DOJ and FTC Release Draft Vertical Merger Guidelines: a Modest and Overdue Makeover

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On January 10, 2020, the U.S. Department of Justice and Federal Trade Commission released a long-awaited draft of new Vertical Merger Guidelines. The draft Guidelines are broadly consistent with positions the DOJ and FTC have articulated in recent enforcement actions and public pronouncements. For that reason, the draft may disappoint those who have advocated for more vigorous vertical merger enforcement. At the same time, however, the new Guidelines are open-ended enough to allow for the possibility of enhanced vertical enforcement, especially in a future Democratic administration.

The new Guidelines generally restate current DOJ and FTC positions and articulate familiar theories and principles, instead of staking out novel theories. It is important to note that guidelines issued by the DOJ and FTC do not have the force of law and are not binding on the courts, although courts have viewed past guidelines as influential policy statements.

Advocates for vigorous vertical merger enforcement will likely be disappointed that the draft Guidelines do not take a more assertive approach. Indeed, the two Democratic FTC Commissioners, Rohit Chopra and Rebecca Kelly Slaughter, abstained from joining the draft principally because it does not advocate for significantly greater vertical merger enforcement. But the issuance of new Guidelines does suggest that the DOJ and FTC continue to be focused on vertical merger enforcement despite the DOJ's failure to block the acquisition of Time Warner by AT&T in 2018.

The new Guidelines are a draft and the agencies have invited public comments on them. Nevertheless, the DOJ has immediately withdrawn its prior non-horizontal merger guidelines that dated back to 1984. It is notable that the 1984 Guidelines stated expressly that vertical mergers were *less likely* than horizontal mergers to raise competition concerns, a position that agency staff and courts have also expressed from time to time. The new Guidelines **do not** contain a similar statement. Instead, they are silent regarding the relative risks of horizontal and vertical mergers. This silence is open to multiple interpretations and will likely be the subject of comments filed with the agencies.

Discussion

The draft Guidelines set forth "analytical techniques, practices and enforcement policy" that the agencies will use to assess vertical mergers, although they do not claim to be comprehensive. Key aspects of the Guidelines include:

Soft "Safe Harbor" for Market Shares Below 20%: The draft Guidelines rely on market shares as a screen to identify vertical mergers that are unlikely to pose competitive concerns. The draft states that the DOJ and FTC are unlikely to challenge a vertical merger in situations where the merging parties have less than a 20% share of the upstream and downstream markets. The agencies retain the flexibility to challenge mergers with shares below those thresholds under circumstances that give rise to competitive concerns.

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Theories of Anticompetitive Harm: The draft Guidelines set forth several types of adverse competitive effects that may arise from vertical mergers. In the category of **unilateral effects**, the draft notes that a vertical merger may be anticompetitive if it results in weakening rivals of the merged firm by refusing to supply related products to a rival (known as **foreclosure**) or by **raising rivals' costs** (for instance, by raising prices for such products). The draft also explains that a vertical merger can be anticompetitive if the merged firm gains access to **competitively sensitive information** about rivals, which could discourage vigorous competition or discourage rivals from doing business with the merged firm. (In the past, the agencies typically addressed this issue by the creation of information "firewalls" where necessary.) Additionally, the draft notes that in some cases, a vertical merger may weaken competition by enabling or encouraging tacit coordination among competitors (known as **coordinated effects**).

Elimination of Double Marginalization and Other Efficiencies: The draft Guidelines also recognize that vertical mergers may generate efficiencies. A vertical merger may **eliminate double marginalization**—that is, the separate markup that a non-vertically integrated supplier charges to its customer. A merged firm may be able to make profitable price reductions that would not be profitable for a non-vertically integrated firm, to the benefit of both the merged firm and its end customers. A vertical merger may also permit the combined firm to **coordinate its combined assets** by streamlining production, inventory management, or distribution or by creating innovative products, generating efficiencies that would have been hard to achieve through arm's-length contracts.

No Discussion of Remedies: The draft Guidelines do not discuss remedies that the DOJ and FTC would consider appropriate to address anticompetitive aspects of a vertical merger. The agencies have sometimes sought behavioral remedies—such as firewalls and non-discrimination commitments—as a condition of deal approval. In recent years, however, some have criticized behavioral remedies, and the leadership of the DOJ Antitrust Division has expressed a preference for structural remedies rather than behavioral remedies. The draft Guidelines do not weigh in on this debate, which will continue to play out in agency decisions. Whether the final Guidelines will include any discussion of remedies remains to be seen and may depend on the nature and source of any comments. We believe it is unlikely that the final Guidelines will address remedy issues, however, because the agencies have typically preferred to address those questions in separate guidelines dedicated to the topic of remedies.

Practical Implications

The ultimate impact of the new Vertical Merger Guidelines will depend on the enforcement approach taken in practice by the DOJ and FTC to vertical mergers as well as adoption by the courts.

Today, there is a diversity of views about the competitive effects of vertical mergers and how vigorously the agencies should police such deals. This diversity is illustrated by the statements of the two Democratic FTC Commissioners, who abstained rather than voting in favor of the new draft. While they agreed that the old 1984 Guidelines should be replaced, they each issued statements criticizing the current draft Guidelines as not adequate to address the potential anticompetitive effects of vertical mergers. In contrast, Republican Commissioner Christine Wilson issued a concurring statement raising a number of questions that suggest ways in which the Guidelines might be modified to take a more lenient view of vertical mergers. For example, she asks whether vertical merger enforcement should be limited to oligopoly markets.

Because most merger investigations are resolved at the agency level, rather than challenged in court, the draft Guidelines provide important insight into how the antitrust agencies will assess vertical merger concerns. Ultimately, though, the impact of the new Guidelines will depend on the enforcement practices of the DOJ and FTC in assessing vertical mergers, as well as the views of the courts in litigated vertical mergers.

Time will tell whether it is significant that the Guidelines no longer expressly state that vertical mergers are less likely than horizontal mergers to raise competition concerns. The new Guidelines are sufficiently open-ended that they could allow for the possibility of enhanced vertical enforcement. Shifting political winds, such as a possible future Democratic administration, may also impact how the Guidelines are applied.

The DOJ and FTC have invited public comments on the draft Guidelines before they are finalized. Comments are due on February 11, 2020, with issuance of a final version expected before the end of the year.

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