DOJ and FTC Issue Final Revised Vertical Merger Guidelines

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On June 30, 2020, the U.S. Department of Justice and Federal Trade Commission released a final version of the agencies' updated Vertical Merger Guidelines. The updated Guidelines are broadly consistent with the draft Guidelines the DOJ and FTC released in January of this year, but contain meaningful changes that express certain concerns with vertical mergers with greater specificity, and eliminate the proposed "safe-harbor" contained in the draft Guidelines. Accordingly, while the Guidelines may still disappoint advocates for yet more intense vertical merger enforcement, the Guidelines nonetheless represent a potential step toward more vigorous vertical merger enforcement in the U.S.

The revised Guidelines continue to be grounded in existing DOJ and FTC positions and well-established theories and principles. In addition, there is no change in the weight of the Guidelines as a policy document: while they do not legally bind courts, many merger investigations are resolved at the agency level in accordance with the Guidelines, and courts have viewed other guideline documents from the agencies as influential policy statements.

As with the draft Guidelines, the final Guidelines did not gain the support of the two Democratic FTC Commissioners, Rohit Chopra and Rebecca Kelly Slaughter, who both dissented from the new Guidelines. Commissioner Chopra argued that the new Guidelines did not adequately address entry suppression and rested too much in economic theory, while Commissioner Slaughter principally argued that the Guidelines should have been more demanding with respect to potential competitive benefits from vertical mergers. Still, the final Guidelines do discuss in greater depth than the draft Guidelines the need for particular showings of procompetitive benefits, as well as other changes discussed below.

Discussion

Key changes in the final Guidelines relative to the draft Guidelines include:

Increased Demands Regarding Procompetitive Effects: The final Guidelines make clear that elimination of double marginalization ("EDM") is the principal procompetitive effect that can be anticipated from vertical mergers. The draft Guidelines noted that the agencies rely on parties to show how EDM occurs. However, the final Guidelines make it clear that while "it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from [EDM]," the agencies may independently evaluate EDM-related evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs. The final Guidelines note that the agencies may consider whether EDM-related cost savings are "merger-specific," or could have been achieved independent of the merger through contracting between independent firms.

Elimination of the "Safe Harbor" for Market Shares Below 20%: The draft Guidelines stated that the DOJ and FTC were 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 final Guidelines eliminate this language. While the draft Guidelines did not establish the 20% rule as a hard-and-fast policy for enforcement, the revised language in the final Guidelines suggest that the agencies may in practice choose to exercise greater flexibility in enforcement than the otherwise would.

Comparison of Vertical and Horizontal Mergers: The draft Guidelines eliminated the 1984 Guidelines' explicit statement that vertical mergers were less likely than horizontal mergers to raise competition concerns. The revised Guidelines have not reinserted this language *per se*, but do note that "the agencies more often encounter problematic horizontal mergers than problematic vertical mergers," in the context of noting that "vertical mergers are not invariably innocuous." This insertion, while couched in language describing the agencies rather than mergers, nonetheless signals some continuity with the agencies' prior approach to the two types of transaction.

Theories of Anticompetitive Harm: The final Guidelines expand upon the theories of anticompetitive harm articulated in the draft Guidelines. As with the draft Guidelines, the final Guidelines recognize **unilateral effects** on competition, including **foreclosure**, **raising rivals' costs**, and **gaining access to competitively sensitive information**. The final Guidelines explain that in considering foreclosure effects, the agencies will look to whether a merged firm has the ability to cause a rival to lose sales or compete less aggressively for business, and whether the merged firm would have an incentive to do so. The final Guidelines go into more detail than the draft Guidelines on the types of costs that can be imposed on rivals, including raising costs of distribution, raising input costs, and forcing potential rivals to enter both upstream and downstream segments of a market (known as **two-level entry**). The final Guidelines also recognize unilateral effects where firms producing two non-competing upstream inputs to a single downstream product merge (known as a **merger of complements**), and **diagonal mergers**, where a merger across different levels in different product chains prevents two products from competing with each other. As with the draft Guidelines, the final Guidelines also recognize **coordinated effects**, where a vertical merger weakens competition by enabling tacit coordination among competitors.

No Discussion of Remedies: As with the draft Guidelines, the final Guidelines do not discuss remedies, over the dissent of Commissioner Slaughter. This is not particularly surprising because the agencies have typically preferred to discuss remedies in separate and more tailored guidance documents.

Practical Implications

The ultimate impact of the final Guidelines remains to be seen.

The final Guidelines clarify a number of points discussed in the draft Guidelines, and lay the foundation for potential increased vertical merger enforcement. The final Guidelines provide some level of reassurance that they are grounded in well-established antitrust principles, inasmuch as they confirm that the agencies generally find vertical mergers to be less objectionable than horizontal ones. At the same time, however, the deletion of the soft "safe harbor" and articulation of concerns over diagonal mergers and mergers of complements suggest a heightened interest in non-horizontal merger enforcement.

At the end of the day, as always, the agencies retain substantial discretion in making enforcement decisions and identifying enforcement priorities. In this regard, Commissioner Slaughter's dissent specifically calls on the FTC to "aggressively investigate and apply" the Guidelines' theories of harm. So while the Guidelines broadly appear to be an extension of current vertical merger principles, as we noted in January, they remain open-ended enough to allow for expanded enforcement, especially in the event of a potential future Democratic administration.

In addition, since the Guidelines are not law, their ultimate influence and significance will also depend on how courts evaluate vertical merger challenges in the future. Given the relative paucity of litigated vertical merger challenges over the last four plus decades, we expect that it will take some time to determine whether and how the Guidelines ultimate influence the development of antitrust law.

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