

# New Merger Guidelines and Beyond: U.S. Antitrust Update and Practical Perspectives

April 2024



**Brian J. Boyle**  
Partner



**Leonor Velazquez  
Davila**  
Associate Director  
Ethics and Legal  
Compliance



**Kevin Berggren**  
Senior Director  
Legal Counsel



# Agenda

- What is Antitrust?
- Hot Topics and Practical Perspectives
  - Merger Reforms
    - 2023 Merger Guidelines
    - Proposed HSR Rule Changes
    - M&A Safe Harbor
- Labor Markets in Focus
- Information Exchanges and Unlawful Agreements

# What is Antitrust?



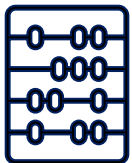
Maintain fair prices



Encourage innovation



Promote quality



Market efficiency



Fines and damages



For individuals, imprisonment







Reputational damage



Burdensome injunctions

# US Antitrust Enforcement

Antitrust violations can result in expensive **litigation**, **fin**es, **damages**, and **prison sentences**

	 <b>FTC</b>	 <b>DOJ</b>	 <b>States</b>	 <b>Private Parties</b>
Civil / Criminal	Civil	Civil Criminal	Civil (most states) Criminal (a few)	Civil
Conduct	Anticompetitive/ Exclusionary Conduct (Tying, Boycotts, Predatory Pricing)  Mergers	Anticompetitive/ Exclusionary Conduct Mergers  Price Fixing, Bid Rigging, Market Allocation	Anticompetitive/ Exclusionary Conduct Mergers  Price Fixing, Bid Rigging, Market Allocation	Anticompetitive/ Exclusionary Conduct Mergers (rarely)  Price Fixing, Bid Rigging, Market Allocation
Consequences	Injunctions Civil Penalties	Injunctions Civil Penalties Criminal Penalties Jail Time	Injunctions Civil Penalties Criminal Penalties (a few) Jail Time (very rare)	Injunctions Treble (3x) Damages

# U.S. Antitrust Laws

Sherman Act  
§1 – Agreements  
§2 – Monopoly

FTC Act

Clayton Act

Hart-Scott-Rodino  
Act

Robinson Patman  
Act

State Laws

# Antitrust Hot Topics

# 2023 Merger Guidelines

## What Happened?

- FTC and DOJ issued proposed first revamp of the Merger Guidelines in over 40 years on December 18, 2023
- What are the Merger Guidelines?
  - Policy statement issued jointly by the Agencies - reflect the agencies' approach to analyzing the competitive effects of transactions
  - Guidelines are not legally binding, but historically have been influential with courts
  - 2023 Guidelines illustrate eleven principles guiding merger control enforcement actions in the U.S.

## Why is this important?

- The Merger Guidelines consolidate an aggressive enforcement agenda and affirm the Agencies' intent to challenge a broader spectrum of mergers
- Proposed Mergers are likely to undergo intense scrutiny and longer reviews
- Merging parties are likely to face a broader range of issues in the review process
- Agencies will continue to scrutinize proposed remedies, especially purely structural (divestiture) remedies
- Early planning and careful preparation are key to a successful outcome



# 2023 Merger Guidelines

## Broadly applicable Guidelines

- Mergers raise a rebuttable “presumption of illegality” when they increase concentration in an already “concentrated” market—but the threshold for a “concentrated” market is materially lower
- Lower market concentration thresholds create more aggressive structural presumptions of anticompetitive harm
  - A merger may be at risk if it results in a market share of 30% or more or an HHI of 1800 or more
- Mergers can also “violate the law” if they:
  - Eliminate substantial competition between firms
  - Increase the risk of coordination
  - Eliminate potential or nascent competitors
  - Create a firm that may limit access to products or services that rivals use to compete
  - Entrench or extend a dominant position in a marketplace
  - Substantially lessen buyer competition for workers, suppliers, or other providers
  - Increase risk for serial acquisitions and other “trends toward consolidation”
- AI may be a focus of coordinated effects analyses in merger review

# Practical Implications

- Commercial implications of these changes?
- How to align expectations in your organization?
- Does this change the way in-house counsel should prepare for transactions?
- Does this change the role in-house or outside counsel should play?

# Proposed HSR Changes

## Significant proposed changes to HSR filing requirements

- U.S. will resemble E.U. process and be even more burdensome in some respects
- Much greater narrative component
  - Discussion of the strategic rationale for the deal; diagram of deal structure; detailed transaction timeline
  - Detailed competition analysis, including descriptions of horizontal overlaps between the merging parties and their vertical relationships
- More documents from more custodians
  - Expansion of Item 4 documents: Copies of drafts of documents (not just final or most-recent versions) prepared by and for officers, directors, and (new) deal team leads analyzing the transaction
- Employee information: Extensive information regarding the parties' employees, including a breakdown of those employees by occupational classification and geography
- **Takeaway:** more complex, lengthy, and costly process

# Practical Implications

- Timing considerations
- Internal training and document hygiene
- Drafting considerations

# M&A Safe Harbor

- DAG Lisa Monaco, October 4, 2023
- For the first time, a department-wide Safe Harbor Policy exists for voluntary self-disclosures made in the context of M&A transactions
  - Misconduct discovered at an acquired entity must be disclosed within six months from closing. Applies whether conduct was discovered pre- or post-acquisition.
  - Thereafter, companies have one year from closing to fully remediate (subject to reasonableness analysis).

*“Compliance should no longer be viewed as just a cost center for companies. Good corporate governance and effective compliance programs can shield companies from enormous financial risks and penalties.”*

# Practical Implications

- How should you think about antitrust compliance when integrating new acquisitions?

# Labor Markets in Focus

## No-Poach and Wage-Fixing

- DOJ Antitrust Guidance for HR Professionals (2016)
- DOJ struggled to secure convictions
  - Multiple acquittals in no-poach and wage fixing cases
- More No-Poach Prosecutions?
  - Dismissal of last filed case (Nov. 16)
  - DOJ: “We look forward to charging more no-poach and wage-fixing cases”
- Private litigation also remains a threat

# Labor Markets in Focus

## FTC's Proposed Non-Compete Ban

- Declares non-compete clauses an “unfair method of competition”
- Extends to “de facto noncompetes” like broad NDAs, contractual requirements to reimburse for training
- Applies to employees and other workers
- Applies to sales of businesses, other than substantial owners with at least 25% interest
- Implementation may be delayed by litigation



# Practical Implications

- What does the focus on labor market practices mean for antitrust compliance programs?
- How to manage the uncertainty that comes from changes like the proposed non-compete ban?

# Information Exchange

## **DOJ and FTC's 1996 Healthcare Policy Statement created a safety zone for exchanging competitively sensitive information**

- Survey managed by a third party
- Information more than three months old
- Five or more participants, and none constituting more than 25 percent of a statistic on a weighted basis, and
- Sufficiently aggregated to prevent recipients from identifying the source of any specific information on pricing.

## **Agencies sent mixed signals in 2023**

- DOJ withdrew 1996 Policy Statement
- Other policies reflecting the same principles, most notably the Competitor Collaboration Guidelines (2000) and FTC blog post (2014) remain in place

# Information Exchange

## **Antitrust Division leadership skepticism of old framework and concern over new technology**

- “exchanges facilitated by intermediaries can have the same anticompetitive effect as direct exchanges among competitors”
- “the distinctions between past and current or aggregated versus disaggregated data may be eroded” by “high-speed, complex algorithms.”

## **Litigation and enforcement focus on information exchange through intermediaries, including AI**

- Agricultural data
- Real estate leasing data
- Hotel rental data

# Practical Implications

- How do you approach the issue of artificial intelligence when thinking about compliance?

Thank you