

# An Overview of Market Definition in the Draft Merger Guidelines

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The Horizontal Merger Guidelines issued by the US Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) have been an important source of guidance on the Agencies' approach to merger enforcement. In our practice as economic experts in antitrust cases generally, as well as in merger cases specifically, the Horizontal Merger Guidelines have also been a cited authority for plaintiffs, defendants, and courts on a variety of issues, including market definition. Therefore, previous merger guidelines have been an important source of information for antitrust practitioners beyond their stated purpose.

On July 19, 2023, the FTC and DOJ released a draft version of the new Merger Guidelines for public comment. The new Guidelines, once approved, are intended to update and replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The new draft represents a significant change from those earlier guidelines. For example, the new draft lowers the HHI thresholds under which a horizontal merger would be presumed to substantially lessen competition, returning to its 1992 benchmark, as well as adds a market-share threshold of 30 percent for the newly merged firm. The new draft also introduces a number of presumptions not present in previous guidelines. For vertical mergers, for example, a share above 50 percent in the market for what might be withheld from competitors creates a presumption that the merger may lead to a substantial lessening of competition.

This note is not meant to provide commentary on the Draft Guidelines, nor is it meant to provide an exhaustive description of how Draft Guidelines differ from previous iterations. Many similar notes

focus on the legal status of various theories of harm proposed in the Draft Guidelines. Instead, we focus on market definition in the Draft Guidelines where we as economists can perhaps provide a unique perspective.

As we describe below, the Draft Guidelines allow more leeway in how antitrust markets are defined. While more flexibility for the Agencies might seem to be an advantage, that is not necessarily the case. The less specific the Guidelines are about how to approach market definition, the more latitude there is for argument over the right approach. The lack of specificity can also cause issues for those seeking an authority to support a particular approach. The 2010 Horizontal Merger Guidelines are often cited in support of a market definition in a wide range of antitrust cases, even those not involving mergers. Given that the burden of proof usually lies with the plaintiff, making the Guidelines less proscriptive along these lines could disadvantage plaintiffs in privately litigated cases.

While the 2010 Horizontal Merger Guidelines focused on the hypothetical monopolist test, the Draft Guidelines describe four "tools to demonstrate that a market is a relevant antitrust market" with the last of those being the hypothetical monopolist test. The first two tools involve inferring the boundaries of a market based on evidence of direct competition between the merging firms or the exercise of market power. It is not clear to us from the description how one would use those approaches to define the boundaries of the market with sufficient specificity to calculate market shares. While evidence relating to direct competition and market power is sometimes used in the context of a hypothetical monopolist test, the

suggestion that these on their own would be sufficient to define a market is a change from past guidelines.

The third tool described is the “practical indicia” of the boundaries of a market often referred to as the Brown Shoe factors. In our experience these factors are often part of the evidence that the Agencies use to support market definition, but these were largely absent from the 2010 Horizontal Merger Guidelines.

The fourth and last tool, as previously mentioned, is the hypothetical monopolist test. While somewhat similar, the details of the test described in the Draft Guidelines differ in important ways from the test as described in the 2010 Horizontal Merger Guidelines. Generally, the Draft Guidelines are less specific about how the test should be performed, which means that a larger number of different market definitions could be consistent with it.

For example, not present in the Draft Guidelines’ description of the hypothetical monopolist test is the *smallest market principle*. The *smallest market principle* (described in 2010 Horizontal Merger Guidelines §4.1.1) would allow 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. It is not clear to us what the practical implication would be from this change other than it would seem to make it easier to argue for broader markets.

Another notable absence from the draft Guidelines is the circle principle. The basic idea of the circle principle is 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. Section 4.1.1 of the 2010 Horizontal Merger Guidelines states:

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product.

The removal of the circle principle may lead to a narrower market definition by excluding some products that would have otherwise been included in the market under the 2010 Horizontal Merger Guidelines.

New in the Draft Guidelines on market definition are subsections describing Bundled Product Markets and One-Stop Shops in Markets. The 2010 Horizontal Merger Guidelines could be read to imply that only products that were substitutes could be included in an antitrust market. The new Bundled Product Markets section makes clear that products that may not be strictly substitutable themselves but tend to be “bundled” or sold together can be included in the same antitrust market. This was an issue in the recent ASSA ABLOY merger litigation. While the case was ultimately settled, one of the issues was whether different types of locks used in apartment buildings, even if not specifically substitutable, should be included in the same market because they were sold together.

Similarly, the One-Stop Shops in Markets section of the Draft Guidelines provides the Agencies broader discretion to define markets to cover suppliers who offer a range of products in a single market, even if there exist other suppliers who only offer a narrow range of products. The example given in the Draft Guidelines is grocery stores versus specialty shops like butchers, bakers, and green grocers.

The deadline for public comment on the Draft Guidelines is September 18, 2023. As past versions of the Horizontal Merger Guidelines have been important sources for antitrust practitioners working in a variety of areas, the proposed changes in the market definition section of the Draft Guidelines could have important consequences beyond merger enforcement.

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