

DOJ and FTC publish draft vertical merger guidelines

14 January 2020

On Friday, 10 January 2020 the Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, the agencies) announced the publication of draft vertical merger guidelines that describe how the agencies currently review vertical mergers to determine whether the deals violate the antitrust laws. The draft vertical guidelines are intended to replace the DOJ's 1984 Non-Horizontal Merger Guidelines that have long been recognized as outdated. The updated draft vertical guidelines "are based on new economic understandings and the agencies' experience over the past several decades and better reflect the agencies' actual practice in evaluating proposed vertical mergers," according to Makan Delrahim, the head of the DOJ Antitrust Division.¹

Public comments on the draft vertical guidelines are due in 30 days, by 11 February 2020.

Key areas of focus

The draft vertical guidelines are intended to provide direction to the business community and antitrust practitioners with respect to the principal analytical techniques, practices, and enforcement policies the agencies will employ when assessing vertical mergers. The FTC and DOJ have highlighted the following topics as specific areas of focus:

- The definition of relevant markets and "related products," which are products supplied by the merged firm in an upstream or downstream market, and that affect competition in the relevant market.
- The analysis of potential anti-competitive effects resulting from vertical mergers, which may include both unilateral (e.g., foreclosure and raising rivals' costs and access to competitively sensitive information) and coordinated effects.
- The agencies' use of economic models to evaluate the potential effects of vertical mergers.
- How the elimination of double marginalization may mitigate or completely neutralize the potential anti-competitive effects of vertical mergers.

¹ Department of Justice press release, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment (10 January 2020) available at <https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment>.

Reflecting an economic view that vertical mergers may cause anti-competitive harm particularly in concentrated markets, the draft vertical guidelines state that the agencies are "unlikely" to challenge a vertical merger if the merging 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. This threshold is not intended to be a "rigid screen to separate competitively benign mergers from anti-competitive ones," however. Instead, the threshold will allow the agencies to identify mergers for which it is necessary to analyze additional competitive factors when assessing the deal's adverse competitive effects. These factors include, but are not limited to, the actual effects observed in consummated mergers, direct comparisons based on experience, and evidence about the disruptive role of a merging party.²

Relationship to 2010 Horizontal Merger Guidelines

The draft vertical guidelines should be read in conjunction with the agencies' 2010 Horizontal Merger Guidelines, and many provisions of the 2010 Horizontal Merger Guidelines are incorporated by reference. The draft vertical guidelines specifically state that the agencies will use the methodologies set forth in the horizontal guidelines with respect to defining relevant markets for vertical mergers and measuring shares and concentration in a relevant market (with the exception of relying on changes in concentration as an indicator of competitive effects from vertical theories of harm). The agencies also will evaluate claims of pro-competitive efficiencies using the same approach outlined in the horizontal merger guidelines. This includes requiring merging firms to substantiate efficiency claims "so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."³

FTC commissioners split on support for the new guidelines

The FTC voted to publish the draft vertical guidelines along party lines, with the three Republican commissioners (Chairman Joseph Simons, Commissioner Noah Phillips, and Commissioner Christine Wilson) voting in support of the draft guidelines and the two Democratic commissioners (Commissioner Rebecca Slaughter and Commissioner Rohit Chopra) abstaining. Commissioners Wilson⁴, Slaughter⁵, and Chopra⁶ each issued individual statements.

Commissioner Wilson's concurring statement characterizes the new guidelines as a "timely and comprehensive draft" that "explains and formalizes existing agency practices."⁷ On the other hand, Commissioners Slaughter and Chopra both express concern that the draft guidelines do not appropriately capture the potential harm that may result from vertical mergers. Slaughter takes issue with the draft guidelines' "effective safe harbor" for merging parties with less than 20 percent market share. More generally, she questions the use of a market share-based threshold for assessing whether vertical mergers create competition concern. Chopra argues that the transformation of the modern U.S. economy – including increased concentration, the value

² U.S. Department of Justice and Federal Trade Commission Draft Vertical Merger Guidelines (2020) at 3-4, available at <https://www.justice.gov/opa/press-release/file/1233741/download>.

³ U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

⁴ Federal Trade Commission Concurring Statement of Christine S. Wilson on the Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment (20 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

⁵ Federal Trade Commission Statement of Commissioner Rebecca Kelly Slaughter on the FTC-DOJ Draft Vertical Merger Guidelines (10 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtermvgabstain.pdf.

⁶ Federal Trade Commission Statement of Commissioner Rohit Chopra Regarding the Request for Comment on Vertical Merger Guidelines (10 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

⁷ Among other things, Commissioner Wilson encouraged public comments to address whether the guidelines' market share "safe harbor" should be higher, i.e., 30 percent.

placed on data in digital markets, and the growth of multisided platforms – call for a more fulsome revision of current vertical merger enforcement practices. He also advocates for a broader assessment of market power and firm dominance, and broader assessments of anti-competitive harm, including whether the merger would allow the merged firm to evade regulatory requirements, to "gain an upper hand in using government-granted benefits such as intellectual property rights," and to package products or link technologies in ways that deter entry.

The differing views among the FTC commissioners will likely be the subject of public comments that could affect the substance of the final published guidelines.

Next steps

The draft vertical guidelines are open to comment for 30 days, after which the agencies will review and consider the public comments prior to the issuance of a final version of vertical merger guidelines.

Thanks to Jill Ottenberg for assisting in the preparation of this alert.

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