

Review of the New U.S. Vertical Merger Guidelines

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The new *Vertical Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission on June 30, 2020, demonstrate that the agencies were responsive to comments received during the consultation process.

In January 2020, the agencies released the *Draft Vertical Merger Guidelines* for public comment.

The threshold-based safe harbors in the draft have been replaced with a statement about the set of facts that would lead the agencies to raise concerns (a rebuttable presumption). In the draft, the threshold for the relevant market was decoupled from the incentive for post-merger manipulation, and the threshold for the related market would have been difficult to implement. These thresholds were the subject of considerable debate in the comments. In the final guidelines, they have been replaced with presumptions based on a robust framework of competitive harm in vertical mergers, which will provide a healthier screen on the mergers to be investigated.

The guidelines now provide a framework that sets out the fundamental elements of a theory of harm through raising rivals' costs (RRC) or foreclosure—the *ability and incentive framework*. The robust framework of competitive harm that allowed the guidelines to dispense with thresholds is also new. The framework makes clear that for anticompetitive concerns to arise from a vertical merger, the merged firm must be able to leverage its power in one market to competitively disadvantage its rivals in another market, and that such a strategy must be profitable to the merged firm given its costs and benefits.

The guidelines now make explicit that they encompass diagonal mergers and mergers of complements, in addition to vertical mergers. The draft guidelines stated that they would apply only to vertical mergers. A number of comments, including the Cornerstone Research comments, noted that the approach in the guidelines could easily be extended to other types of non-horizontal mergers. Revising the guidelines to encompass these mergers brings the U.S. guidelines into closer alignment with those of the EU and the UK (although a number of important differences remain). In addition, the agencies helpfully point out that a merger may present both vertical and horizontal concerns, and that both sets of guidelines can be relied on to review such a merger. This avoids unnecessary battles to pigeonhole mergers into one or the other set of guidelines.

The agencies have avoided potential confusion and inconsistency from the draft guidelines'

positioning of Elimination of Double Marginalization (EDM) in its own independent

section. Moving EDM into the section on pro-competitive effects removes the impression that EDM might face a different standard than other efficiencies (e.g., placing the burden of proof on the agencies). The new guidelines are explicit that “it is incumbent on the merging firms to provide substantiation for claims that they will benefit from [EDM].” Separate treatment of EDM also created a risk of internal inconsistency, because the evidence base for assessing EDM and competitive harms like RRC and foreclosure overlaps substantially. The guidelines now clarify that, to the extent possible, the same set of facts and assumptions will inform the conclusions about the two.

“The final guidelines are a significant improvement that still leave a number of areas to be developed with experience in practice. For example, efficiencies are often central to vertical and complementary mergers, but the guidelines remain vague on the types of efficiencies that may arise beyond EDM,” noted Bob Majure, a Cornerstone Research vice president and former Director of Economics for the Antitrust Division of the U.S. Department of Justice. “Additionally, the examples in the guidelines could have been expanded further to address the complex relationships that arise in industries like healthcare and technology. As the agencies refine their approach to non-horizontal mergers, we hope these guidelines will be kept more up to date than their predecessors.”

[Comments on the January 2020 Draft Merger Guidelines](#) authored by Kostis Hatzitaskos, W. Robert Majure, and Ana McDowall of Cornerstone Research, and Aviv Nevo of the University of Pennsylvania.

[Comments on the January 2020 Vertical Merger Guidelines and the Healthcare Sector](#) authored by Gautam Gowrisankaran of the University of Arizona, and Avigail Kifer, Dina Older Aguilar, and Andrew Sfekas of Cornerstone Research.

[Comparison with the EU Non-Horizontal and UK Merger Assessment Guidelines](#) authored by Peter Davis, Kostis Hatzitaskos, and W. Robert Majure of Cornerstone Research.

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