DOJ-FTC Proposed Vertical Merger Guidelines
Public Comment
Sanjukta Paul and Marshall Steinbaum
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Although the existing non-horizontal merger guidelines do not reflect current scholarship and experience regarding merger enforcement in this area, the replacement guidelines proposed by the FTC and DOJ Antitrust Division are not adequate and should not be adopted. Below we enumerate a non-exhaustive list of their shortcomings.

1. First and foremost, there was no evident effort to take stock of the recent record of either vertical mergers or of enforcement efforts in this area. By contrast, we possess significant information about horizontal merger enforcement, thanks to efforts both inside and outside the agencies (J. Kwoka 2018). Little systematic effort has been made to study the effects of vertical mergers. Instead, the draft guidelines rely on theory in place of evidence, an approach that has led antitrust jurisprudence and enforcement astray in the past.
2. In several instances, the guidelines rely on theoretical speculation in place of facts. For example, they posit that foreclosure will not be attempted unless it's profit-maximizing. Usually enforcers lack insight into the "true" objective functions of market actors. In fact, the idea that market actors maximize an objective function is a device of economic theory, not a description of reality. Market actors make business decisions as part of a much more complex set of factors, contingent upon a variety of business strategies and goals. In light of this, it is possible that market actors will misrepresent their future actions on the strength of the theoretical claim that anti-competitive behavior would be unprofitable, only to later engage in that very behavior (whether profitable or not) after enforcement efforts have concluded. For example, in the AT&T-Time Warner merger trial, the CEO of AT&T testified that it would be unprofitable to withhold Time Warner content from rival distributors. And yet, following the failed merger challenge, he did (Lazarus 2019; Bode 2019; Munson 2018).
3. The draft guidelines also rely on theory to replace fact regarding the putative efficiencies brought about by vertical mergers: "Because vertical mergers combine complementary economic functions and eliminate contracting frictions, they have the potential to create cognizable efficiencies that benefit competition and consumers. Vertical mergers bring together assets used at different levels in the supply chain to make a final product. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution, or create innovative products in ways that would have been hard to achieve though arm's length contracts." This is an astonishingly broad assertion rooted in a very specific theoretical approach, not fact, and it has no basis in the relevant statutes. Like assumptions about efficiencies in merger analysis generally, any empirical evidence we have to support the existence of such efficiencies often assumed the manufacturing context rather than the contemporary services-based economy, much less the peculiarities of today's so-called tech platforms. Moreover, it is simply untenable to assume that such efficiencies (*arguendo*) cannot be achieved through other means: for instance, through contract, or through acquisitions of assets leading to natural growth of a firm, rather than growth through consolidation with existing firms. If acquisition of a given asset would streamline production, it makes sense for a firm to purchase that asset—and for investors to support its purchase. We should thus be able to rely upon the existing market to produce such putative efficiencies naturally.

4. The draft guidelines do not specifically address tech platform business models or their strategies of serial acquisitions. We have seen a campaign of (supposedly) vertical transactions, for example in social networking, leading to the dominance of single firms spanning a huge and mutually interlocking set of business models and counterparties, and with the power to exclude threatening rivals at will (Robertson 2018). Would that kind of history have any bearing on review of future transactions?
5. Relatedly, the guidelines should carefully analyze what efficiencies, if any, can properly be considered in the first place in case of mergers and acquisitions by tech platforms (Newman 2019). Tech platforms frequently define their firm boundaries narrowly—thus avoiding much regulation and legal responsibility that affects other firms, from labor regulation to safety regulation to general tort principles (Paul 2019; Steinbaum 2019). (e.g., "We're a software company/two-sided platform, not a transportation company/publisher/telecommunications carrier/employer.") Those boundaries should not be drawn broadly for the purpose of merger review, in order to implicitly ascribe productive efficiencies in any number of industries or functions to any acquisitions of other firms.
6. The guidelines do not acknowledge or address the differences among business models that vertical acquisitions can involve, with potentially widely different implications for consumers, workers, and the public. For example, when private equity companies buy up supply chains, they are frequently replacing a management interested in long-run modest returns with one interested in asset-stripping, foreclosure, and other ways of pushing the envelope to bring about short-term profits. Depending on the identity of the buyer and not simply its market share or technical function in the supply chain, a vertical merger can have very different competitive impact (Chopra 2019). Yet nowhere do the guidelines indicate that this would be taken into account. This is another striking example of the guidelines' hewing to theory rather than the actual complexities of business reality.
7. Generally speaking, workers should be expressly included alongside consumers, in these or any other guidelines, as a class that may be harmed by vertical mergers and whose welfare ought to be considered in any review. The theorized efficiencies from consolidating supply chains can, in reality, have dire impact on workers at firms who may be squeezed by dominant distributors using foreclosure or other methods by which to extract concessions from unaffiliated suppliers (Wilmers 2018).
8. Footnote 5 of the draft guidelines invites trading off efficiencies in one market with harm to competition in another, which was prohibited by *United States v. Philadelphia National Bank* (1963). While the basis for any kind of efficiencies defense to an anti-competitive merger, very much including the elimination of double-marginalization ("EDM") is missing from the relevant statutes, no efficiencies theory should be admitted wherein the pro-competitive benefits do not affect the same market, counter-party, or stakeholder as the harm to competition against which efficiencies are balanced. There is no mechanism whereby the winners might compensate the losers, nor is there any reliable way to tell whether efficiencies even outweigh competitive harms. Given our experience showing that few, if any, promised efficiencies from mergers in fact materialize, any administrative merger policy should seek to minimize and constrain efficiencies defenses, rather than expand and invite them (Carstensen and Lande 2018; Schilling 2018).
9. There is no basis in the social science literature for the 20% market share safe harbor, which presupposes that markets can even be properly defined at the time of a merger. For example, sequential mergers by tech platforms with seemingly upstream applications have turned out to have both horizontal and vertical characteristics, as when those functionalities are integrated into dominant platforms.

10. The guidelines do not anywhere acknowledge the possibility that harm to competition might be manifested or detected through evidence other than an increase in price.[1] Meanwhile, there is ample evidence to date of vertical mergers having dire effects on competition, but that would not necessarily result in price increases (Glick and Ruetschlin 2019; Abdela, Karlsson, and Steinbaum 2019).
11. No part of the merger guidelines reflects the possibility that anticompetitive conduct concerning one or both of the parties might be uncovered as part of merger review, and what bearing that conduct might have on the agencies' disposition toward the merger.
12. The guidelines also contain no discussion of vertical mergers as a means of evading regulations, including rate regulation and non-discrimination regulations such as common carriage.
13. At the broadest level, the deference shown in the draft guidelines to vertical mergers enacts the unwarranted assumption that antitrust law should be concerned only with horizontal competition while ignoring the importance of policing vertical domination. This has no basis in the relevant statutes nor in legislative intent.

For all of these reasons, we urge the FTC and the DOJ Antitrust Division not to adopt the proposed guidelines, and instead to initiate a more comprehensive process that takes account of recent scholarship and experience with vertical mergers and vertical merger enforcement.

Sanjukta Paul
Assistant Professor of Law
Wayne State University

Marshall Steinbaum
Assistant Professor of Economics
University of Utah

[1] The draft guidelines do refer to anti-competitive acts on the part of merging parties other than increasing prices (for example, as part of a strategy of foreclosure), but they do not anywhere acknowledge that non-price evidence might itself constitute harm to competition.

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