincentive to invest in data and consumers would suffer. Also, acquisition of data by merger or otherwise doesn't prevent a rival from investing in similar data acquisition. A similar argument could be made about acquisitions involving virtually any category of tangible or intangible capital.

Additionally, many of the factors that concern the Agencies also bring consumer benefits. Network effects, for example, benefit individuals. A classic example of a positive externality is telephone networks, in which the benefits to everyone from an additional person joining the network exceed the benefits to that person alone, which suggests that some people would not join even though society would be better off if they did. We make no claims about externalities from network effects of current large platforms, but the point remains that they can generate large benefits.

[8] *2023 Draft Guidelines* at 24, n.76, citing *Ohio v. Am. Express*, 585 U.S. __, 138 S. Ct. 2274, 2280 (2018).
[9] *2023 Draft Guidelines* at 24.
[10] Jan Wolft, "FTC Abandons Challenge to Meta's Acquisition of Virtual-Reality Startup," Wall St. J., Feb. 24, 2023, https://www.wsj.com/articles/ftc-abandons-challenge-to-metas-acquisition-of-virtual-reality-startup-6ee5e767.
[11] *2023 Draft Guidelines* at 25.
[12] *2023 Draft Guidelines at 25.*

The discussion on conflicts of interest – "a platform operator that is also a platform participant has a conflict of interest" [13]– also fails to recognize both the ubiquity and the consumer benefits of such arrangements, particularly on retail platforms. "Store brands" are commonplace and consumers benefit from the availability of brands from the platform operator as well as other participants on the same platform.

D. The Draft Guidelines Provide No Safe Harbors

The proposed Guidelines contain detailed discussion of mergers that might be challenged. They do not discuss mergers that would not be challenged. Previous versions of the Guidelines contained "safe harbors" – concentration levels at which the agencies indicated they would be unlikely to bring a challenge.[14] The final Guidelines should include safe harbors to help define what the Agencies view as acceptable as well as what they view as unacceptable.

III. The Agencies Provide No Evidence Supporting a Change in Concentration Thresholds

A central theme running through the proposed Draft Guidelines is that greater concentration is bad and less concentration is good. But the economics literature is more nuanced. It is, of course, true that competition is good and important, but a small number of competitors can compete vigorously – for example, a few supermarket chains within a city. Protecting *competitors* to keep them in business is not the same as protecting *competition*. Moreover, scale can help control costs and improve offerings to consumers. That may be difficult with an overly segmented market.

Prior to the 1980s, the structural approach, as represented by the Structure-Conduct-Performance (SCP) paradigm dominated antitrust policy. This approach fell out of favor as theoretical and empirical analysis showed no direct link between market concentration and market power and harm to consumers. The SCP models assumed market structure to be exogenous and were shown to be flawed.[15] A concentrated market could be the result of superior

---

[13] *2023 Draft Guidelines at 25.*

[14] *2010 HMG* at 30.

[15] The SCP paradigm of the 1960s implicitly assumes perfect and complete information, which predates the advances in economics in game theory, incomplete and imperfect information, and industrial organization.

market performance. Economists ranging from conservative (Harold Demsetz, 1973)[16] to liberal (David Autor, 2017, et al.)[17] have explained that markets can become more concentrated as more efficient firms produce higher quality products and potentially lower prices, thereby gaining market share. A policy of discouraging more efficient firms from growing is not pro-consumer.

Moreover, even a highly concentrated market could be contestable, disciplined by potential entrants, and produce desirable results. In other words, the issues of competition, market performance, and market power are far more complex than measures of concentration.

Still, the FTC-DOJ Merger Guidelines have long used concentration thresholds as guides to help determine which mergers they should investigate. The 2010 guidelines took a nuanced approach to interpreting HHI levels and changes resulting from a merger. While they noted that mergers yielding an HHI of as low as 1500 and any change over 100 could "potentially raise significant competitive concerns and often warrant scrutiny,"[18] the highest caution was for mergers that yielded HHIs of more than 2500 and changes in the HHI of more than 200. Those were "presumed to be likely to enhance market power."[19] The guidelines note that "the presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."[20]

The 2023 Draft Guidelines exchange these thresholds for a simple test: any post-merger HHI over 1800 and yielding a change in HHI of more than 100 "causes undue concentration and triggers a structural presumption."[21] The Guidelines also give the Agencies another bite at the enforcement apple by creating a new structural presumption when the merged firm has at least 30 percent of the market and the HHI changes by more than 100.

---

[16] Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. of Law & Econ. 1 (1973).

[17] David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Quarterly J. of Econ. 645-709 (2020).

[18] *2010 HMG* at 19.

[19] *2010 HMG* at 19.

[20] *2010 HMG* at 19.

[21] *2023 Draft Guidelines* at 6.

The table below shows how the Draft Guidelines differ from the 2010 Guidelines.

HHI	Market Classification	Change in HHI <100	>100	100-200	>200
2010 Guidelines					
<1500	Unconcentrated	unlikely to have adverse competitive effects and ordinarily require no further analysis.			
1500-2500	Moderately Concentrated		potentially raise significant competitive concerns and often warrant scrutiny		
>2500	Highly Concentrated			potentially raise significant competitive concerns and often warrant scrutiny.	presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.
2023 Draft Guidelines					
>1800 OR >30% Market Share	Highly Concentrated		Threshold for Structural Presumption		

The Agencies do not justify these changes. They state, simply, that "The Agencies consider a threshold of a post-merger 1,800 HHI and an increase in HHI of 100 to better reflect both the law and the risks of competitive harm and have therefore returned to those thresholds here."[22] In other words, the Agencies prefer the 1982 definition to the 2010 definition, but do not explain why or offer evidence that the 1982 definition led to better outcomes. Any particular threshold involves some judgment, but some explanation or evidence supporting the change to a stricter standard seems appropriate.

The Agencies justify the new market share criteria, meanwhile, with a single cite: the *1963 Philadelphia National Bank* case,[23] which was argued and decided decades before research on the question existed.

The practical implication of these changes would be to increase the number of transactions that would be presumptively anticompetitive. The addition of the 30% threshold may increase that number in anomalous ways. For example, the new 30% threshold has a larger effect as the

[22] *2023 Draft Guidelines* at 7, n.29.
[23] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963).

number of non-merging competitors increases. That is, the share-based threshold is more easily triggered than the HHI threshold in less concentrated markets with more independent competitors.[24]

The Draft Guidelines extend the application of the 30 percent market share threshold to mergers that "may entrench or extend a dominant position" (Guideline 7).[25] This Guideline applies to "mergers that are neither strictly horizontal nor vertical," which suggests it applies to both. To identify a firm with a dominant position, the Agencies look at whether the firm has the ability to (i) raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but for that dominance, (ii) possesses at least 30 percent market share.[26] Determining whether the first set of conditions is satisfied is difficult, because normally we can assume a firm is already setting price and quality at the profit-maximizing level, regardless of how much market power it has.

In describing activities that would entrench a dominant position,[27] the Guidelines list activities that normally characterize a firm engaging in vigorous competition and trying to improve its products for the benefit of its customers. For example, a vertical merger that enables a firm to improve its offerings or lower its costs presumably would be proscribed because it might "deprive rivals of scale economies or network effects."

The practical implication of this Guideline is likely to make it exceedingly difficult for the larger platforms from making any acquisitions at all. This would adversely affect innovation in several ways. Most importantly, it could discourage startup investing by making the major exit strategey for venture-funded startups—acquisition[28]—less likely. This is particularly important in tech, including biotech, where a smaller firm may discover a product but the resources of a bigger company are needed to develop and market it. Additionally, it removes one mechanism the "dominant" platform can use to improve its services.

[24] "New Concentration Thresholds in the Draft 2023 US Merger Guidelines," *CRA Insights*, July 21, 2023, https://www.crai.com/insights-events/publications/new-concentration-thresholds-in-the-draft-2023-merger-guidelines/

[25] *2023 Draft Guidelines* at 18.

[26] *2023 Draft Guidelines* at 19.

[27] *2023 Draft Guidel*ines at 19-20.

[28] http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf

IV. The Agencies Demand Rigorous Evidence From Firms in Rebuttals, but Do Not Require it of Themselves

The Draft Guidelines state that when evaluating claims of procompetitive efficiencies, the Agencies "will not credit vague or speculative claims, nor will they credit benefits outside the relevant market."[29] The Draft Guidelines explain that among the arguments merging parties must show to prove procompetitive benefits include the following:

> These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.[30]

The rigor the Agencies demand when evaluating benefits is admirable. It makes sense that a party should show independent "reliable methodology and evidence" when arguing its case. The Agencies believe this so strongly that if those do not exist, "the Agencies are unable to credit those efficiencies." While the Agencies require merging parties to show rigorous evidence, they do not seem to hold themselves and their concerns to a similar standard, as evidenced by the lack of evidence and analysis presented in the Draft Guidelines.

In some cases, the Agencies hold themselves to a different standard even for similar issues. For example, the Agencies create very specific criteria merging parties must present to argue in a rebuttal that firms represent potential entry. They note that becoming a competitor can be difficult: "Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Additionally, when reviewing rebuttal evidence regarding entry, "the Agencies consider whether a current market participant could reasonably consider one of the merging companies to be a potential entrant and whether that potential entrant has a likely influence on existing competition."[31] Further, "Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient."[32]

However, even while minimizing the chances a firm might become a competitor when merging parties make that claim, the Agencies apply a much looser test to determine whether a

[29] *2023 Draft Guidelines at 33*.
[30] *2023 Draft Guidelines at 34*.
[31] *2023 Draft Guidelines* at 31.
[32] *2023 Draft Guidelines* at 32.

firm might be a potential competitor when considering acquisitions, allowing even "subjective evidence." In those cases,

> The Agencies' starting point for assessment of a reasonable probability of entry is objective evidence regarding the firm's available feasible means of entry, including its capabilities and incentives. Relevant objective evidence can include, for example, evidence that the firm has sufficient size and resources to enter; evidence of any advantages that would make the firm well-situated to enter; evidence that the firm has successfully expanded into other markets in the past or already participates in adjacent or related markets; evidence that the firm has an incentive to enter; or evidence that industry participants recognize the company as a potential entrant. This analysis is not limited to whether the company could enter with its pre-merger production facilities, but also considers overall capability, which can include the ability to expand or add to its capabilities on its own or in collaboration with someone other than the acquisition target.
>
> Subjective evidence that the company considered entering absent the merger can also indicate a reasonable probability that the company would have entered without the merger. Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable.[33]

In short, the Draft Guidelines imply that a wide range of firms might be considered potential entrants when reviewing an acquisition, but only a small, well-defined set of firms can be considered potential entrants when reviewing rebuttal evidence.

Requiring rigorous evidence is the proper approach. It should be applied to all aspects of merger review, not just to arguments against the Agencies' claims.

V. Conclusion

The Agencies intend the 2023 Draft Guidelines to update and combine the 2010 and 2020 Horizontal and Vertical Merger Guidelines into a single set of merger guidelines. The Draft Guidelines focus on competitors and a number of other market participants in addition to consumer welfare, but offer no guidance on how the Agencies will weigh competing interests. They give the Agencies far more leeway in how to determine whether a proposed merger is anticompetitive, making it more difficult for parties to know how a merger will be judged.

The Draft Guidelines include legal citations, but ignore the economics literature. This omission is important because unlike the legal literature, the economics literature evaluates the effects of competition and merger enforcement. The Agencies should update the Draft Guidelines to address the lack of evidence and allow the literature to guide their policymaking rather than looking only for research that supports the views expressed in the Draft.

[33] *2023 Draft Guidelines* at 11, 12.