U.S. Antitrust Agencies Release New Vertical Merger Guidelines

I. Overview

On June 30, 2020, the Federal Trade Commission (the "FTC") and the Antitrust Division of the U.S. Department of Justice (the "DOJ" and, together with the FTC, "the Agencies") released new Vertical Merger Guidelines outlining their enforcement policies and practices for assessing vertical mergers, acquisitions, and joint ventures. The Vertical Merger Guidelines, meant to be considered alongside the Agencies' Horizontal Merger Guidelines from 2010, replace the DOJ's Non-Horizontal Merger Guidelines from 1984. The Agencies released the final version of the updated Vertical Merger Guidelines after seeking comment in January on a prior draft, as discussed here.

The Vertical Merger Guidelines are intended to increase enforcement transparency and provide insight into how proposed vertical transactions, or those between companies at different stages of the supply chain, might be reviewed. While not binding on the courts, judges adjudicating complex mergers may consult the Agencies' guidelines as an analytical tool. The Vertical Merger Guidelines discuss potential competitive effects of vertical mergers and provide examples of harm that could stem from certain transactions. They draw upon the Horizontal Merger Guidelines to describe evidence that may be considered, market definition and market share assessments, and the analysis of competitive effects. In summary, the Vertical Merger Guidelines provide the following guidance:

- The Agencies use a fact-specific analysis to determine whether a proposed vertical merger would substantially lessen competition. Generally, this analysis attempts to predict the net impact of the deal's potential procompetitive and anticompetitive effects. While vertical mergers raise distinct considerations from strictly horizontal transactions, which raise antitrust concerns more frequently, "vertical mergers are not invariably innocuous" and some may require both horizontal and vertical analyses.

- The Agencies' begin their analysis by identifying a relevant market or markets and specifying products or services supplied by the merged firm that its rivals require to effectively compete (for example, inputs or means of distribution to customers). While the Agencies consider market share and concentration in their evaluation of mergers, they will not rely on the Horizontal Merger Guidelines' concentration thresholds as screens or indicators of competitive effects for vertical deals. The finalized Vertical Merger Guidelines abandoned the approach in the draft version that the Agencies would be unlikely to challenge a merger where the parties have market shares below 20%.

- Potential anticompetitive effects that may arise from vertical mergers include the foreclosure of competitors in a relevant market, raising rivals' costs, obtaining access to rivals' competitively sensitive information, harming maverick competitors, and coordination with rivals. Yet "a merger would rarely warrant close scrutiny for its potential to lead to foreclosure or raising rivals' costs" unless the merging firms had both the ability and incentive to impose these effects.

- Procompetitive benefits specific to vertical mergers may offset potential anticompetitive effects. Double marginalization, or including markups throughout the supply chain, may be

eliminated if the merger gives the downstream firm access to its upstream input at cost. To determine the extent to which this may occur in a given transaction, the Agencies typically analyze the merged firm's cost incentives for self-supplying inputs versus purchasing them externally.

- Notably, the Vertical Merger Guidelines do not address the Agencies' approach to identifying appropriate remedies—nor were remedies included in the draft guidelines. Historically, the Agencies have often used conduct remedies, setting limitations on the merged company's business practices, to resolve vertical merger concerns, but many contemporary enforcers prefer structural remedies, where divestitures are required to obtain antitrust approval.

II. Dissenting Statements

Dissenting statements filed by FTC Commissioners Rohit Chopra and Rebecca Kelly Slaughter raised concerns that the Vertical Merger Guidelines were released too hastily, failed to adequately address barriers to entry caused by vertical transactions, and relied on disputed theories to support assumptions and ignore economic realities. Commissioner Slaughter argued that changes to the original draft guidelines were substantive and necessitated a second comment period and workshop. She also expressed concern that the Vertical Merger Guidelines signaled that the Agencies view vertical mergers as procompetitive and feared the new guidelines would lead to lax enforcement.

Commissioner Chopra argued that "economic calcification" in digital markets and others—where fewer firms are entering and "killer apps quickly become killer acquisitions"—has caused unchecked market dominance and a reduction in innovation. Commissioner Chopra stated the Vertical Merger Guidelines failed to analyze structural effects such as barriers to entry associated with vertical mergers, as some firms may become market gatekeepers. Last, both Commissioners expressed skepticism regarding potential efficiencies stemming from the elimination of double marginalization.

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If you have any questions about the issues addressed in this memorandum, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or email publications@cahill.com.

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