

The need to revise the U.S. non-horizontal merger guidelines

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1. Mergers between competitors are considered “horizontal,” between suppliers and customers as “vertical,” and between other firms as “conglomerate.” President-elect Trump has vowed to block the recently announced \$112 billion AT&T/Time Warner merger.¹ These companies are not direct competitors and so the merger is “non-horizontal.” Key questions for the new Administration are under what conditions does it make sense to block a non-horizontal merger and what is a rational approach for evaluating the impact of such a merger?

2. Unfortunately, the U.S. antitrust agencies have not updated their Non-Horizontal Merger Guidelines² for 32 years, even though (1) the antitrust agencies have revised the Horizontal Merger Guidelines³ 6 times over the last 48 years, (2) the competition agencies in the United States have challenged a number of major mergers between firms that do not directly compete with one another, (3) economic analysis has progressed in identifying when non-horizontal mergers can reduce competition, and (4) almost 10 years ago the European Commission (EC) issued detailed Non-Horizontal Merger Guidelines covering vertical and conglomerate mergers.⁴ The limitations of the existing U.S. Non-Horizontal Merger Guidelines have been highlighted by many

antitrust government officials, attorneys, and economists—and there have been calls to update the sections that deal with vertical mergers since at least the turn of the century.

3. There are several reasons advanced to explain why the U.S. Non-Horizontal Merger Guidelines have not been revised. It has been argued that they should not be updated because there is not a sufficient consensus about how to analyze them, because a public statement about merger enforcement would encourage more active enforcement than merited, and because the administrative costs of a revision are greater than the benefits. The first two of these arguments correctly caution against overly aggressive enforcement, but are not arguments against revising clearly outdated guidelines. The third underestimates the benefits of revising the guidelines, especially when the agencies have challenged a number of multi-billion dollar vertical mergers in recent years, and President-elect Trump appears to be concerned with such mergers. Merger guidelines can provide transparency in merger policy and enforcement, which is extremely important both in ensuring that businesses understand the ground rules and in providing self-discipline for the agencies. A revision of at least the vertical portion of the Non-Horizontal Merger Guidelines is long overdue, and should be a priority of the new Administration.

I. Antitrust guidelines

4. The purpose of antitrust guidelines is reflected in the current U.S. Horizontal Merger Guidelines (“HMGs”): “[t]hese Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition.”⁵ In attempting to accomplish this goal, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have issued

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1 A. Pressman, What AT&T Could do If Trump Blocks the Time Warner Deal, *Fortune* (Nov. 9, 2016), <http://fortune.com/2016/11/09/att-trump-blocks-time-warner>.

2 U.S. Department of Justice, 1984 Merger Guidelines, <http://www.usdoj.gov/atr/hmerger/11249.pdf> [hereinafter the “Non-Horizontal Mergers Guidelines” or “1984 Guidelines”].

3 See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, FTC (Aug. 19, 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [hereinafter the “2010 Guidelines” or “HMGs”] and J. Langenfeld, Non-Horizontal Merger Guidelines in the United States and the European Union: Time for the United States to Catch Up? 16 *George Mason Law Review*, 851–884 (2009).

4 Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings, *Official Journal of the European Union*, C265 (2008) [hereinafter “EC Guidelines”].

5 2010 Guidelines, *supra* note 4, at Section 1.

and revised merger guidelines entirely or in part 6 times over the last 48 years. The HMGs go on to say “*They are not intended to describe how the Agencies analyze cases other than horizontal mergers.*”⁶ Presumably the “*principal analytical techniques and the main type of evidence on which the Agencies rely*” are also important to know in a buyer and seller (vertical) merger, but the agencies have not addressed non-horizontal merger analysis in merger guidelines since 1984.

5. The U.S. Non-Horizontal Merger Guidelines obviously do not reflect advances in the economic literature in the field of non-horizontal mergers since 1984. Other jurisdictions have issued guidelines that reflect the new learning: the EC issued Non-Horizontal Merger Guidelines in 2007 and the Australian Competition & Consumer Commission issued merger guidelines in November of 2008 that address non-horizontal mergers.⁷ The primary focus of non-coordinated effects in the EC Guidelines, for example, is on the potential for foreclosure.⁸ In contrast, the U.S. 1984 Guidelines’ presentation of non-coordinated competitive problems from vertical mergers is centered on the creation of barriers to entry,⁹ and does not mention foreclosure.

6. The U.S. Non-Horizontal Merger Guidelines also do not accurately reflect the agencies’ enforcement policies regarding vertical mergers. In 2005, Former Chairman Pitofsky stated that under the 1984 Guidelines none of five recent vertical challenges at that time would have been regarded as violations and “*could not have been brought if the vertical guidelines were controlling.*”¹⁰ In contrast to the HMGs that are so influential, the “*vertical guidelines have been widely ignored.*”¹¹ It is not surprising that the Antitrust Modernization Commission in 2007¹² and the American Bar Association’s Section of Antitrust in 2013¹³ recommended updating the Non-Horizontal Merger Guidelines to incorporate the new thinking about vertical mergers and provide transparency in how the agencies analyze these non-horizontal mergers.

6 Id. at Section 1.

7 Australian Competition & Consumer Commission (ACCC), *Merger Guidelines*, ACCC (Nov. 2008), <https://www.accc.gov.au/system/files/Merger%20guidelines.pdf>, § 1.15, Section 5 on unilateral effects, Section 6 on coordinated effects. These Guidelines do not have an independent section on the coordinated effects of conglomerate and vertical merger (while the EC Guidelines do). However they recognize in Section 6 that vertical and conglomerate mergers may give rise to coordinated effects and discuss generally how a merger (of any type) can facilitate coordinated conduct. The ACCC Guidelines are in many ways similar to the EC Non-Horizontal Merger Guidelines in recognizing foreclosure and other anticompetitive theories that are absent from the 1984 U.S. Non-Horizontal Merger Guidelines.

8 See EC Guidelines *supra* note 4, at 11–14, and J. Church, Vertical Mergers, in *Issues in Competition Law and Policy*, 1455–1501 (2008).

9 1984 Guidelines *supra* note 2, at § 4.21.

10 R. Pitofsky, Antitrust: Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission, 72 *University of Chicago Law Review*, 209–221 (2005).

11 Id. at 220. See also T. B. Leary, The Essential Stability of Merger Policy in the United States, 70 *Antitrust Law Journal*, 105–120 (2002–2003) and T. J. Muris, Principles for a Successful Competition Agency, 72 *University of Chicago Law Review*, 165–184 (2005).

12 Antitrust Modernization Commission (AMC), Report and Recommendations, AMC (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf, at 68.

13 American Bar Association (ABA), Presidential Transition Report: The State of Antitrust Enforcement 2012, ABA, Feb 2013.

7. Some sections of Non-Horizontal Merger Guidelines that address issues other than vertical mergers do not appear to require substantial changes. The U.S. agencies have generally followed the 1984 Guidelines for cases that involve potential competition, the regulatory avoidance, and increased opportunity and ability to engage in coordinated behavior. Economic thinking has not changed dramatically in these areas. The sections of the 1984 Guidelines that address these areas could be improved, but there is less reason to revise these sections. To the extent that the new Administration is concerned about conglomerate mergers that may place too much power in the hands of too few, the U.S. merger guidelines are clearly inadequate for addressing the relevant issues. The EC has provided an approach for analyzing whether conglomerate mergers would benefit or penalize consumers. The new Administration may want to study the EC’s Guidelines and its experiences applying them over the last 10 years.

II. Economics of vertical mergers and recent enforcement history

8. There has been a great deal of new economic thinking about the competitive implications of vertical mergers since the dominance of Chicago School economics in 1984, and there have been a number of enforcement actions in the United States based at least in part on this newer research.¹⁴ The Chicago School literature on vertical mergers in general argues against challenging vertical mergers. Central to much of the Chicago School’s argument is the successive monopoly model, where there is only one maximum monopoly profit.¹⁵ In this model, additional monopolies in the manufacturing and distribution chain lead to a world of “double marginalization,” in which an upstream monopolist increases prices and restricts output compared to the competitive level, and the downstream monopolist then further raises prices and restricts output because of higher input costs. Vertical integration enhances economic efficiency by allowing the upstream firm to supply inputs to the downstream firm at marginal cost without adding a supra-competitive profit margin upstream.¹⁶ However, the elimination of double marginalization depends on the

14 See Church *supra* note 8.

15 The single profit result states that there is only one monopoly rent to be captured between two firms in a vertical relationship. As a consequence, integration will not add anything to the market power of the acquiring firm. See R. H. Bork, *The Antitrust Paradox* (1st ed. 1978); R. A. Posner, *Antitrust Law* (1st ed. 1976).

16 Other efficiencies from vertical mergers can include the realization of economies of scope, supply assurance, improved information flow and coordination compared to contracting, elimination of free riding on promotional activities, and internalization of R&D benefits. For a general discussion of potential efficiencies from vertical and conglomerate mergers, see S. Bishop, A. Lofaro, F. Rosati, and J. Young, The Efficiency-Enhancing Effects of Non-Horizontal Mergers, Report for European Commission (Enterprise and Industry Directorate-General), 2005.

assumptions of successive monopolies, linear pricing,¹⁷ and the input being used in fixed proportion to other inputs. Absent these assumptions there is the potential for anticompetitive effects from a vertical merger.

9. Under Post-Chicago theories of vertical mergers, a vertically integrated firm could foreclose its rivals if there is “imperfect competition” in the pre-merger and post-merger environment. The literature identifies two types of foreclosure: input foreclosure (where the integrated firm seeks to raise rivals’ costs) and customer foreclosure (where the integrated firm seeks to reduce rivals’ revenues).¹⁸ In all, Salop and Culley count 48 challenges to vertical mergers from 1994 to 2015, and 36 were all or in part based on foreclosure concerns.¹⁹

10. Research shows that input foreclosure can follow from a vertical merger when the upstream division of the integrated firm either stops supplying inputs to competitors of its downstream division, or continues to sell at a substantially increased price.²⁰ Research also shows that an acquiring downstream firm may actually have the incentive to foreclose its rivals or raise rivals’ costs, and provides the conditions under which increased intermediate prices increase final good prices.²¹

11. The 1984 Merger Guidelines do not acknowledge the possibility of input foreclosure or raising rivals’ costs as the basis for a merger challenge. However, the FTC and the DOJ have used input foreclosure arguments in challenging vertical merger cases since at least the 1990s.²² There have been many vertical mergers since then that have been (or are likely to be) investigated for input foreclosure concerns,²³ and in recent years the agencies have challenged a number of very large mergers based on these concerns. In addition, customer foreclosure can follow from a vertical merger when the downstream division of a merged firm stops purchasing inputs from competitors of the upstream division and increases the competitors’ cost structures. However, for input or customer foreclosure to be credible, it must be profit maximizing for the merged firm to forgo selling inputs to downstream competitors or obtaining inputs from an external supplier.²⁴

12. In particular, an analysis of unilateral effects from input foreclosure should examine the incentive and ability of the vertically merged firm to impose upstream price increases (or reductions in service) on downstream rivals for the purpose of shifting sales to the merged firm’s own downstream subsidiary. In assessing the profitability of this strategy, the most important considerations are the size of the price increases that targeted downstream rivals would pass on, the amount of diversion from them to the merged firm’s downstream subsidiary, and the profitability of the diverted volume. The analysis would compare the potential loss in profits to the merged firm’s upstream unit (because its sales to downstream rivals would decline) to the increased profits from higher upstream and downstream prices as well as increased downstream sales.

13. Moresi and Salop, for example, present a methodology for quantifying these incentives by defining “vertical” gross upward pricing pressure indices (“vGUPPIs”).²⁵ The indices relevant to a merged firm’s incentive to raise wholesale prices to downstream rivals incorporate (a) rivals’ downstream volumes that would be diverted to the merged firm’s own downstream partner (because rivals may pass-through wholesale price increases into higher downstream prices); (b) the margin the merged firm’s downstream partner would realize on diverted volume; (c) the ratio of the wholesale price charged to the merged firm’s downstream partner to the prices charged to its downstream rivals; (d) the extent to which the downstream rival may be able to avoid a wholesale price increase by substituting away some or all its wholesale purchases to other wholesalers; and (e) the incentive for downstream rivals to raise their own prices (which depends on the amount of input price increase and their ability to pass-through that increase to higher downstream prices). Any expected downward pricing pressure on the merged firm’s downstream subsidiary can be compared and balanced against upward pricing pressure on downstream rivals to obtain an estimate of the “net” downstream pricing pressure, and whether the transaction is likely to be anticompetitive.

14. Another method to evaluate unilateral competitive effects of vertical mergers is the “vertical arithmetic” employed by the U.S. DOJ in the *Comcast/NBC* matter, discussed below.²⁶ This approach attempts to gauge the probability that the upstream firm will withhold its product from downstream rivals, as opposed to using price as the device to favor and discriminate. The vertical arithmetic approach applies very similar data to those applied to a vGUPPI analysis.

15. An additional tool is merger simulation. Merger simulation was used by economists retained by AT&T and DirecTV and evaluated by the FCC in the analysis

¹⁷ That is unit pricing, without non-linear discounting such as rebates.

¹⁸ S. C. Salop and D. P. Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 *Journal of Antitrust Enforcement*, 1–41 (2016).

¹⁹ *Id.* at 12.

²⁰ M. Salinger, *Vertical Mergers and Market Foreclosure*, 103 *The Quarterly Journal of Economics*, 345–356 (1988), provides a model of input foreclosure assuming oligopoly in both the upstream and downstream markets.

²¹ J. A. Ordover, G. Saloner and S. C. Salop, *Equilibrium Vertical Foreclosure*, 80 *American Economic Review*, 127–142 (1990). *See also* G. Gaudet and N. V. Long, *Vertical Integration, Foreclosure, and Profits in the Presence of Double Marginalization*, 5 *Journal of Economics & Management Strategy*, 409–432 (1996); R. S. Higgins, *Competitive Vertical Foreclosure*, 20 *Managerial and Decision Economics*, 229–237 (1999); Y. Chen, *On Vertical Mergers and Their Competitive Effects*, 32 *Rand Journal of Economics*, 667–685 (2001).

²² Church *supra* note 8 provides a list of 23 merger consents or abandoned mergers that involve vertical anticompetitive theories during the 1990s, at 1460. He lists on 3 cases since 2000.

²³ Langenfeld *supra* note 3.

²⁴ *See* M. A. Salinger, *Vertical Mergers in Multi-Product Industries and Edgeworth’s Paradox of Taxation*, 39 *The Journal of Industrial Economics*, 545–556 (1991) on vertical mergers.

²⁵ S. Moresi and S. C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 *Antitrust Law Journal*, No. 1, 185 (2013).

²⁶ *See*, for example, W. Rogerson, *Vertical Mergers in the Video Programming and Distribution Industry: The Case of Comcast-NBCU*, *CSIO Working Paper No. 0116* (2012).

of their recent merger.²⁷ Vertical merger simulation involves modeling and estimating demand for products supplied by the upstream firm; obtaining upstream and downstream shares by competitor; estimating upstream and downstream marginal costs that are consistent with observed prices; and using the resulting estimated values to simulate the effects of a vertical merger based on joint profit maximization. Although vertical merger simulation yields “complete” estimates of the price effects of a merger, it is typically more burdensome and requires more extensive data analysis and restrictive modeling assumptions than other approaches.

16. A recent example of a merger likely to face foreclosure or raising rivals’ costs scrutiny by the DOJ is the \$112 billion AT&T and Time Warner merger²⁸ discussed by Mr. Trump, which is ongoing at this time.²⁹ Although AT&T and Time Warner compete in separate markets, telecom and entertainment respectively, there are still concerns regarding the possible effects of such a merger. For instance, input foreclosure could occur through AT&T’s denial of Time Warner media to its competitors or, conversely, customer foreclosure could occur through AT&T’s refusal to purchase and distribute media from Time Warner competitors.³⁰

17. In 2016, the DOJ forced the abandonment of the \$45 billion merger of Comcast and Time Warner Cable.³¹ For this merger Comcast offered to divest 3.9 million customers where the two firms directly competed in an effort to eliminate horizontal competitive concerns and keep its market share below 30% of all U.S. multichannel video programming distributor (MVPD) customers.³² While the customer divestiture addressed horizontal merger concerns, a central concern of the vertical integration was how Comcast’s post-merger control of broadband capacity would enable it to discriminate against competitors such as Netflix by becoming “an unavoidable gatekeeper for Internet-based services that rely on a

broadband connection (...).”³³ Furthermore, there was the concern that Comcast, through its estimated post-merger market shares in national cable TV and broadband of 38% and 36% respectively,³⁴ would exert buyer power to its upstream rivals in other areas such as content markets.³⁵ Ultimately, after facing increasing pressure from both the Department of Justice and the Federal Communications Commission (FCC), Comcast relinquished its attempts at the merger when the FCC prepared a hearing order that would delay the merger for an unpredictable and extended amount of time.³⁶

18. In 2015, the owner of one of only two oil refineries in Hawaii, Par Petroleum Corporation (Par), sought the acquisition of Mid Pac Petroleum, LLC (Mid Pac). The FTC challenged this merger alleging a foreseeable reduction in competition in the bulk supply market of Hawaii-grade gasoline blendstock (HIBOB). The allegations stemmed from Mid Pac’s 2005 long-term storage and throughput agreement with Aloha Petroleum, Ltd., the sole Hawaiian bulk supplier without a refinery, regarding shared access to the only commercial gasoline terminal in Hawaii that can import HIBOB.³⁷

19. The Commission concluded that Par, via the use of Mid Pac and Aloha’s storage and throughput agreement, could constrain HIBOB imports by storing large amounts of HIBOB at the terminal for prolonged periods of time. The parked goods would reduce the size of cargo shipments that Aloha could import through the terminal; directly increasing Aloha’s fixed freight costs and decreasing imports.³⁸ This situation would give Par, and Hawaii’s other oil refiner Chevron, incentive to constrain HIBOB supply in the Hawaiian market. In response to the possibility of input foreclosure, the Commission enacted a consent order requiring the termination of Mid Pac’s storage and throughput agreement for the merger to be approved.³⁹

20. In 2013, the FTC raised input foreclosure concerns regarding General Electric Co.’s (GE) \$4.3 billion acquisition of Avio S.p.A. (Avio), a manufacturer of engine components for aircraft.⁴⁰ The Airbus A320neo aircraft only having two engine choices, the PW1100G by Pratt and Whitney and the CFM Leap 1-A in which GE had a

27 See Memorandum Opinion and Order, In the Matter of Applications of AT&T and DirecTV, For Consent to Assign or Transfer Control of Licenses and Authorizations, Before the Federal Communications Commission, MB Docket No. 14-90, FCC 15-94 (Jul. 28, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-94A1.pdf.

28 L. Picker and C. King, Regulatory Microscope Lies Ahead for AT&T and Time Warner, *The New York Times* (Oct. 22, 2016), <http://www.nytimes.com/2016/10/23/business/dealbook/regulatory-microscope-lies-ahead-for-att-and-time-warner.html>.

29 Angling for the Future of TV, *The Economist*, Oct. 29-Nov. 4, 2016, at 55–56.

30 D. Fisher, AT&T-Time Warner Deal Will Hinge on ‘Foreclosure’ Effects, *Forbes* (Oct. 25, 2016), <http://www.forbes.com/sites/danielfisher/2016/10/25/att-time-warner-deal-will-hinge-on-foreclosure-effects/#3e50749e7d51>.

31 R. Yu and M. Snider, How Comcast, Time Warner Cable deal Unraveled, *USA Today* (Apr. 25, 2015), <http://www.usatoday.com/story/money/2015/04/24/how-comcast-deal-to-buy-time-warner-cable-fell-apart/26313471>.

32 D. L. Cohen, Comcast Reaches Agreement with Charter to Divest 3.9 Million Customers Marking an Important Milestone Towards Comcast’s Merger with Time Warner Cable, Comcast (Apr. 28, 2014), <http://corporate.comcast.com/comcast-voices/comcast-reaches-agreement-with-charter-to-divest-3-9-million-customers-marking-an-important-milestone-toward-comcasts-merger-with-time-warner-cable>

33 Press Release, The U.S. Department of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable after Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015) and Angling the Future *supra* note 29.

34 D. Moss, Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should be Blocked, *American Antitrust Institute White Paper*, June 2014

35 *Id.* at 9–11.

36 Yu and Snider *supra* note 31.

37 Press Release, The Federal Trade Commission, Statement of the Federal Trade Commission in the Matter of Par Petroleum Corporation and Mid Pac Petroleum, LLC. File No. 141-0171 (Mar. 18, 2015), at 1.

38 *Id.* at 1.

39 *Id.* at 2.

40 Press Release, The Federal Trade Commission, Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment in the Matter of General Electric Company, File No. 131-0069, at 1.

50% stake. Avio was the sole designer of the PW1100G engine's accessory gearbox (AGB), a component that is designed and manufactured novel to each aircraft engine.⁴¹ With the acquisition of Avio, the FTC foresaw GE having "both the ability and the incentive to disrupt the design and certification of the Avio-supplied AGB for the Pratt and Whitney PW1100G engine."⁴² In response, the FTC proposed a consent agreement that removed GE's "ability and incentive to disrupt Avio's AGB work during the design, certification and initial production ramp-up phase."⁴³

21. The Department of Justice (DOJ) challenged United Technologies Corporation's (UTC) \$18.4 billion 2012 acquisition of Goodrich Corporation (Goodrich)⁴⁴ in part under competition concerns standard in horizontal mergers, but also partially due to input foreclosure concerns. The concerns involved UTC's position in the large aircraft turbine engine market after acquiring Goodrich's stake in its joint venture with Rolls-Royce in an engine control system (ECS) producer known as Aero Engine Controls (AEC).⁴⁵

22. Similar to AGBs in aircraft engines, large turbine engines require the design and manufacturing of engine specific ECSs to run.⁴⁶ At the time of the merger, Rolls-Royce was required to solely purchase the ECSs for its large turbine engines from AEC, its joint venture with Goodrich. After merging with Goodrich, UTC would become the sole supplier of ECSs for one of its two direct competitors in the market for large turbine engines while also acquiring access to sensitive information on Rolls-Royce's engines.⁴⁷ To alleviate any possible input foreclosure concerns, the DOJ ordered UTC to divest Goodrich's holdings in AEC to Roll-Royce or, if the option were waived by Rolls-Royce, an outside entity.⁴⁸

23. In 2011, the DOJ challenged a \$6.5 billion joint venture between Comcast Corporation (Comcast), GE, NBCU, and Navy, LLC.⁴⁹ The venture would have combined the assets of Comcast, owner of multiple national cable programming networks and largest video programming distributor in the United States, with those of NBCU, a media company in which GE had an 88% stake.⁵⁰ The DOJ's concerns addressed the possibility that if the joint venture excluded access of NBCU's media to Comcast's

competitors, then competition in the market for media distribution may unduly be lowered; hurting consumers and innovating entrants such as online video programming distributors (OVDs).⁵¹ The presumption that such exclusivities may occur was not without precedent given that Comcast had previously refused to license one of its channels, CSN Philadelphia, to competitors DirecTV and Disk. The DOJ presuming this to explain the smaller market shares of Comcast's competitors in Philadelphia.⁵² The DOJ's final judgment on the matter ordered that the joint venture provide OVDs comparable video programming at economically equivalent price, terms, and conditions to those under which they are provided to standard MVPD.⁵³ Furthermore, the joint venture had some additional restrictions placed on it, such as the relinquishing of its Hulu voting rights,⁵⁴ and OVDs were given the option to appeal the DOJ for commercial arbitration should agreements regarding video programming not be reached naturally with Comcast.⁵⁵ There have been multiple complaints that the merged company has failed to abide by the restrictions imposed by the DOJ order.⁵⁶

24. Despite the absence of any discussion of customer foreclosure in the 1984 Guidelines, it has also been used by the antitrust agencies in analyzing and deciding to challenge mergers.⁵⁷ For example, in 2007 and 2008 the DOJ challenged the \$1.5 billion merger of Monsanto Company (Monsanto),⁵⁸ provider of agricultural products, and Delta and Pine Land Company (DPL), the world's largest producer of traited cottonseed.⁵⁹ Beginning in the late 1980s, DPL licensed its cottonseed traits to enhance their seed breeds primarily from Monsanto.⁶⁰ In 2004, ADP began working with Monsanto competitors to develop breeds including non-Monsanto traits which, in response, led Monsanto to create its own competing traited cottonseed manufacturing company, Stoneville.⁶¹ The proposed merger would combine the market shares of both traited cottonseed manufacturers, ADP and Stoneville, which sum to 95% of the sale of traited cottonseed sold in both the MidSouth and the Southeast United State markets.⁶² The DOJ feared that the merger

41 Id. at 2.

42 Id. at 3.

43 Id. at 3.

44 Memorandum Opinion, *United States of America v. United Technologies Corporation and Goodrich Corporation*, No. 1:12-cv-1230 (Mar. 29, 2013), at 3.

45 Id. at 4–5.

46 Id. at 4.

47 Id. at 4–5.

48 Final Judgment, *United States of America v. United Technologies Corporation and Goodrich Corporation*, No. 1:12-cv-1230 (Mar. 29, 2013), at 27–29.

49 Complaint, *United States of America et al. v. Comcast Corporation, General Electric Co., and NBD Universal, Inc.*, No. 1:11-cv-00106 (Jan. 18, 2011), at 8.

50 Id. at 6–7.

51 Id. at 19–22.

52 Id. at 19.

53 Id. at 11–14.

54 Id. at 15–16.

55 Id. at 14–15.

56 See Angling for the Future *supra* note 29, at 56, J. Brodtkin, Comcast Accused of Violating NBC Merger Commitment and Net Neutrality Rule, *Ars Technica* (Mar. 3, 2016), and Claire Atkinson, Regulators Eyeing Comcast for Possible NBCU Deal Violations, *The New York Post* (May 28, 2015), <http://nypost.com/2015/05/28/comcast-under-fire-for-possible-violations-before-nbcu-purchase>.

57 See Langenfeld *supra* note 3, at 861–861; Salop and Culley *supra* note 18, at 17, 23–24.

58 Press Release, U.S. Department of Justice, Justice Department Requires Divestitures in \$1.5 Billion Merger of Monsanto and Delata & Pine Land (May 31, 2007).

59 Complaint, *United States of America et al. v. Monsanto Company and Delta Pine Land Company*, No. 1:07-cv-00992 (Nov. 6, 2008), at 2.

60 Id. at 2.

61 Id. at 3.

62 Id. at 2–3.

could harm farmers or Monsanto's trait development competitors by removing the largest cottonseed producer from the traits market or by eliminating DPL as an independent Monsanto partner.⁶³ To alleviate concerns, the DOJ's final judgment ordered Monsanto to divest some portions of both merging companies' holdings in Stoneville, DPL, and, Monsanto competitor, Vipcot.⁶⁴

III. Conglomerate mergers and learning from the EC

25. The U.S. antitrust agencies have not been active in challenging conglomerate mergers since the creation of the 1984 Guidelines. However, the *Economist* magazine recently expressed concerns about the high levels of overall concentration, "*abnormal profits are spread across a wide range of sectors,*" and limitations on U.S. enforcement.⁶⁵ Moreover, President-elect Trump voiced his opposition to the non-horizontal AT&T/Time Warner merger based on "*too much concentration of power in the hands of too few.*"⁶⁶ These concerns may indicate that the new Administration's concerns regarding non-horizontal mergers may extend beyond vertical, potential entry, and regulatory avoidance issues to conglomerate concentration. The U.S. 1984 Guidelines recognize conglomerate mergers as one of two types of non-horizontal mergers, but they do not add any discussion on how to analyze potential anticompetitive effects from conglomerate mergers.⁶⁷ To the extent the new Administration is concerned about conglomerate concentration, it should extend the Non-Horizontal Merger Guidelines to cover them.

26. The EC Guidelines recognize the anticompetitive effects of conglomerate mergers and devote an entire section to them.⁶⁸ The EC Guidelines outline potential anticompetitive effects of conglomerate mergers, while recognizing they are seldom anticompetitive.⁶⁹ The new Administration may want to learn from the EC's experience about how best to separate potentially anticompetitive conglomerate mergers from procompetitive ones.

27. The EC Guidelines indicate that the main concern regarding unilateral effects resulting from conglomerate mergers are those of foreclosure,⁷⁰ which they define as "*any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing the companies' ability and/or incentive to compete.*"⁷¹ They discuss qualitatively the ability and incentive of a conglomerate firm to foreclose (by bundling/tying) and point out the potential for anticompetitive effects.⁷² The EC Guidelines state that a conglomerate merger will be challenged only if the conglomerate has both the ability and incentive to foreclose, and consumers are subsequently harmed as a result.⁷³

28. Section 5B of the EC Guidelines discusses coordinated effects resulting from conglomerate merger and, in general, reflects the current literature. First, the EC Guidelines state that coordination is more likely to happen in markets where it is easy to identify terms of coordination.⁷⁴ Second, they explain that if foreclosed competitors exit the market, there will be a reduction in the number of firms in the market thereby making tacit collusion easier.⁷⁵ Third, the threat of foreclosure itself may induce competitors to coordinate because cheating may result in getting foreclosed by the conglomerate.⁷⁶ Last, the EC Guidelines note that multimarket competition increases the scope and effectiveness of disciplining.⁷⁷

63 Id. at 11–12.

64 Final Judgment, *United States of America et al. v. Monsanto Company and Delta Pine Land Company*, No. 1:07-cv-00992 (Nov. 6, 2008), at 4–16.

65 Too Much of a Good Thing, *The Economist*, Mar. 26, 2016, at 9.

66 Pressman *supra* note 1.

67 1984 Guidelines *supra* note 3, at § 4.11 & n. 25.

68 See EC Guidelines, *supra* note 4, at 21–25.

69 Id. at 21.

70 Id. at 22.

71 Id. at 8.

72 Id. at 22–25.

73 Id. at 22.

74 Id. at 25. This reflects the argument that multimarket contact reduces difficulty in identifying coordinate outcome. See J. T. Scott, *Purposive Diversification and Economic Performance* 22 (1993); see also J. T. Scott, *Designing Multimarket Contact Hypothesis Tests: Patent Citations and Multimarket Contact in the Chemicals Industry*, in *Multimarket Organization and Multimarket Strategy* 175 (J. A. Baum and H. R. Greve eds., Elsevier Sci. & Tech. 2001).

75 EC Guidelines, *supra* note 4, at 25.

76 Id. This is consistent with Professor Church's report to the European Commission. See J. Church, *The Impact of Vertical and Conglomerate Mergers on Competition* 241-59 (2004), available at http://ec.europa.eu/competition/mergers/studies_reports/merger_impact.pdf.

77 Id. at 25; see F.M. Scherer, *Industrial Market Structure and Economic Performance* 340 (2nd ed. 1980) ("*When one conglomerate enterprise competes with another, the two are likely to encounter each other in a considerable number of markets. The multiplicity of their contacts may blunt the edge of their competition. A prospect of advantage from vigorous competition in one market may be weighed against the danger of retaliatory forays by the competitor in other markets.*" (quoting Subcommittee on Antitrust and Monopoly Hearings, 89th Cong. 45 (1965) (testimony by Corwin Edwards))). But see B. D. Bernheim and M. D. Whinston, *Multimarket Contact and Collusive Behavior*, 21 *Rand Journal of Economics*, 1–3 (1990) ("*The problem with [Edwards's] argument is that once a firm knows that it will be punished in every market, if it decides to cheat, it will do so in every market.*").

IV. Costs and benefits to revising U.S. Non-Horizontal Merger Guidelines

29. There are obviously costs and benefits associated with revising any policy statement, even one as out of date as the 1984 Guidelines. Before her appointment as FTC Bureau of Competition director, Deborah Feinstein recognized the 1984 Guidelines were out of date, but argued that “[t]he resources that go into drafting and achieving consensus on new guidelines are extensive and may not be justified given the low rate of challenge to vertical mergers.”⁷⁸ It is true that there are many more horizontal mergers investigated and challenged than non-horizontal mergers.⁷⁹ However, the U.S. agencies on average engage in between one and two vertical enforcement actions per year.⁸⁰ These challenges often involve multibillion dollar mergers. The recent vertical mergers discussed above alone were collectively valued at almost \$200 billion. Moreover, Malcolm Coate estimates that the FTC has investigated over three times as many vertical mergers than it has challenged since 2005.⁸¹ These figures do not reflect the potential for investigations of conglomerate mergers that might be undertaken under the new Administration. There is clearly a substantial cost to any carefully constructed policy statement, but the magnitude of commerce involved in non-horizontal merger investigations and challenges should outweigh those costs.⁸²

30. Other arguments have been presented against updating the Non-Horizontal Merger Guidelines.⁸³ These criticisms in effect argue for caution in challenging non-horizontal mergers, but do not give adequate weight to the consensus that the 1984 Guidelines do not reflect current economic thinking or policy.

31. It has been argued that U.S. vertical merger cases typically involve negotiated consents, where the merging parties have incentives to agree to close the merger promptly and thus may not accurately reflect antitrust jurisprudence in this area.⁸⁴ Recent research by John Kwoka on negotiated merger consents finds that even

in primarily horizontal merger cases there is an average price increase of 12.81% after these mergers, indicating that these remedies are largely ineffective in restraining post-merger price increases.⁸⁵ The fact that some merging parties may have signed consents rather than test the agencies’ theories in court in no way undercuts the usefulness of new guidelines to identify agreed upon principles for evaluating and correcting potential antitrust concerns, but instead underscores the importance of guidelines.

32. All agree that anticompetitive theories relating to vertical and conglomerate mergers are more complex than horizontal mergers, and that has been used to argue against revision of the 1984 Guidelines. Horizontal mergers can lead to an immediate reduction in output and increased prices. Non-horizontal merger concerns often involve the merged firm expanding its output at the expense of its competitors, raising these rivals’ costs, and in the longer run reducing the sales of its competitors by more than any expansion of the merged firm’s output. Alternatively, a vertical merger might prevent downstream competitors from expanding output by restricting input sales to them, allowing the merged firm to profitably raise its downstream prices. As such, revised Non-Horizontal Merger Guidelines need to address different issues than the HMGs, which supports a revision of the 1984 Guidelines that addresses these issues.

33. There are some legitimate questions about whether antitrust analysis and economics are up to the challenge of providing clear guidance for new Non-Horizontal Merger Guidelines. For example, current economic models describe possible anticompetitive effects from vertical mergers, but some argue the theories lack generality and depend on a variety of conditions that may not easily be observed. However, evaluating the competitive effects of even horizontal mergers in an oligopoly depends on assumptions that can also lack generality and can be difficult to observe. In part, this is why the Horizontal Merger Guidelines devote a great deal of analysis to competitive effects, and a revision of the Non-Horizontal Merger Guidelines should similarly address competitive effects.

34. There can also be concerns that the new economic models do not address all of the potential procompetitive effects of vertical integration, and in particular the benefits of eliminating double marginalization in vertical cases. However, the agencies have analyzed the likelihood of the elimination of double-marginalization and other efficiencies on a case-by-case basis in the past, and outlining those analyses in guidelines would be quite useful to focus all on the key issues.

35. Some have expressed concerns that revised guidelines would lead to too much enforcement or overstate the agencies’ intentions to challenge more non-horizontal mergers.⁸⁶ Given President-elect Trump’s opinion on the

78 D. Feinstein, Are the Vertical Merger Guidelines Ripe for Revision? *Antitrust*, 6 (2010).

79 Cornerstone Research, *Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies*, Cornerstone Research, Aug. 12, 2015, at 12.

80 Salop and Culley *supra* note 18, at 4.

81 M. B. Coate, Merger Policy at the Federal Trade Commission: What, If Anything, Has Changed? Mar. 21, 2016, at 42.

82 The author has firsthand experience with the costs of revising merger guidelines. He contributed to the 1992 Horizontal Merger Guidelines as director for Antitrust of the Bureau of Economics at the Federal Trade Commission.

83 P. Yde, Non-Horizontal Merger Guidelines: A Solution in Search of a Problem? 22 *Antitrust*, 74–79 (2007) and G. Werden, Should the Agencies Issue New Merger Guidelines? 16 *George Mason Law Review*, 839 (2009).

84 *Id.* at 77.

85 J. Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*, 155–156 (2015).

86 Feinstein *supra* note 78, at 5; Yde *supra* note 83, at 78.

AT&T/Time Warner merger, there may be interest in more active non-horizontal merger enforcement. However, agency staffs would likely limit their investigations to the vertical theories discussed in the revised guidelines, which presumably would not result in over-enforcement.

36. Finally, some have argued that vertical cases will be costly to investigate because they are complex and require inquiries into potential efficiencies.⁸⁷ Vertical cases may be costlier to investigate, but the investigations will likely take place regardless of what the guidelines state. If anything, costs are likely to be higher if parties are relying on outdated guidelines that do not identify the types of theories that may be pursued, again arguing for revising the 1984 Guidelines.

V. The time to act

37. The U.S. Non-Horizontal Merger Guidelines have been ripe for revision for some time. The new leaders of U.S. antitrust agencies will have to weigh the benefits and costs associated with important policy changes, including revising the 1984 Non-Horizontal Merger Guidelines. There are substantial benefits from updating at least the

vertical portions of those Guidelines, such as informing businesses about when a merger is likely to be investigated, and giving the agencies' staff clearer guidance about the nature and scope of such investigations. The most immediate cost of revising the guidelines is that the agencies must devote scarce resources to the task.⁸⁸ Past administrations have not been willing to undertake that investment, but that should not deter the new Administration to reap the benefits of the long overdue revision of the 1984 Guidelines and the opportunity to set a clear course for evaluating non-horizontal mergers.

38. The revision should describe a set of theories of anti-competitive effect and the factual circumstances in which those theories may apply. The EC Guidelines follow this approach in a structured analysis that applies market power screens, identifies a coherent theory of anticompetitive harm that has factual relevance, and assesses the nature and magnitudes of merger-related efficiencies from vertical and conglomerate mergers.⁸⁹ In effect, the EC has already done much of the difficult work here. The U.S. agencies should be able to build on that platform and prepare revised Non-Horizontal Merger Guidelines that reflect current economic thinking and administration policy. ■

⁸⁷ Feinstein *supra* note 78, at 7; Yde *supra* note 83, at 78.

⁸⁸ It took about two years to create the 1992 Horizontal Merger Guidelines, even though there was a consensus on many of the important issues. The author was involved in that process, and it was a major undertaking.

⁸⁹ See EC Guidelines *supra* note 4.