

An Overview of Market Definition in the 2023 Merger Guidelines

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On December 18, 2023 the Federal Trade Commission and Department of Justice (collectively, the Agencies) released the 2023 Merger Guidelines.¹ The new guidelines are a modification of the draft Merger Guidelines published in July 2023 and replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. A previous Secretariat client alert described changes in the Agencies' approach to market definition that were contemplated in the draft Merger Guidelines. That previous Note is available here: <https://secretariat-intl.com/insights/an-overview-of-market-definition-in-the-draft-merger-guidelines/>

This note provides an update to our previous discussion. While the details of the hypothetical monopolist test have been moved out of an appendix and into the body of the document, the approach to market definition changed very little between the July 2023 draft and the final versions. Thus, our earlier Note's analysis holds as much for the final Merger Guidelines as it did for the July 2023 draft Merger Guidelines. We will not repeat all that we said in that earlier Note, so for readers interested in those details we recommend our previous Note. Here we will only touch on the most significant points.

Broadly speaking, the new Merger Guidelines allow more leeway in how the Agencies can define relevant antitrust markets.² In a discussion piece, Susan Athey and Aviv Nevo (respectively, the Chief Economist of the Antitrust Division and the Director of the Federal Trade Commission's Bureau of Economics), state that this "gives the Agencies the option to focus on the loss of competition between the parties rather than fight over how narrowly a market could be properly defined."³ Aviv Nevo explained in an FTC/DOJ workshop that the benefit of this approach is that in

cases where market definition is difficult, the new merger guidelines allow the Agencies to define a broad market and focus on the competitive effects.⁴ Nevertheless, in our experience, the agencies rarely challenge a horizontal merger where the shares in the claimed market do not meet the threshold for a presumptive concern. It is not clear to us that the 2023 Guidelines make merger challenges easier when mergers that fall below the relevant market share thresholds.

Our view, articulated in the previous Note, is that the added discretion over market definition is not necessarily an advantage for the Agencies or private plaintiffs, who bear the burden to substantiate their claimed markets.⁵ While we understand that in the 2023 Merger Guidelines the Agencies seek to argue that there is not necessarily a unique antitrust market for a particular case, in antitrust cases courts commonly view market definition as one of the primary areas of dispute. As it is well established in the case law, that view will be slow to change. Less specificity in the 2023 Merger Guidelines might increase the scope for dispute potentially making it harder for plaintiffs to establish that their market definition is correct.

More specifically, the new Merger Guidelines no longer include the *smallest market* and *circle principles*. The smallest market principle (described in the 2010 Horizontal Merger Guidelines §4.1.1) allowed practitioners to distinguish among several potentially valid markets and identify a relevant antitrust market by establishing that it should be no bigger than necessary to satisfy the test. Removing the smallest market principle potentially opens the door to broader markets.

The *circle principle* holds that for any two products (A and B) in an antitrust market, other products should also be included in the market if they are closer substitutes to A than B is to A. In contrast to the potential effect from removing the *smallest market principle*, removing the *circle principle* potentially opens the door to narrower market definitions by excluding some products that would have otherwise been included in the market.

The removal of both principles takes away some of the specificity that had been previously included. Other

changes to the Agencies approach to market definition in the 2023 Merger Guidelines include the addition of One-Stop markets and markets involving bundled goods as potentially relevant antitrust markets. While such markets were sometimes defined in practice, it is not clear to us how their inclusion in the Guidelines will affect merger enforcement going forward.

Comments and questions may be sent to Keith Waehrer, Managing Director, at kwaherer@secretariat-intl.com

1. See, U.S. Department of Justice & Federal Trade Commission, Merger Guidelines, (2023) (henceforth Merger Guidelines), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf; FEDERAL TRADE COMMISSION, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines, December 18, 2023, available at <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>.

2. The new Merger Guidelines also introduced the concept of a small but significant and non-transitory increase in price or other worsening of terms (“SSNIPT”). Merger Guidelines *supra* note 1, §4.3.A. It replaces the small but significant and non-transitory increase in price (“SSNIP”) from previous guidelines that was used to describe the change in price used in the hypothetical monopolist test. While perhaps not explicit in previous guidelines, we believe it was well understood by antitrust economists and lawyers that, even under previous guidelines, one could perform the hypothetical monopolist test by adjusting the non-price terms of trade if the situation warranted it. Thus, it is not clear to us that this change will have much of a practical effect on the implementation of the hypothetical monopolist test.

3. See, Susan Athey & Aviv Nevo, *DOJ and FTC Chief Economists Explain the Changes to the 2023 Merger Guidelines*, PROMARKET, December 19, 2023, available at <https://www.promarket.org/2023/12/19/doj-and-ftc-chief-economists-explain-the-changes-to-the-2023-merger-guidelines/>

4. See, DOJ/FTC 2023 Draft Merger Guidelines Workshop, September 5, 2023. Video available at <https://www.ftc.gov/media/draft-merger-guidelines-workshop-september-5-2023>

5. The burden of proof is closely tied to the ability to infer loss of competition from evidence and facts by using analytical Tools, such as probability and statistics. See, *for example*, Merger Guidelines *supra* note 1, §1 & ft. 7.

6. See, *for example*, Merger Guidelines *supra* note 1, §4.3. “Market definition ensures that relevant antitrust markets are sufficiently broad, but it does not always lead to a single relevant market.”