

DOJ and FTC release final merger guidelines

December 20, 2023 | Client Update | 7-minute read

On December 18, 2023, the Department of Justice and the Federal Trade Commission issued the final version of their revised merger guidelines, which include modest changes from the agencies' July 2023 draft guidelines. The changes include a softening of the language on structural presumptions with respect to vertical mergers and dominant firms and a more prominent acknowledgement of the role of rebuttal arguments and evidence of efficiencies in the agencies' analyses of competitive harm.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Arthur J. Burke

+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

Ronan P. Harty

+1 212 450 4870
ronan.harty@davispolk.com

Nathan Kiratzis

+1 212 450 4157
nathan.kiratzis@davispolk.com

Anna M. Kozlowski

+1 212 450 3327
anna.kozlowski@davispolk.com

Christopher Lynch

+1 212 450 4034
christopher.lynch@davispolk.com

Gregory S. Morrison

+1 212 450 3455
gregory.morrison@davispolk.com

Suzanne Munck af Rosenschold

+1 202 962 7146
suzanne.munck@davispolk.com

Howard Shelanski

+1 202 962 7060
howard.shelanski@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

¹ Merger Guidelines, DOJ and FTC (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

Summary of key changes

Guideline 3: Mergers can violate the law when they increase the risk of coordination.

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.

Draft Guideline 6 was deleted, however key substance was moved elsewhere.

Final Guideline 6: Mergers can violate the law when they entrench or extend a dominant position.

Draft Guideline 13 was deleted, however its substance remains elsewhere.

Section 3: Rebuttal evidence showing that no substantial lessening of competition is threatened by the merger.

Conclusion and practical implications

² For an in-depth analysis of the Guidelines, see *DOJ and FTC Release Draft Merger Guidelines*, Davis Polk & Wardwell LLP (July 21, 2023), <https://www.davispolk.com/insights/client-update/doj-and-ftc-release-draft-merger-guidelines>.

Summary of key changes

Guideline 3: Mergers can violate the law when they increase the risk of coordination.

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.

Draft Guideline 6 was deleted, however key substance was moved elsewhere.

Final Guideline 6: Mergers can violate the law when they entrench or extend a dominant position.

Draft Guideline 13 was deleted, however its substance remains elsewhere.

Section 3: Rebuttal evidence showing that no substantial lessening of competition is threatened by the merger.

Conclusion and practical implications

³ *Id.*

Summary of key changes

Guideline 3: Mergers can violate the law when they increase the risk of coordination.

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.

Draft Guideline 6 was deleted, however key substance was moved elsewhere.

Final Guideline 6: Mergers can violate the law when they entrench or extend a dominant position.

Draft Guideline 13 was deleted, however its substance remains elsewhere.

Section 3: Rebuttal evidence showing that no substantial lessening of competition is threatened by the merger.

Conclusion and practical implications