

DOJ and FTC publish vertical merger guidelines

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On 30 June 2020 the Department of Justice (DOJ) and Federal Trade Commission (FTC) (the agencies, collectively) announced the publication of new vertical merger guidelines (the new vertical guidelines or the 2020 Vertical Merger Guidelines).¹ The new vertical guidelines describe how the agencies review vertical mergers to determine whether the deals pose potential competitive harm in violation of the antitrust laws.

Key takeaways are:

- The new vertical guidelines do not contain an explicit safe harbor for mergers that fall below a certain size threshold.
- The agencies' anticompetitive effects analysis focuses on foreclosure and raising rivals' costs, as well as access to competitively sensitive information.
- There is now one section on procompetitive effects that acknowledges that vertical mergers are often procompetitive, rather than separate sections on efficiencies and elimination of double marginalization (EDM).
- Dissents issued by Rebecca Kelly Slaughter and Rohit Chopra indicate the continuing split among FTC commissioners on the proper way to assess competitive harms.

The publication of the new vertical guidelines comes after the January 2020 release of draft vertical merger guidelines.² The DOJ and FTC reviewed 74 public comments from economists and members of the antitrust bar and held a public workshop in March 2020 to solicit additional feedback on the draft guidelines. The new vertical guidelines—which were approved by a 3-2 vote of FTC commissioners split across party lines—will replace the 1984 Non-Horizontal Merger Guidelines that have long been recognized as outdated.

In a press release announcing the publication of the new guidelines, Assistant Attorney General Makan Delrahim explained that they reflect the actual current state of practice at the agencies

¹ Department of Justice press release, Department of Justice and Federal Trade Commission Issue New Vertical Merger Guidelines (30 June 2020) available at <https://www.justice.gov/opa/pr/departments-justice-and-federal-trade-commission-issue-new-vertical-merger-guidelines>.

² Hogan Lovells, DOJ workshop on draft vertical merger guidelines: Panelists express widely divergent views (20 March 2020) available at <https://www.hoganlovells.com/en/publications/doj-workshop-on-draft-vertical-merger-guidelines-panelists-express-widely-divergent-views>.

and are intended to "give greater predictability and clarity to the business community, the bar, and enforcers" with respect to the agencies' analysis of vertical mergers.

Key areas of focus

The new vertical guidelines are intended to provide guidance with respect to how the agencies will review the proposed mergers of companies that operate at different levels of the same supply chain. According to the agencies, the new vertical guidelines were drafted with the intent of identifying and challenging competitively harmful mergers, while "avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace."³ The agencies have highlighted the following points of focus in the new guidelines:

- In assessing potential competitive harm of certain transactions, the agencies may evaluate the proposed merger under both the 2010 Horizontal Merger Guidelines⁴ and the 2020 Vertical Merger Guidelines.
- The new vertical guidelines apply to strictly vertical mergers and "diagonal" mergers and also identify vertical issues that can arise in mergers of complements.
- The agencies will specify one or more "related products"⁵ if a potential competitive concern is identified in a relevant market.
- The agencies will consider efficiencies resulting from the merger that may benefit competition, including EDM, streamlined production, inventory management or distribution, and increased innovation.

While the final vertical guidelines contain much of the same substance as the draft guidelines released by the agencies in January 2020, there are some departures. One point of disagreement that arose in the public comments and among panelists at the March 2020 workshop was whether the draft vertical guidelines should include a safe harbor for mergers that fall below a certain size threshold. The draft guidelines did not include an explicit safe harbor provision, but stated that the agencies were "unlikely" to challenge a vertical merger if the parties' share in the relevant market is less than 20 percent and the related product is used in less than 20 percent of the relevant market. The final vertical guidelines do not enumerate a specific market share resulting from a vertical merger that is likely to raise competitive concerns. Instead, the new guidelines note that while the agencies do not rely on thresholds "as screens for or indicators of competitive effects from vertical theories of harm," they will consider "high concentration in the relevant market [as potential] evidence about the likelihood, durability, or scope of anticompetitive effects in the relevant market."⁶

The final vertical guidelines also diverge from the draft guidelines with respect to how the agencies will consider EDM as a potential procompetitive benefit to a vertical merger. The draft vertical guidelines included a discussion of EDM in a separate section, rather than including it as one of a number of other cognizable efficiencies to be considered in a vertical merger analysis. The new vertical guidelines classify EDM as a potential procompetitive benefit to be considered

³ Department of Justice press release, Department of Justice and Federal Trade Commission Issue New Vertical Merger Guidelines (30 June 2020).

⁴ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (19 August 2010), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

⁵ 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 . . . [e.g.] an input, a means of distribution, access to a set of customers, or a complement." U.S. Department of Justice and Federal Trade Commission Vertical Merger Guidelines (2020) at 3.

⁶ *Id.* at 4.

as part of the agencies' cumulative vertical merger analysis, stating that EDM is "not a production, research and development, or procurement efficiency," but rather it "arises directly from the alignment of economic incentives between the merging firms." The new vertical guidelines state that while it is the duty of merging firms to "provide substantiation for claims that they will benefit from the elimination of double marginalization, the agencies may independently attempt to quantify its effect based on all available evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs."⁷

Dissents from Democratic FTC Commissioners Rohit Chopra and Rebecca Kelly Slaughter

Commissioners Chopra and Slaughter issued dissenting statements. Chopra's dissent contends that the final guidelines do not adequately address "the many ways that vertical transactions may suppress new entry or otherwise present barriers to entry."⁸ Chopra also criticizes the final guidelines for making "assumptions based on contested economic theories and ideology rather than historical, real-world facts and empirical data in line with modern market realities."⁹ Slaughter argues that the agencies should have allowed for a second public comment period to address the revisions made to the January 2020 draft guidelines. Slaughter also takes issue with what she perceives as the new guidelines' "failure to disavow the false assertion that vertical mergers are almost always procompetitive,"¹⁰ which she believes could lead to the perception that the agencies will view vertical mergers as likely to be procompetitive. Contributing to this concern, Slaughter criticizes the new vertical guidelines' emphasis on the benefits of vertical mergers, failure to identify merger characteristics that are most likely to be problematic, treatment of the EDM, and omission of important competition concerns including buy-side power, regulatory evasion, and remedies.

Conclusion

The new vertical guidelines provide a more nuanced understanding of how the agencies intend to evaluate the potential anticompetitive effects of vertical mergers. Parties considering such transactions should consult experienced antitrust counsel to determine how the new guidelines may affect the agencies' review of proposed vertical mergers.

⁷ *Id.* at 11.

⁸ Federal Trade Commission Dissenting Statement of Commissioner Rohit Chopra (30 June 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

⁹ *Id.*

¹⁰ Federal Trade Commission Dissenting Statement of Commissioner Rebecca Kelly Slaughter (30 June 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

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