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DOJ workshop on draft vertical merger guidelines: Panelists express widely divergent views

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On 11 March 2020 the U.S. Department of Justice (DOJ) held a workshop to discuss comments on the draft vertical merger guidelines (the guidelines)[1] published by DOJ and the Federal Trade Commission (FTC) on 10 January 2020. The workshop included discussion panels comprised of current and former DOJ Antitrust Division officials, private practitioners, and academics.[2]

Assistant Attorney General Makan Delrahim opened the workshop by explaining that the intention of the DOJ and FTC (collectively the "agencies") in publishing updated guidelines is to provide transparency into the agencies' investigative practices. FTC Commissioner Christine Wilson stressed the importance of the guidelines in assisting stakeholders and ensuring best practices. Based on the comments of the panelists, it is unclear if the guidelines will accomplish that goal.

Panelists generally agree that the guidelines should provide more clarity and transparency

There was general agreement that the 1984 Non-Horizontal Merger Guidelines are out of date and were properly withdrawn. There was also agreement that the guidelines should do more to lay out how the agencies are treating vertical merger issues to provide guidance to the bar and to courts, and to increase predictability for merging parties. For example, one panelist stressed that the guidelines fall short in providing effective guidance with respect to when and how the agencies will determine if a vertical merger is likely to harm consumers, specifically with respect to tech companies. The panelist suggested that the guidelines should define upstream/downstream markets in data-driven sectors, provide clarity regarding when data raises foreclosure concerns, and imbue the guidance with the incipiency standard regarding likely harm. Another panelist argued that the guidelines should include a full list of potential competitive harms based on the understanding that mergers can be both horizontal and vertical. Others pointed out that it is often difficult to classify complex deals as horizontal or vertical, and believe the guidelines need to provide more guidance in such circumstances.

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[1] U.S. Department of Justice and Federal Trade Commission Draft Vertical Merger Guidelines (2020) available at https://www.justice.gov/opa/press-release/file/1233741/download.

[2] Department of Justice press release, Public Workshops on Draft Vertical Merger Guidelines, available at https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines.

Other than aspirational goals, however, there was little agreement on what the guidelines should say and what their approach should be.

Should a safe harbor be included in the guidelines?

One of the most debated issues was whether the guidelines should include a safe harbor for mergers that fall below a certain size threshold. The current draft guidelines do not include an explicit safe harbor provision, but state that the agencies are "unlikely" to challenge a vertical merger if the merging parties' share in the relevant market is less than 20 percent and the related product is used in less than 20 percent of the relevant market.

- Some panelists opined that the 20 percent threshold is too low, and could chill benign and pro-competitive vertical mergers. Panelists argued that it usually takes a higher market share to create market power or foreclosure effects, and therefore the safe harbor should be set at 30-40 percent and include a stronger statement that "vertical mergers below these levels likely would not require further analysis."

- Other panelists argued that the guidelines should not include any safe harbor. They opined that a safe harbor without any corresponding presumptions of anticompetitive harm could lead the agencies to clear mergers that should be challenged. Rather than a safe harbor, those panelists argued that the guidelines should flag conditions when the agencies would consider a merger to raise heightened concerns.

- Still others noted that it is unclear whether the 20 percent figure is descriptive of current agency practice. This is an empirical question, they said, and the guidelines should not identify a safe harbor threshold until there is more information and data about actual practices. Others believe the agencies should defer to economists regarding whether 20 percent is the appropriate number.

Related product markets

Panelists also discussed the guidelines' concept of "related products." One panelist expressed concern that the guidelines deviate from focusing squarely on upstream/downstream markets, which is the language most commonly used to discuss vertical mergers, and viewed "related products" as an "ill-defined concept." Other panelists argued that consideration of related products was appropriate because the availability of substitutes in a related product market would affect the merger analysis even if the "related product" is not technically an input to the other firm's product or vice versa.

Elimination of double marginalization and other efficiencies

Currently, the draft guidelines discuss the elimination of double marginalization (EDM) in a separate section between the guidelines' discussion of potential unilateral and coordinated anticompetitive effects. The panelists debated both this structure and the emphasis the guidelines place on EDM as a potential procompetitive benefit.

- Some panelists argued that EDM should be included in the efficiencies section – not in its own section – and that the burden should be on the merging parties to provide evidence that any EDM reflected a cognizable efficiency in that specific merger. This view reflected a general debate about whether EDM is pervasive or inevitable, with some arguing that it is inevitable in customer/supplier mergers, and others arguing that it is a fact issue that should be considered on a case-by-case basis.

- Commissioner Wilson expressed her view that the agencies should treat EDM differently than other efficiencies in the final guidance, since EDM can occur even if the merger does not

result in any cost-saving efficiencies. Another panelist agreed, arguing that it is appropriate to have EDM in a separate section, and that the strict standards for proving efficiencies in horizontal mergers should not be placed on an efficiency like EDM.

- One panelist considered the guidelines' placement of the EDM discussion between the unilateral effects section and the coordinated effects section appropriate, because it suggests that the agencies consider EDM part of an effects analysis, rather than an efficiency.

Additional issues raised by the panelists:

- The guidelines' list of potential harms leaves a lot of situations unaddressed. The guidelines should make it clear that the categories are not airtight or exhaustive, but can be used as a basis for explaining how competitive harm occurs.
- The guidelines should be more explicit about whether they are discussing downstream harm or upstream harm.
- The guidelines should address the impact of smaller mergers, specifically with respect to the issue of dominant platform issues and the need to protect nascent and potential competitors.
- The examples provided in the guidelines should be more relevant to the modern economy.

Next steps

The agencies intend to consider both public comments and workshop discussions in advance of issuing final vertical merger guidelines. The timeline for the publication of the final guidelines is unclear. [3]

[3] A second workshop was scheduled to take place at the FTC's offices in Washington, D.C. on 18 March 2020 but was canceled because of COVID-19. Federal Trade Commission press release, Federal Trade Commission Cancels March 18 Workshop on Draft Vertical Merger Guidelines (13 March 2020) available at https://www.ftc.gov/news-events/press-releases/2020/03/federal-trade-commission-cancels-march-18-workshop-draft-vertical.

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