

July 8, 2020

DOJ and FTC Issue New Vertical Merger Guidelines

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On June 30, 2020, the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (together, the “Agencies”) issued new [Vertical Merger Guidelines](#) (“Guidelines”).¹ These Guidelines mark the first time the Agencies have issued joint guidelines on vertical mergers, and replace the [DOJ’s 1984 Non-Horizontal Merger Guidelines](#). The new Guidelines follow the Agencies’ earlier release of Draft Vertical Merger Guidelines (“Draft Guidelines”) in January 2020 and provide important insight on how the Agencies assess the likely competitive impact of vertical mergers.²

Background and Process

Prior to 2017, antitrust challenges to vertical mergers were rare, as it was presumed that most vertical mergers were procompetitive. However, vertical mergers have come under increasing agency scrutiny in recent years, including DOJ’s unsuccessful 2017 challenge of AT&T’s proposed acquisition of Time Warner Inc. Publication of the Guidelines also comes amidst strong political pressure for increased scrutiny of merger activities, particularly during the current public health crisis. On June 18, 2020,³ several U.S. Senators expressed concerns that:

Going forward, the economic chaos caused by the pandemic may lead to profound structural changes in many industries and a sharp rebound in mergers and acquisitions activity, as cash-rich companies and investors seek to acquire struggling businesses and assets at bargain prices. Many of these transactions will be vertical mergers, and inevitably, some will raise significant antitrust issues. [...] We have serious concerns regarding the potential under-enforcement of section 7 of the Clayton Act against anticompetitive mergers, including anticompetitive vertical mergers.⁴

Two days later, the DOJ approved and the three Republican FTC Commissioners⁵ voted in favor of issuing the Guidelines, over the dissent of the two Democratic FTC Commissioners, each of whom voted no and issued a dissenting statement.⁶

Key Aspects of the Guidelines

The Guidelines seek to reflect, rather than change, current enforcement policies and practices by describing how the Agencies analyze a range of non-horizontal transactions, including “vertical” mergers (mergers that combine firms at different stages of the same supply chain), so-called “diagonal” mergers (combining firms or assets at different stages of

competing supply chains), and mergers involving firms that provide complementary products or services.

■ Theories of Competitive Harm

The Guidelines outline several theories of competitive harm that may result from vertical mergers, addressing both so-called unilateral effects as well as coordinated effects.

■ Unilateral Effects

The Guidelines generally describe two “common types” of unilateral anticompetitive effects that may arise from vertical mergers: (1) foreclosure and raising rivals’ costs, and (2) access to competitively sensitive information.

- **Foreclosure and Raising Rivals’ Costs:** Following a vertical merger, a merged firm may find it profitable to restrict or withhold access to one or more related products (e.g., by raising price, lowering service or quality, or outright refusing to supply) to its actual or potential rivals in the relevant market. The Guidelines explain that the effect of such conduct may be to weaken actual or potential rivals and thereby diminish competition. In assessing the likelihood of this type of competitive harm, the Guidelines focus on whether the merged firm would have both the *ability* and the *incentive* to engage in such a strategy.⁷
- **Access to competitively sensitive information:** Vertical mergers may also result in firms having access to sensitive business information about upstream or downstream rivals that they did not have pre-merger. Such knowledge may reduce competition in a number of ways, such as by leading the combined firm to act or react in a less competitive way to rivals’ conduct, or by impairing the competitive strength of rivals, who, for example, may choose not to do business with the combined entity in order to prevent the merged firm’s access to sensitive information, and may instead do business with higher-cost or less-preferred business partners.⁸

■ Coordinated Effects

The Guidelines also describe how vertical mergers may reduce competition through coordinated effects, i.e., by facilitating post-merger coordination among rivals. The non-exhaustive list of coordinated effects concerns described in the Guidelines are:

- **Eliminating or hindering a “maverick” firm:** A combined firm resulting from a vertical merger could act anticompetitively by restricting a so-called maverick firm’s access to a related product, thereby weakening a “maverick” firm that may have previously played (or been poised to play) an important competitive role in destabilizing the ability of firms in the market to profitably coordinate their competitive activities.
- **Additional coordinated effects:** Coordinated effects are possible in other ways, including by providing a firm with access to confidential information about its rivals, thereby facilitating “(a) reaching a tacit agreement among market participants, (b) detecting cheating on such an agreement, or (c) punishing cheating firms.”⁹

■ The Concept of “Related Products”

The Guidelines explain that when the Agencies identify a potential competitive concern in a relevant market, “they will also specify one or more related products.”¹⁰ A related product is defined as “a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market.”¹¹ Such related products could be inputs, means of distribution, access to a set of customers, or a complement. Notably, the Agencies chose to use the term “related product,” rather than “relevant product,” perhaps to avoid the burden of

proving a second relevant product market when pursuing litigation in opposition to a vertical transaction.

- **Potential Procompetitive Effects From Vertical Mergers**

In addition to describing the principal ways in which vertical mergers may harm competition, the Guidelines also address the other side of the ledger, by outlining at least two ways in which vertical mergers may benefit competition, namely through:

- **Elimination of Double Marginalization**

The Guidelines explain that “[d]ue to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm’s incurring lower costs for the upstream input than the downstream firm would have paid absent the merger.”¹² The Guidelines explain that this benefit results from the fact that the merged firm will have access to the upstream input at cost, whereas an independent downstream firm generally would pay a price that includes a profit margin for the input. By reducing the vertically-integrated firm’s costs, elimination of double marginalization often facilitates lower pricing in the downstream market. The Guidelines require that claims of elimination of double marginalization must be substantiated, and that such an effect must be merger-specific.¹³

- **Efficiencies**

The Agencies recognize that vertical mergers may generate efficiencies that benefit competition and consumers by combining complementary functions and assets at various points in a supply chain. The Guidelines indicate that such efficiency claims will be analyzed under the same approach outlined in the Horizontal Merger Guidelines.

- **Lack of Guidance Regarding Remedies**

The Guidelines do not address the critical question of how the Agencies will analyze potential remedies to problematic vertical transactions. This void is particularly notable in light of the fact that the Agencies’ approach to remedies in vertical mergers is somewhat less settled than with horizontal mergers. One possible explanation for the omission is that the Agencies may not currently be fully aligned in their approach to vertical merger remedies. Whereas the Agencies in the past have accepted behavioral or conduct remedies in a number of vertical mergers, DOJ recently has signaled some resistance to this approach, instead suggesting that structural remedies (generally divestitures) are the proper means to resolve problematic vertical mergers.¹⁴

Key Changes from the Draft Guidelines

The Guidelines include a number of changes from the Draft Guidelines, reflecting the Agencies’ consideration of public comments received, including the dissenting statements issued by the two Democratic Commissioners at the time the Draft Guidelines were issued. The most notable changes include:

- **Removal of the Market Share Safe Harbor**

The Draft Guidelines included a safe harbor for vertical mergers involving firms with market shares of less than 20 percent. This safe harbor was removed from the newly issued Guidelines. This is one of the more significant changes made to the final version, as this threshold was widely criticized when last proposed in January (some argued it was too low and would lead to the unnecessary scrutiny of mergers that are unlikely to lead to competitive harm, while others argued that having a safe harbor may allow potentially harmful mergers to be cleared without sufficient review).

■ Guidance on Transactions Unlikely to Warrant Close Scrutiny

Although no longer providing a market share “safe harbor,” the Guidelines do provide some examples of situations where a “merger would rarely warrant close scrutiny for its potential to lead to foreclosure or raising rivals’ costs.” These examples include situations where:¹⁵

- “rivals could readily switch purchases to alternatives to the related product, including self-supply, without any meaningful effect on the price, quality, or availability of products or services in the relevant market;”
- “the merged firm would not benefit from a reduction in actual or potential competition with users of the related product in the relevant market.”

■ Scope Broadened to Include Non-Vertical Mergers

The final Guidelines apply not only to vertical mergers, but also to other types of non-horizontal mergers, such as diagonal mergers and mergers involving producers of complementary products.¹⁶ This is notable as it may signal increased regulatory focus on certain categories of mergers that typically have not drawn significant antitrust scrutiny, such as mergers involving complementary products or services.

Dissenting Statements

In their dissenting statements, both Commissioners Chopra and Slaughter raise issues regarding the process for issuing the Guidelines as well as the substance of the Guidelines. In particular, Commissioner Chopra agrees with Commissioner Slaughter that “it was imprudent not to seek additional comment on this new iteration, which is drastically different from the original draft released for public comment.”¹⁷ The dissenting Commissioners also raise substantive concerns that the Guidelines are incomplete, over-emphasize the benefits of vertical mergers, and do not adequately treat the question of elimination of double-marginalization.¹⁸ They also contend that the Guidelines do not sufficiently (i) address the many ways vertical mergers can create barriers to entry, (ii) take into account “real-world facts and empirical data in line with modern market realities,” (iii) address labor competition issues, (iv) address concerns associated with private equity involvement and risk of regulatory evasion, and (v) define or provide metrics for non-price effects (e.g. innovation and quality).¹⁹

Key Takeaways

- The Guidelines are a useful step forward, providing additional transparency regarding how the Agencies evaluate vertical transactions. However, the theories of harm described in the Guidelines are highly fact specific and require a complex, merger-specific balancing of the potential competitive harm and procompetitive benefits of each transaction. Thus, it remains the case that early analysis of vertical merger issues by experienced counsel is necessary to fully assess the potential risks of a transaction and avoid surprises.
- The Guidelines reflect continued, and perhaps growing, interest by the Agencies in pursuing antitrust enforcement with respect to non-horizontal mergers, including not only vertical mergers, but also diagonal mergers, and mergers involving complementary products.
- The sharp divide at the FTC between Republican and Democrat Commissioners may signal a possible shift in future vertical merger enforcement policy, depending on the outcome of the November presidential election.

- ¹ U.S. Dep't of Justice & Fed. Trade Comm'n, *Vertical Merger Guidelines* (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.
- ² Fed. Trade Comm'n, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (June 30, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>.
- ³ The National Law Review, *Congressional Pressure Builds for Increased Antitrust Scrutiny of Vertical Mergers* (June 25, 2020), available at <https://www.natlawreview.com/article/congressional-pressure-builds-increased-antitrust-scrutiny-vertical-mergers>.
- ⁴ Letter from U.S. Senators A. Klobuchar, P. Leahy, R. Blumenthal, C. Booker, M. Hirono, J. Merkley, T. Baldwin, and E. Markey to Asst. Attorney General Delrahim and Chairman Simons from (June 18, 2020), available at https://www.klobuchar.senate.gov/public/_cache/files/5/e/5e9f9d2d-dac8-4dd2-9d56-474fa3bea515/1793D1AA9B818C127A8DAE9466D2CBC6.0618dojverticalmergerletter.pdf.
- ⁵ Statement of Chairman Joseph Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, *Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines* (June 30, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf.
- ⁶ Fed. Trade Comm'n, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (June 30, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>.
- ⁷ U.S. Dep't of Justice & Fed. Trade Comm'n, *Vertical Merger Guidelines* (June 30, 2020), pp. 4-10, available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.
- ⁸ *Id.* at 10.
- ⁹ *Id.*
- ¹⁰ *Id.* at 3.
- ¹¹ *Id.*
- ¹² *Id.* at 10.
- ¹³ *Id.* at 12.
- ¹⁴ Asst. Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar> ("As we reduce regulation across the government, I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.").
- ¹⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, *Vertical Merger Guidelines* (June 30, 2020), p. 5, available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.
- ¹⁶ *Id.* at 9.
- ¹⁷ Dissenting Statement of Commissioner Rohit Chopra, *Regarding the Publication of Vertical Merger Guidelines Commission* (June 30, 2020), p. 1, n.1, available at https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; see also Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In re FTC-DOJ Vertical Merger Guidelines Commission* (June 30, 2020), p. 1, available at https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.
- ¹⁸ Dissenting Statement of Commissioner Rohit Chopra, *Regarding the Publication of Vertical Merger Guidelines Commission* (June 30, 2020), pp. 1, 7, available at https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; see also Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In re FTC-DOJ Vertical Merger Guidelines Commission* (June 30, 2020), pp. 1-2, 4-7, available at https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.
- ¹⁹ Dissenting Statement of Commissioner Rohit Chopra, *Regarding the Publication of Vertical Merger Guidelines Commission* (June 30, 2020), pp. 1, 3-6, 8, available at https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; see also Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In re FTC-DOJ Vertical Merger Guidelines Commission* (June 30, 2020), p. 7, available at https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

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