United States of America
Federal Trade Commission

Reflections on the 2020 Draft Vertical Merger Guidelines and Comments from Stakeholders

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Remarks at the
DOJ Workshop on Draft Vertical Merger Guidelines

Washington, DC

March 11, 2020

[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my advisors, Jeremy Sandford and Tom Klotz, for assisting in the preparation of these remarks.

I. Introduction

Good morning. Many thanks to my colleagues at the Antitrust Division of the Department of Justice (DOJ) for inviting me to participate in this workshop on the 2020 Draft Vertical Merger Guidelines. It is a privilege to be here with such a distinguished array of participants. And many thanks, also, to the DOJ and Federal Trade Commission (FTC) personnel for their work in preparing the Draft Vertical Merger Guidelines (DVMGs) that we have gathered here today to discuss. It is clear that significant thought and much interagency collaboration have gone into preparing the document that we issued for public comment on January 10, 2020.

I learned from one of my early mentors, James F. Rill, just how vital this inter-agency collaboration is — not only for domestic purposes, but for international ones, as well. Jim served as DOJ Assistant Attorney General for the Antitrust Division under President George H. W. Bush, and is a towering figure in the field of international competition policy. Jim taught me that U.S. antitrust enforcement is most effective, and its leadership in the international arena at its best, when the two agencies coordinate closely and operate from the same set of enforcement principles. U.S. leadership has been vital in facilitating the adoption of sound competition enforcement policies by dozens of jurisdictions around the world.

Jim served as Co-Chair of the International Competition Policy Advisory Committee (ICPAC). I had the honor of working with him on the ICPAC hearings and final report, which recommended the creation of what would become the International Competition Network (ICN). Then, while serving at the FTC as Chief of Staff to Chairman Timothy J. Muris, I had the privilege of helping launch the ICN. And my first trip as a Commissioner was to the ICN Merger Workshop in Tokyo. Thus, I have seen first-hand the benefits of U.S. antitrust leadership in the international arena. Unfortunately, I have also witnessed the detrimental effects of internecine rivalry and unilateral action on U.S. standing and credibility in the international arena. For these reasons, I fervently hope that the DOJ and FTC will continue to work together productively to jointly finalize and issue a set of Vertical Merger Guidelines that reflects sound economic principles.

Many thoughtful public comments have helped me to refine my own thinking on the issues addressed in our DVMGs. To take just one example, another early mentor of mine, Professor Steven C. Salop, not only coauthored two different comments, but also submitted a complete, alternate set of vertical merger guidelines. The work done by so many eminent legal and economic scholars like Steve speaks to the importance of getting Vertical Merger Guidelines, and vertical merger enforcement policies, correct. Thank you to all who submitted comments; your insights have been greatly appreciated.

Today, I'd like to highlight some themes and questions that emerged from the public comments that I found particularly compelling. Before I begin, though, I must offer the usual disclaimer — the views I express today are my own, and do not necessarily reflect those of the Commission or any other Commissioner.

II. Rationales for New Guidelines

Any time the subject of new guidelines comes up, it is natural to wonder what the Agencies hope to accomplish by issuing guidelines. My own views on guidelines are shaped by excellent papers written by Greg Werden and Paul Yde.[2] My reading of their papers suggests at

[2] *See* Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines?*, 16 GEO. MASON L. REV. 839 (2009); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, Fall 2007, at 74.

least four reasons why the antitrust agencies issue guidelines. First, the agencies may use guidelines as a way to summarize the law, just as the American Law Institute issues Restatements of the laws of contracts, property, and other topics.

Second, the agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. For example, Werden explains that the 1968 Horizontal Merger Guidelines "were a measured response" designed to address the "cloud of uncertainty" that hung over federal merger law following the Supreme Court decisions in Von's Grocery, Pabst Brewing, and Proctor & Gamble.[3]

Third, guidelines may disclose and formalize an approach the agencies have heretofore used informally. For example, Werden notes that the 1992 Horizontal Merger Guidelines formally "codified" several unilateral effects analyses the Antitrust Division of the Department of Justice (DOJ) had been using for years.[4]

Fourth, the agencies may use guidelines to advance new analytic techniques. For example, the 1982 Horizontal Merger Guidelines adopted, and subsequently popularized, the hypothetical monopolist test. The 2010 Guidelines likewise sought to popularize GUPPIs.[5]

I was prompted to reflect on these potential rationales for issuing guidelines by Professor Michael A. Salinger's submission that asked if the DVMGs are intended to announce a shift in policy towards challenging more vertical mergers.[6] Given that vertical merger competitive

[3] Werden, *supra* note 2, at 841.
[4] *Id.* at 842.
[5] *See, e.g.*, Serge Moresi, The Use of Upward Price Pressure Indices in Merger Analysis, ANTITRUST SOURCE, Feb. 2010, at 1 (tracing the development of the Upward Pricing Pressure (UPP) model – which has since become GUPPI – to academic work that Professors Farrell and Shapiro conducted before they "became chief economists at the FTC and DOJ"); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (issued Aug. 19, 2010) (adopting, during the tenure of Professors Farrell and Shapiro, the UPP analysis "[w]here sufficient data are available" and noting UPP merger simulations "need not rely on market definition or the calculation of market shares and concentration").
[6] Michael A Salinger, Comments on the DOJ and FTC Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-

effects modelling is still more art than science, and given that vertical merger case law is scant, I believe that Vertical Merger Guidelines will be most effective if they codify existing enforcement practices. On average, the Agencies closely review roughly two or three vertical mergers, and challenge one vertical merger, each year.[7] The public, the antitrust bar, and the business community will benefit from straightforward explanations of how we assess these vertical mergers and their likely competitive effects.

With respect to the specific issue raised in Salinger's submission, I would note the following. To be sure, our understanding of vertical mergers has changed since the 1984 Guidelines were issued. And at the FTC's Hearings on Competition and Consumer Protection in the 21st Century, participants on our vertical merger panels agreed essentially unanimously that the 1984 Guidelines are outdated.[8] However, I'm not aware of legal or empirical economic scholarship that would merit an across-the-board increase in vertical merger enforcement above current levels.

guidelines/salinger_comments_on_doj_and_ftc_draft_vertical_merger_guidelines_-_february_2020.pdf, at 1 (Feb. 2020) (the Draft Guidelines "appear to be announcing a dramatic shift in policy in which the Agencies will challenge vertical mergers more frequently than they have in the past.").

[7] Chamber of Commerce, Regarding Draft 2020 Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg9_us_chamber_comment.pdf, at 2 (Feb. 14, 2020) ("Over roughly the past quarter century, the FTC and DOJ conducted detailed investigations of at most 2-3 vertical mergers per year… Of the vertical investigations that resulted in remedies – only about one per year – nearly all were settled by consent decrees.") (citing Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994-July 2018*, Georgetown University Law School Working Paper (Aug. 23, 2018) and Koren Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ANTITRUST SOURCE, Feb. 2019, at 3-5).

[8] For example, Steve Salop said "DOJ no longer thinks what they thought in 1984," Carl Shapiro said they were "badly out of date," and Paul Yde said "nobody pays any attention to the '84 guidelines anymore." *See* Transcript at 32, 56, 109, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5, available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf (Nov. 1, 2018).

III. Relationship Between EDM and Raising Rivals' Costs

Some commenters[9,10] called for the elimination of double marginalization (EDM) to be treated like a cost-saving efficiency. Others[11] called for the discussion of EDM to be incorporated into the unilateral effects section, emphasizing the interdependence between EDM and potential harms. I found compelling the perspective of those commenters[12] who asserted that EDM arises from the same economic incentives as the leading vertical theory of harm, raising rivals' cost (RRC). Just to recap, RRC occurs when the merged firm increases price to other downstream firms to drive sales to itself, while EDM occurs when the merged firm sells to itself at cost, resulting in lower prices to its customers.

Both EDM and RRC result from changed economic incentives generated by the merger, as opposed to cost-saving efficiencies that might be generated by, say, the combination of complementary productive assets. In other words, EDM occurs even in the absence of cost-saving efficiencies. Several comments[13,14] pointed to recent economics papers emphasizing that

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[9] Jonathan B. Baker et al., Recommendations and Comments on the Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf, at 30 (Feb. 24, 2020) ("We recommend that EDM be treated the same way as other efficiencies and that this section be incorporated into the efficiencies discussion (Section 8).").

[10] Martin Gaynor, Comments on Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/gaynor_comment_vmg_feb_26_2020.pdf, at 2 (Feb. 26, 2020) ("it's unclear why [EDM] should be considered separately from any other efficiency, or accorded any special status.").

[11] Global Antitrust Institute, DOJ/FTC Draft 2020 Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg8_gai_comment.pdf, at 5 (Feb. 7, 2020) ("EDM is indistinguishable from the unilateral effects that may create an incentive to raise price, as discussed in Section 5 of the VMGs").

[12] Gopal Das Varma and Martino DeStefano, Draft Vertical Merger Guidelines issued by the Department of Justice and Federal Trade Commission for Public Comment, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comments_on_draft_vertical_merger_guidelines_das_varma_destefano.pdf, at 3 (Feb. 26, 2020) ("Recent research, however, has shown that RRC and EDM are not two separate phenomena.").

[13] *Id.* ("the size of EDM, through its effect on the merged entity's share of the relevant market, affects the strength of the merged entity's RRC incentive. This makes EDM to be a determinant of RRC, not just a stand-alone competitive benefit to be weighed against RRC.").

[14] Koren W. Wong-Ervin, U.S. Vertical Merger Guidelines: Recommendations and Thoughts on EDM and Merger Specificity, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wong-

RRC effects and EDM effects are correlated in size, across a variety of market shares and concentration levels. Indeed, these commenters provided compelling arguments that EDM is a determinant of the size of RRC. As one comment[15] pointed out, a large EDM effect can even cause the merged firm to lower the price it charges to other downstream firms.

Consequently, my view is that any RRC analysis must simultaneously – and symmetrically – address EDM. Evidence, whether qualitative or quantitative, that a merger is likely to generate large RRC effects is unavailing without a concurrent EDM analysis. The vertical analysis I've seen from FTC staff and outside experts *does* reflect a symmetric approach to EDM and RRC. Since these DVMGs will be useful only to the extent they codify existing practices, it is important that they treat EDM and RRC symmetrically.

IV. "Demonstration" of EDM

The Draft Guidelines state that "The agencies generally rely on the parties to identify and demonstrate whether and how the merger eliminates double marginalization." This sentence generated many comments about what this reliance might look like.[16,17,18] My experience has been that FTC staff rely on parties' information to conduct competitive effects analyses. For

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ervin_vmg_article_1-21-20_final.pdf, at 2 (Jan. 21, 2020) ("For example, if you take the model from Sheu & Taragin (2017) and perform comparative statics (e.g., asked what if the diversion ratio between downstream firms increased?), you would find that the changes that increase RRC also increase EDM.").

[15] Salinger, *supra* note 6, at 3 (constructing an example in which an unintegrated downstream firm receives a *lower* input price following a vertical merger involving its supplier and its rival).

[16] Chamber of Commerce, supra note 7, at 8 ("Section 6 appears to place the EDM burden of proof on the parties. This is an unjustified departure from the seemingly burden-neutral list of factors in Section 4").

[17] NetChoice, Comments of NetChoice on DOJ & FTC Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg16_netchoice_comment.pdf, at 5 (Feb. 20, 2020) ("But the Agencies undercut this benefit [of EDM] by placing the burden on the merging parties.").

[18] Steven J. Cernak, *Who Bears the Burden on Elimination of Double Marginalization in the Draft Vertical Merger Guidelines?*, Truth on the Market, https://truthonthemarket.com/?s=cernak&orderby=relevance&order=DESC, (Feb. 7, 2020) ("it seems to follow that the Agencies would have the burden to factor EDM into the rest of their competitive analysis to show what the potential overall net effect of the merger would be.").

example, in a horizontal merger, parties' business documents or transactions data obtained via Second Request may inform assessments of the degree of substitutability between merging firms.

In a vertical context, naturally, assessments of both RRC and EDM will depend in part on information provided by the parties. For example, information on pre-merger markups would inform analysis of the magnitude of EDM and RRC. Under a symmetric approach to RRC and EDM, requiring parties to "demonstrate" a merger's EDM would amount to demanding a full competitive effects analysis from merging parties – not, I think, the appropriate way to proceed. My view is that for any effects analysis, merging parties have a burden of production, but the Agencies bear the burden of proof. Given the many comments relating to the burden of EDM, it appears that this concept would benefit from clarification in the DVMGs.

V. EDM and Merger Specificity

Regardless of *how* one allocates the burden of demonstrating EDM, many commenters observed that meeting the burden depends on the *standard* for merger specificity of EDM.[19,20,21] At issue is the possibility that two unintegrated firms can achieve the same benefits of EDM via contract. For example, such a contract could obligate the upstream firm to sell its product at cost in exchange for an upfront payment from the downstream firm. I agree that if pre-merger

[19] Carl Shapiro, Comment on DOJ/FTC Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/shapiro_comment_on_draft_vmgs.pdf, at 3 (March 3, 2020) ("As with other efficiencies, EDM must be shown to be merger specific to be credited.").

[20] Baker, supra note 9, at 31 ("The dVMGs recognize that the benefits of EDM are low when the firms previously partially eliminated double marginalization contractually. But this section does not make clear that EDM claims must always be tested for merger-specificity.").

[21] Geoffrey A. Manne and Kristian Stout, Comments of ICLE on the Draft Vertical Merger Guidelines (Matter Number P810034), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/icle_-_vmg_draft_comments_0.pdf, at 1 (Feb. 2020) ("the agencies should clearly disavow … the implications of the presumed functional equivalence of vertical integration by contract and by merger").

contracting eliminates all or nearly all of one margin, a vertical merger is unlikely to result in procompetitive EDM.

However, I would not have our competitive effects analysis hinge on the *possibility* of efficient contracting outside of a merger. Contracting is hard. As one comment[22] observed, mergers "solve coordination problems that are solved less well, or not at all, by contracts." Another[23] stated that "a merger is the only realistic and practical way to eliminate double marginalization . . . It is simply not realistic that arm's length parties could sufficiently align their incentives to eliminate double marginalization." Factors like demand uncertainty, risk aversion, information asymmetries, or transaction costs make efficient contracting difficult or impossible.[24] Another of my mentors, Professor Roger Blair, spent a decade of his fruitful career writing about the relative benefits and drawbacks of vertical integration through contract and merger. Roger argued that because there are transactions costs and other inefficiencies associated with vertical contracting, many vertical mergers produce merger-specific EDM.[25]

For me, the relevant question is whether the firms *did* achieve efficient contracting before merging, not whether they *could*. In my view, only in the former case should we alter our competitive effects analysis. Suppose (for the sake of argument) that the Agencies were to

[22] Gregory J. Werden and Luke M. Froeb, Comments on Proposed Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg5_werden_froeb_comments_on_vertical_merger_guidelines.pdf, at 1 (2020).
[23] Canadian Bar Association Competition Law Section, Draft 2020 Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cba_vmg_2020_submission.pdf, at 4 (Feb. 2020).
[24] Wong-Ervin, supra note 14, at (quoting Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. L. & ECON. 297 (1978) ("Due to uncertainty and the difficulty of specifying all elements of performance in a contractually enforceable way, contracts will necessarily be incomplete to one degree of another."). See also Francine LaFontaine, Transcript at 73, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5, available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf ("quantity forcing and two-part tariffs do not easily generate the same outcome as what a vertical merger could do because of demand uncertainty, risk aversion, information asymmetries, all sort of incentive problems.").
[25] *See* Roger D. Blair & David L. Kaserman, *Vertical Integration, Tying, and Alternative Vertical Control Mechanisms*, 20 CONN. L. REV. 523 (1988) at 540-45

dismiss EDM when they believe parties *could* contract more efficiently absent merging. Such a regime would raise several questions. First, how do we square a finding that such contracting would be profitable with the plain fact that the parties were unable to implement efficient contracts prior to merging? Second, why would parties incur the expense, time, and uncertainty of HSR review if the same benefits were available to them via contract? Third, how are the Agencies to distinguish those firms that *could* realize EDM via contract from those that could not? And finally, would the Agencies treat RRC effects, which *could* be achieved by contract, [26] symmetrically?

As a practical matter, the FTC routinely collects data and documents relating to firms' supply contracts in the course of its antitrust investigations. I cannot recall an instance in which a firm had managed to fully eliminate double marginalization by contract. The most likely explanation for not observing EDM among unintegrated firms in the real world is that contracting costs preclude effective EDM. Of course, we do see various forms of nonlinear pricing, such as two-part tariffs, in the real world. However, I agree with the comment that noted that "the mere existence of a contract capable of mitigating double marginalization does not tell us about its efficacy compared to vertical integrations."[27]

In summary, I think it is completely appropriate to assess the nature of pre-merger contracting as part of a competitive effects analysis, but I would base competitive effects analysis only on what the market *actually* looks like, and not what the Agencies *think* the market should look like.

[26] Werden & Froeb, supra note 22, at 5 ("…most of the anticompetitive effects that could follow from a merger, especially raising rivals' costs, also might have been achieved without a merger.").

[27] Global Antitrust Institute, *supra* note 11, at 7 (citing Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 51 (2008) ("The use of nonlinear contracts can mitigate double-marginalization, but it does not necessarily eliminate it.").

VI. Safe Harbors and Share Screens

Perhaps no aspect of the Draft Guidelines provoked more comments than its statement that the Agencies are unlikely to challenge a merger in which both upstream and downstream shares are below 20 percent. Some commenters expressed concern that the screen may miss problematic mergers.[28,29] Other commenters expressed concern that the screen will inappropriately develop into a structural presumption.[30,31] Few, if any, comments defended the 20/20 screen. In fact, an array of commenters expressed highly negative views, characterizing it as "arbitrary and unprincipled" [32] and "ineffective and useless,"[33] and stating that it "does not provide much certainty"[34] and "has no basis in the social science literature."[35]

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[28] NET Institute, Comments on the DOJ/FTC Draft Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg14_economides_comment.pdf, at 6 (Feb. 2020) ("…there is no support offered in the Draft Guidelines for its arbitrary safe harbor threshold. As a caution, one of us has found numerous anticompetitive horizontal mergers within its 20 percent safe harbor.").

[29] Richard M. Scheffler et al, Comments on the Draft Vertical Merger Guidelines with Special Consideration to Health Care, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg20_scheffler_arnold_brown_et_al_comments.pdf, at 6 (Feb. 24, 2020) ("In health care, hospital acquisitions of physician practices regularly fall under 20%, but research has shown that hospital acquisitions of physician practices often leads to higher prices without commensurate improvements in quality").

[30] Global Antitrust Institute, *supra* note 11, at 8 ("...there is a significant risk the 20 percent figure will be interpreted by counsel or courts as a trigger for competitive concerns.").

[31] Jan Rybnicek, The Draft Vertical Merger Guidelines Would Do More Harm Than Good, Truth on the Market, https://truthonthemarket.com/?s=Rybnicek&orderby=relevance&order=DESC (Feb. 7, 2020) ("It is likely that agency staff will soon interpret (despite language stating otherwise) the 20% market share as the minimum necessary condition to open an in-depth investigation and to pursue an enforcement action.").

[32] Sean P. Sullivan and Henry C. Su, Public Comments on the U.S. Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines Released for Public Comment on January 10, 2020, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/sullivan_su_-_comments_on_draft_vmgs.pdf, at 6 (Feb. 25, 2020).

[33] Werden & Froeb, supra note 22, at 3 ("The separation would be ineffective and useless if, for example, a small minority of mergers on both sides of the line posed significant competitive problems.").

[34] Kenneth Edelson and Jonathan Jacobson, Vertical Mergers 2020, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg4_totm_blog_-_vertical_mergers.pdf, at 2 (2020).

[35] Sanjukta Paul and Marshall Steinbaum, DOJ-FTC Proposed Vertical Merger Guidelines, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg3_proposed_vertical_merger_guidelines_comment_final_2_2020.pdf, at 2 (Feb. 2020) ("There is no basis in the social science literature for the 20% market share, which presupposes that markets can even be properly defined at the time of a merger.").

I hear these concerns loud and clear. My view is that any screen would have only one purpose: to rule out harm at an early stage, before staff resources are consumed. Line drawing is potentially a useful resource allocation tool, provided we draw lines based on precedent and empirical results. I'm not sure the 20 percent screen in the DVMGs meets this standard. I would prefer to either remove this screen or, with the benefits of international harmonization in mind, adjust it to match the 30 percent screen used by the European Commission.[36] I fully agree with commenters that neither law nor economics support an inference of illegality on the sole basis of shares, particularly for a vertical merger.

Stepping back, our instinct to use market shares to analyze vertical mergers likely derives from well-honed techniques for horizontal merger analysis, ranging from humble delta HHIs to state-of-the-art merger simulation models, each of which depends on shares. But we should employ caution in applying horizontal logic to vertical mergers. If horizontal merger analysis weighs anticompetitive effects against cost-saving efficiencies, vertical analysis adds a third and procompetitive factor, EDM, to the mix.

As I described earlier, economic analysis indicates that procompetitive EDM and anticompetitive harm tend to increase or decrease in concert across different levels of market concentration. Consequently, we cannot rely on concentration screens in the vertical merger context as we do with horizontal mergers. For example, high upstream and downstream shares bring us closer to the textbook case of successive monopolies, often used as an illustration of a

[36] European Union, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, ¶ 25, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=EN (2008) ("The Commission is unlikely to find concern in non-horizontal mergers … where the market share post-merger of the new entity in each of the markets concerned is below 30 %").

merger with EDM but no adverse effects.[37] Further, the correlation between EDM and RRC implies that mergers that are more likely to result in anticompetitive RRC are also more likely to result in procompetitive EDM.[38] As drafted, this share threshold clearly causes more consternation than clarity, which runs counter to the rationale for issuing the DVMGs. The Agencies will need to think carefully about how to address the concerns expressed in the comments.

VII. The Relative Likelihood of Harm from Vertical Transactions

Economists have conducted a number of retrospective studies of vertical mergers. Most suggest that consumers benefit. For example, LaFontaine and Slade found in a 2007 survey that "efficiency considerations overwhelm anticompetitive motives in most contexts."[39] A 2005 survey by four FTC economists found similar results.[40] So did a 2018 survey by economists at the Global Antitrust Institute.[41] I would love to see more vertical merger retrospectives, regardless of the result. If we are missing harmful vertical mergers, I want to know about them.

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[37] *See* Thomas W. Ross, *On the Vertical Integration of Successive Monopolies*, 7 REV. INDUS. ORG. 375, 378 (1992) considering vertical integration with successive monopolies, "it is interesting to consider the effect of integration on the final retail price. Can it ever rise? The answer is no; as long as the merger is profitable it will result in a lower price").

[38] Gopal Das Varma and Martino DeStefano, Draft Vertical Merger Guidelines issued by the Department of Justice and the Federal Trade Commission for Public Comment, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comments_on_draft_vertical_merger_guidelines_das_varma_destefano.pdf, at 5 (Feb. 26, 2020) ("when EDM and RRC are considered simultaneously (rather than each in isolation), the size of EDM can significantly influence the extent of RRC.").

[39] Francine LaFontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 677 (2007) ("…overall a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong.").

[40] James C. Cooper et al., *Vertical antitrust policy as a problem of inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005) (surveying 22 empirical papers and finding most "find evidence that vertical restraints/vertical integration are pro-competitive.")

[41] Global Antitrust Institute, Comment on The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century: Vertical Mergers, https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf, at 6-7 (Sept. 6, 2018) (finding that of eleven papers written since 2008 identifying welfare implications of vertical integration, six found positive welfare changes, four found "no change, a

Given the current state of the empirical literature, I agree with the comment that observed a "deafening silence" concerning "the Agencies' general attitude towards vertical mergers."[42] This silence is particularly noticeable when viewed within the context of other guidance documents. For example, the 1984 Guidelines state that vertical mergers are less likely to be problematic than horizontal mergers.[43] So do the European Commission's 2008 guidelines.[44]

Has anything changed between when those guidelines were issued and now that would make such a disclaimer inappropriate for our DVMGs? I do not think so. The vast weight of economic scholarship continues to find that most vertical mergers benefit consumers. The frequency of Agency scrutiny of vertical mergers remains roughly constant. As noted above, one comment observed that the Agencies have only conducted detailed investigations of "at most 2-3 vertical mergers per year," with only about one per year resulting in a remedy.[45] (Granted, we're above that run rate during my tenure at the Commission.)

I believe it would be constructive – for agency staff, practitioners, and the business community – to include this kind of language in any vertical merger guidelines. Doing so would provide useful guidance on how the Agencies view vertical mergers *vis a vis* their horizontal counterparts and best reflect what we can learn from the empirical economic literature.

On a related note, one comment observed that Section 8 of the Draft Guidelines states that vertical mergers have "the potential to create cognizable efficiencies." Specifically, the

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mixed change, or no economically meaningful change" and "only one (or perhaps two) had results that are consistent with a negative impact").

[42] Werden & Froeb, *supra* note 22, at 1 ("The Guidelines' most conspicuous silence concerns the Agencies' general attitude toward vertical mergers, and on how vertical and horizontal mergers differ. This silence is deafening…").

[43] U.S. Department of Justice 1984 Merger Guidelines § 4.0 ("Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous.")

[44] European Union, *supra* note 36, ¶ 11 ("Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.").

[45] Chamber of Commerce, supra note 7, at 2 ("Over roughly the past quarter century, the FTC and DOJ only conducted detailed investigations of at most 2-3 vertical mergers per year, a tiny fraction of the thousands of transactions reported annually under the Hart-Scott-Rodino ("HSR") Act of 1976.").

comment noted that this language appears to signal a retreat from the 2010 Horizontal Merger Guidelines, which state that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete."[46] To avoid creating the false impression that the Agencies have changed their approach to efficiencies since 2010, the DVMGs should more clearly state the ways in which vertical mergers can generate efficiencies.

VIII. Conclusion

Thank you, once again, to all who submitted such thoughtful and insightful comments on the DVMGs. I believe the excellent public comments we have received chart a constructive course forward as we seek to move this initiative across the finish line. I encourage the DOJ and the FTC to carefully consider the thoughtful input we have received from stakeholders, and to continue speaking with one voice in offering clear guidance on vertical enforcement practices.

[46] *Id.* at 8 ("Section 8 contains only a cursory discussion of the many varieties of efficiencies from vertical mergers… Even the HMGs appear to go farther than this").