

**ANTITRUST LAW IN PERSPECTIVE:
CASES CONCEPTS AND PROBLEMS IN COMPETITION POLICY (4th ed. 2022)
Supplemental Teacher’s Update (January 2024)**

Dear Colleagues,

This letter provides an informal and brief Supplement to our 2023 Teachers Update about the 2023 merger guidelines (“2023 MGs”), which were issued jointly by the Department of Justice and the Federal Trade Commission in December 2023. It is intended primarily for teachers using Gavil et al., *Antitrust Law in Perspective* (4th ed. 2022) during Spring 2024.

The original authorship team (Gavil, Kovacic & Baker) is preparing a fifth edition of the casebook. We hope the new edition will be available to use as early as Fall 2024. We anticipate that the fifth edition will revise the merger chapter (Chapter 5) to address the 2023 merger guidelines and the most recent court decisions in an integrated way.

This Supplemental Update sketches a rough mapping between the current casebook discussion and the new guidelines. It also identifies some important aspects of the new guidelines, particularly where they differ from earlier guidelines that were the basis for the discussion in the fourth edition.

All page references below are to the casebook. All section number references are to the 2023 MGs.

What has been superseded?

The 2010 guidelines (p. 738) covered horizontal mergers only. The enforcement agencies issued vertical merger guidelines in 2020 (p. 880). Those guidelines were withdrawn by the FTC in 2021 but remained in place at the Justice Department. Both the 2010 and 2020 guidelines were replaced by the 2023 MGs, which cover all mergers in a single document for the first time since 1968. They also depart from the traditional reliance on labels such as “horizontal,” “vertical,” and “conglomerate,” as noted below. Instead, they are organized around theories of competitive harm that could result from any merger, regardless of its structural type. They also recognize that a given merger might raise concerns under more than a single theory/Guideline.

More connection to litigation and the case law

For the most part, prior guidelines set forth an economically oriented analytical framework associated with the government’s internal decision process, with limited references to the allocation of burdens between the government and the merging firms. The 2023 MGs continue to emphasize economic analysis. The second paragraph explicates the statutory concern with harm to competition in economic terms, relating it to the exercise of market power (§ 1).

The 2023 MGs differ from their predecessors, however, because they are more explicitly framed around the government’s prima facie case (§ 2) and the merging firms’ rebuttal case (§ 3). Those labels connect the various analyses in the MGs to the allocation of burdens of production

and persuasion in the case law, particularly in the D.C. Circuit decisions in *Baker Hughes* (p. 711) and *Heinz* (pp. 722-23). (See also the discussion of the artificiality of this framework on p. 727). The 2023 MGs also diverge from their predecessors by citing legal precedent throughout.

Advocates of these shifts toward a more legal-oriented document say they will help to make the MGs more persuasive to judges by explaining their connection to the case law. Critics say that this shift may reduce the credibility of the MGs with judges because they rely too much on mid-twentieth century Supreme Court precedents that may formally control but have arguably been eroded by more recent merger decisions by lower courts and non-merger decisions by the Supreme Court (pp. 707-710). The references to the case law may raise the salience of decisions on which the enforcement agencies wish to rely, but they may also become a source of distraction, as merging parties and the government spar over the cases included (or not included) and their proper interpretation.

Presumptions based on concentration

The 2023 MGs retain the use of the Herfindahl-Hirschman Index of concentration first introduced in 1982. They indicate that a merger that increases the HHI above 1800 (a “highly concentrated” market) that also increases the HHI by more than 100 points is “presumed” to harm competition (§ 2.1). These thresholds are lower than the corresponding thresholds in the 2010 guidelines and return the thresholds at which competitive harm is presumed to those employed for horizontal mergers in the 1992 and 1997 guidelines.

The 2023 MGs add that a merger that creates a firm with a share in excess of 30% is presumed harmful if the HHI increases by more than 100 points (§ 1). It is unlikely that a merger that creates a firm with a share in excess of 30% will generate a post-merger HHI less than 1800. That would be possible if the pre-merger market is fragmented, in which case the MGs could be understood as presuming competitive harm from a merger that involves the leading firm (when its post-merger share is greater than 30%) and a smaller firm (including one with less than a 5% share of the same market).

A market share threshold is also used in the 2023 MGs to establish what amounts to a presumption (though the term is not used) that the merged firm can weaken or exclude rivals by limiting their access to a related product, such as a vertically-related or complementary product (§ 5). In particular, if the merged firm accounts for a share greater than 50% in the related product, the Agencies will generally “infer” that it has or is approaching monopoly power in that product (§ 2.5.A.2 n. 30). If, in addition, the related product is competitively significant, that market share is termed a “sufficient basis” for demonstrating that rivals that rely on the related product do not have adequate substitutes, so the merged firm has the ability to weaken or exclude them by limiting their access to the related product (§ 2.5.A.2).

Concordance and terminology

In their overview (Section 1), the 2023 MGs say that Guidelines 1-6 are alternative ways of establishing the government’s prima facie case that the competitive effect of a merger “may be ... substantially to lessen competition, or to tend to create a monopoly”, and Guidelines 7-11

explain how to apply those frameworks in specific settings. These eleven guidelines are set forth in Section 2. Section 3 discusses possible rebuttals, and Section 4 discusses various analytical, economic, and evidentiary tools. Overall, the 2023 MGs place greater emphasis on the incipency language of Section 7 of the Clayton Act and the concept of “risk” of competitive harm than their predecessors.

The table below shows where various topics in the casebook appear in the 2023 MGs, and vice versa. It also identifies some important changes in terminology. The table provides a high-level list of similarities, differences, and terminology changes, not an exhaustive one. It can be used to facilitate reading assignments and class discussion.

Casebook (and Prior Guidelines)	Casebook pages	2023 Merger Guidelines	2023 Merger Guidelines sections
Horizontal merger		Term not used, though the concept is implicit in Guidelines 1 and 2. (Horizontal mergers may also often be evaluated using Guidelines 3, 6, 7, 8 and 10.)	
Vertical merger		Term largely not used, though vertical mergers will often be evaluated using Guideline 5.	“Vertical relationships” and “vertical integration” are mentioned occasionally
Conglomerate merger		Term not used, though conglomerate mergers (especially those involving potential rivals) may be evaluated using Guidelines 4, 6, 8 and 11.	
Structural presumption in horizontal merger analysis	688-737 (case law)	Presumption of illegality from significantly increasing concentration in a highly concentrated market (Guideline 1)	§ 2.1
Unilateral competitive effects of horizontal merger	824-42	Mergers that eliminate substantial competition between firms (Guideline 2)	§ 2.2; much of § 4.2 is also relevant to this issue
Coordinated competitive effects of horizontal merger	803-24	Mergers that increase the risk of coordination (Guideline 3)	§2.3

Exclusionary effects of vertical mergers	881-906 (includes some discussion of coordinated effects of vertical merger)	Mergers that create a firm that may limit access to products or services that its rivals use to compete (Guideline 5)	§2.5
Elimination of potential competition	906-917	Elimination of a potential entrant (Guideline 4)	§ 2.4
Not discussed in Chapter 5, except insofar as viewed as an exclusionary effect of vertical merger or elimination of potential competition	Related to casebook discussion of monopolization in Chapter 4	Entrenchment or extension of a dominant position (Guideline 6)	§ 2.6
Not discussed, except in the context of 1960s case law	690-701 (horizontal mergers) 875-880 (vertical mergers)	Trend toward consolidation (Guideline 7)	§2.7
Not discussed explicitly	Related to casebook discussion of monopolization in Chapter 4 (667-68)	Series of multiple acquisitions (Guideline 8)	§2.8
Not discussed explicitly	Related to the Sidebar on The Economics of Two-Sided Platforms with Network Effects in Chapter 6 (p. 1128)	Merger involving a multi-sided platform (Guideline 9)	§2.9
Merger that enhances buyer market power	799-803	Merger between competing buyers that lessens competition for workers, creators, suppliers, or other service providers (Guideline 10)	§2.10
Discussed with reference to acquisitions by financial investors and private equity firms	918-19	Partial ownership or minority interests (Guideline 11)	§2.11

Failing firms	869-70	Failing firms	§3.1
Supply substitution and entry	847-58 (with repositioning discussed in the context of unilateral competitive effects at pp. 832 & 857)	Entry and repositioning	§3.2
Efficiencies	858-69	Procompetitive efficiencies	§3.3
Buyer power (as a defense)	719-720	Not explicitly discussed	
Market definition	745-786	Market definition	§4.3
Identifying market participants and measuring market concentration	790-797	Calculating market shares and concentration	§4.4

We hope you find these initial observations about the 2023 MGs helpful as you teach them—and that you will find the more fulsome treatment we plan to provide in the next edition of our casebook even more useful.

Andy, Bill, and Jon

Washington, D.C.

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