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Antitrust Agencies Issue Final New Guidelines for Vertical Mergers

Update

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On June 30, 2020, the Department of Justice and a split Federal Trade Commission released the final version of their new Vertical Merger Guidelines, which outline how the federal antitrust agencies evaluate the competitive impacts of vertical mergers, as well as other non-horizontal mergers. This is the first time that the federal antitrust agencies have jointly issued guidance on vertical mergers, and these guidelines provide the first major update regarding vertical merger enforcement since DOJ's 1984 Non-Horizontal Merger Guidelines, which were withdrawn earlier this year.

Vertical mergers combine two or more companies or businesses that operate at different levels in the same supply chain, such as a manufacturer and a retailer of the same product. Unlike a horizontal merger of competitors, a purely vertical transaction does not eliminate a rival in the same market, so the overall competitive effects of vertical mergers are often more difficult to assess. The new guidelines are intended to provide increased transparency for businesses and practitioners into the agencies' principal analytical techniques, practices and enforcement policies for evaluating vertical transactions.

The agencies put out for public comment a draft version of the guidelines in early January. (See DOJ and FTC Propose Highly Anticipated Vertical Merger Guidelines.) Following numerous substantive comments as well as feedback from a public workshop held in March, the final version incorporates several notable changes:

- The draft guidelines stated that transactions where the merging parties' share of both a relevant market and a related product are less than 20% are unlikely to be anticompetitive. This quasi-safe harbor was a significant point of contention, with some commenters, including FTC Commissioner Rebecca Kelly Slaughter, expressing concern that the threshold was too high and lacked evidentiary support, while others felt it was too low and would capture

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mergers that didn't otherwise merit antitrust scrutiny. The final guidelines no longer contain a market share threshold. While this avoids the issue, the lack of any quantitative guidepost reduces predictability for merging parties.

- The final guidelines retain much of the draft's discussion of the ways in which vertical mergers can harm competition, including through full or partial foreclosure of competitors, raising rivals' costs, and gaining access to competitively sensitive information of rival firms. However, the final guidelines provide additional and more detailed examples of potential competitive issues in vertical mergers and how such transactions can alter a firm's incentive and ability to compete.
- The final guidelines go beyond the draft version to clarify that the agencies' analytical approach and enforcement policies apply equally to "diagonal" mergers (those that involve companies or assets at different levels of competing supply chains) and mergers of complements.
- Additionally, the final guidelines explain in greater detail the procompetitive benefits that can result from vertical transactions. Most notable of these is the elimination of double marginalization (EDM), where the merged firm often pays less for an input it can supply to itself as a result of the merger, and thus can lower prices to customers and still remain profitable. The final guidelines raise the standard for EDM claims, clarifying that transaction parties will be expected to substantiate their claims that a merged firm will benefit from EDM, and explain how the agencies will evaluate whether EDM benefits are merger specific.

Though both FTC Chairman Joseph Simons and Assistant Attorney General Makan Delrahim touted the strong collaborative efforts of the FTC and DOJ in this instance, the FTC vote to issue the final guidelines was 3-2, with Commissioners Rohit Chopra and Rebecca Kelly Slaughter (the two Democrats on the Commission) dissenting. Both Commissioners expressed in separate statements concern that the new guidelines incorrectly assume that vertical mergers are usually procompetitive.

Commissioner Chopra also noted the rampant vertical consolidation within industries, particularly in tech markets, and asserted that the guidelines fail to adequately address market structure changes that result from non-horizontal mergers, such as suppression of entry by new firms. He also expressed doubts regarding the validity of the purported benefits of EDM.

Commissioner Slaughter voiced both procedural and substantive concerns in her dissent. In her view, the agencies should have invited a second round of comments or held a second workshop before finalizing the guidelines. Substantively, she contends that the guidelines over-emphasize the benefits of vertical mergers, fail to identify merger characteristics that are most likely to be problematic, and fail to properly analyze the effects of

EDM. Commissioner Slaughter also noted that the guidelines fail to discuss buy-side (monopsony) concerns and remedies.

These guidelines may prove to be very timely, with more consolidation likely to result from the COVID-19 pandemic. While the guidelines largely reflect the agencies' existing analytical approach, the codification of these policies highlights the agencies' increasing focus on vertical mergers, which could lead to longer and more intensive investigations. Further, Commissioners Chopra and Slaughter have issued dissents in several recent vertical merger cases, so it should come as no surprise that they dissented again here. (See FTC Decision Highlights Growing Divide on Vertical Mergers.) Despite the joint FTC/DOJ issuance of these guidelines, potential merging parties should take note (especially with an upcoming election) that the divide within the FTC regarding vertical mergers continues.