Comments on Draft Vertical Merger Guidelines

Martin Gaynor*

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I commend the Antitrust Division of the Department of Justice (hereafter "DOJ") and the Federal Trade Commission (hereafter "FTC") for issuing new draft Vertical Merger Guidelines. The Vertical Merger Guidelines have not been revised since 1984. A great deal has changed in the past 36 years, including both knowledge about the impacts of vertical mergers, and some fundamental aspects of markets and competition in our economy. While this draft is welcome, I think it will benefit substantially from revision and refinement. The DOJ and FTC are to be commended for actively seeking comments on the revised guidelines.

I have the following comments on the Draft Vertical Merger Guidelines.

1. Clarification is needed about what is regarded as a vertical merger. The definition in the Draft Guidelines (footnote 2) states that vertical mergers are between firms that operate at different stages of the same supply chain. This definition appears to exclude mergers of complementary products, such as doctors and hospitals, or concert promoters and ticket agencies (e.g., Ticketmaster/Live Nation).

   (a) It doesn't appear to be sensible to exclude mergers of complements from consideration under the vertical merger guidelines. The economics of mergers of complements and vertical mergers is similar, and raises similar issues. Moreover, if mergers of complements are not included in the vertical merger guidelines there will be no guidance regarding them, since they are not covered in the Horizontal Merger Guidelines.

   (b) For greater clarity I suggest focusing on "non-horizontal" mergers, defining what kinds of mergers fall under this definition, and renaming the guidelines "Non-Horizontal Merger Guidelines" rather than Vertical Merger Guidelines.

2. While the Draft Guidelines are reasonably clear that vertical (non-horizontal) mergers are not to be presumed efficient ("pro-competitive"), I think the Guidelines should contain an explicit statement to that effect.

3. The Draft Guidelines do not mention harms to quality, innovation, or other important non-price dimensions of competition. They should be amended to be clear that harms to non-price aspects of competition matter will be considered as part of any competitive harms ensuing due to a vertical (non-horizontal) merger.

*E.J. Barone University Professor of Economics and Public Policy, Carnegie Mellon University; Director, Bureau of Economics, Federal Trade Commission, 2013-2014

4. The Draft Guidelines omit some potentially important sources of harm, specifically regulatory evasion and multi-market entry barriers, and mention customer foreclosure only briefly. These should be explicitly included, so that the Guidelines will be as clear as possible about possible harms that will be considered.

5. Section 3 of the Draft Guidelines states that the Agencies are "...unlikely to challenge a vertical merger where the parties to the merger have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 percent of the relevant market." While the Draft Guidelines are clear that these do not constitute an absolute safe harbor, relying on market shares may nonetheless not be very useful and could give the wrong impression. Moreover, a 20 percent market share criterion could serve to immunize smaller acquisitions that cumulatively lead to substantial harm to competition. These sorts of acquisitions are particularly common in health care and in high tech, and can have important impacts on competition. I suggest instead adopting statements of the conditions that lead to a presumption of anticompetitive harm. This will provide clearer guidance about when vertical (non-horizontal) mergers are and are not likely to be of concern to the DOJ and FTC.

6. Section 6 of the Draft Guidelines is devoted to elimination of double marginalization (EDM). While EDM can be an efficiency associated with a non-horizontal merger, it's unclear why it should be considered separately from any other efficiencies, or accorded any special status. It's worth noting that EDM is not, in general, a necessary consequence of vertical (non-horizontal) integration. EDM should be considered like all efficiencies and evaluated as any other efficiency, i.e. it must be cognizable.