FTC Confirms Vertical Mergers Remain a Priority Despite DOJ's Loss in AT&T/Time Warner Challenge

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Introduction

The U.S. antitrust agencies have struggled for decades to provide comprehensive guidance on the antitrust treatment of so-called vertical mergers—generally, mergers of two companies at different levels of the distribution chain. Recent developments suggest a new effort to articulate the legal and economic bases for the assessment of vertical mergers. While the specifics have not yet been articulated, it is anticipated that the guidance will address theories of unilateral and coordinated harm, the treatment of efficiencies, and the evaluation of whether remedies are sufficient to address competitive harms. It remains to be seen, however, whether these efforts will provide greater predictability and consistency in vertical merger enforcement.

Background

Before last year, the U.S. Department of Justice ("DOJ") had last litigated a vertical merger challenge in 1977—and it lost.[1] The DOJ last issued vertical merger guidelines in 1984.[2] Since then, vertical merger enforcement has mostly taken the form of settlements—consent decrees—where merging parties agree to behavioral limitations such as non-discrimination commitments or information firewalls between divisions. At least in part, this absence of litigation over vertical mergers was the result of scholarship suggesting that vertical mergers raise few competitive risks and have greater inherent efficiencies than horizontal mergers.

In 2017-18, however, the DOJ sought to block AT&T's vertical merger with Time Warner. After a widely publicized trial, the district court rejected the DOJ's claims and that decision was affirmed on appeal.[3] The DOJ's loss led some commentators to proclaim the case an outlier, inconsistent with general government enforcement priorities and the view that vertical deals pose few antitrust problems.

In the aftermath of the AT&T/Time Warner trial, the DOJ announced plans to issue new vertical merger guidelines.[4] At the time, the U.S. Federal Trade Commission ("FTC")—which has joint authority for U.S. antitrust enforcement—was silent on the issue of new guidelines.

FTC Developments

Last week, FTC Chairman Joe Simons confirmed that the agency is preparing a new guidance document on vertical transactions and is also working together with the DOJ to develop joint vertical merger guidelines. These developments are consistent with prior statements and actions by the FTC indicating

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[1] *United States v. Hammermill Paper Co.*, 429 F. Supp. 1271 (W.D. Pa. 1977).

[2] See Non-Horizontal Merger Guidelines (Jun. 14, 1984), **https://www.justice.gov/atr/page/file/1175141/download?ftag=MSF0951a18**.

[3] *United States v. AT&T Inc.,* 916 F.3d 1029 (D.C. Cir. 2019) affirming *United States v. AT&T Inc.,* 310 F. Supp. 3d 161 (D.D.C. 2018).

[4] See DOJ Vertical Merger Guidelines Called "Badly Out of Date", Law360 (Nov. 1, 2018) (recounting comments by AAG Delrahim at the INCOMPAS Show), **https://www.law360.com/articles/1098243/**.

that vertical mergers continue to be one of the agency's priorities. While the precise parameters of the guidance have not been defined at this point, it will be important for the business community, particularly in industries where acquisitions of upstream and downstream companies or assets are common, to monitor developments in this area.

Speaking at the annual International Antitrust Law and Policy Conference at Fordham University School of Law's Competition Law Institute on September 13, 2019, Chairman Simons confirmed that the guidance document the FTC is preparing on vertical mergers will be similar in design and concept to the 2006 Commentary on the Horizontal Merger Guidelines.[5] Simons said it is too early to say whether the FTC's joint effort with the DOJ to go beyond guidance and develop formal guidelines will be successful.

Simons stated that the "DOJ's case against AT&T/Time Warner exposed significant misconceptions about the government's interest in and willingness to challenge vertical mergers, and the extent to which any particular merger should have a presumption of legality." He said that the guidance the FTC is working on will help to explain the FTC's analytic framework for evaluating vertical mergers and make it clear that "anticompetitive vertical mergers are not unicorns." He went on to say that there should not be a presumption that all vertical mergers are benign. Vertical mergers can, in certain circumstances, be anticompetitive and are common enough that the FTC needs to "pay careful attention to look for and challenge them."

While Simons did not provide details regarding the new guidance, recent discussions may give some insight to the types of issues the guidance could address.

- During the second half of 2018, the FTC held a hearing to discuss renewed approaches to vertical mergers as part of its Hearings on Competition and Consumer Protection in the 21st Century.[6] There, some speakers argued for more aggressive agency scrutiny of vertical mergers and that new guidance should focus on well-established economic principles and be more streamlined than current practice. Others rejected the need for new guidelines.
- Bilal Sayyed, Director of the Office of Policy Planning at the FTC, recently discussed the agency's plan to update how it views vertical mergers while speaking at Georgetown University Law Center's 2019 Global Antitrust Enforcement Symposium. He mentioned that the guidance will likely include a discussion of theories of unilateral and coordinated harm, the treatment of efficiencies and the evaluation of whether remedies are sufficient to address competitive harms.
- Similarly, FTC Commissioner Christine Wilson, while skeptical of the need for new guidelines, stated that, if new vertical merger guidelines were issued, they should cover legal presumptions, prima facie evidence of anticompetitive harm, rebuttal evidence (including efficiencies), and remedies.[7]

Commentators have argued that a vertical deal may present issues when a downstream supplier acquires the only (or key) upstream supplier of an important input and where barriers to entry in the upstream market are high. They have suggested that a vertical deal may also raise antitrust concerns where the integrated firm gains access that it did not previously have to competitively sensitive business information

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[5] See Prepared Remarks of Chairman Joseph Simons, Fordham Speech on Hearings Output (Sept. 13, 2019), **https://www.ftc.gov/public-statements/2019/09/prepared-remarks-chairman-joseph-simons-46th-conference-international.**

[6] See Newsflash: FTC Hearings 5, 6, and 7 on Competition and Consumer Protection in the 21st Century (Nov. 20, 2018), **https://www.davispolk.com/files/2018-11-20_ftc_hearings_5_6_7_on_competition_and_consumer_protection.pdf**.

[7] See Christine Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go? (Feb. 1, 2019), **https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf**.

of an upstream or downstream rival and information walls are not considered to be a sufficient remedy. Others have argued that vertical integration offers the potential for a number of procompetitive benefits like the elimination of double mark-ups and other cost savings, distribution channel efficiencies, and product innovation.

It remains to be seen whether the agencies will succeed in developing a comprehensive set of new vertical merger guidelines. The long hiatus since the 1984 guidelines suggests that this will be a challenge.

Davis Polk will continue to monitor developments relating to vertical merger guidance as well as the FTC's and DOJ's joint efforts to develop vertical merger guidelines.

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