Proposed Improvements in Merger Enforcement and Guidelines

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I applaud the fact that the Agencies are undertaking this rigorous review. These brief comments respond to some of the issues raised in the Agencies’ Request for Information (RFI) regarding modernizing enforcement of the antitrust laws regarding mergers.¹

Improving Horizontal Merger Analysis

The RFI asked specifically about merger presumptions. Among the recommendations in my recent article co-authored with Fiona Scott-Morton, we suggest that new HMGs roll back the “red zone” increases in the HHI level and delta HHI adopted in 2010 back to the levels in 1992 HMGs.² That is, the 2500/200 red zone would be rolled back to 1800/100.³ The Agencies also might roll back the “green zone.” We also proposed consideration of possible anticompetitive presumptions based on GUPPIs, acquisitions of maverick firms, and dominant firm acquisitions. Anticompetitive presumptions are needed for because the cost of false negatives are high since they can lead to long term competitive harms. False negatives are likely in merger litigation. Not only is prediction difficult, but merging parties anticipating increased profits from market power have very large stakes in winning and so are willing and able to dramatically outspend the

¹ Department of Justice & Federal Trade Commission, Request for Information on Merger Enforcement (January 18, 2022) (hereinafter, RFI).


³ As cited in the RFI (at note 12), Philadelphia National Bank 374 U.S. at 363 framed the worrisome threshold as a 30% combined market share. The opinion also suggests the possible relevance of lower thresholds, including University of Chicago Professor George Stigler’s view at the time that a market share in excess of 20% would be “presumptively unlawful.” Id. at. n.41. While the 30% threshold share may seem low, it is noteworthy that the proposed bank merger would have led to a post-merger HHI of 2000-2100 and a HHI increase of about 600, which would have placed it in the “red zone” of the 1992 HMGs, albeit far above the Brown Shoe or Vons market shares. See Steven C. Salop, The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach, 80 80 ANTITRUST L.J. 269, 273 (2015)
Agencies, which likely skews outcomes in the false negative direction. By contrast, the cost of false positives can be mitigated by internal growth and transactions with less concerning acquirers.

Agency budget constraints add to this skewing. Our article also provides evidence that suggests that the Agencies are engaged in triage in light of budget constraints and possibly also a fear of having a less dominant win/loss record in court. In my view, an Agency that wins almost all of its cases likely is forgoing other cases that likely are winnable. And in merger litigation, winning means avoiding likely anticompetitive effects from insufficient merger remedies.

Our article also addressed the appropriate role for econometric evidence of economic effects. We specifically addressed a concern about the fact that standard econometric tests are focused solely on avoiding false positives and place no weight on avoiding false negatives. We also suggested that greater attention be paid to common ownership and systemic risks, two other issues raised in the RFI.

The RFI asked about the analysis of economic harms to workers. Section 12 of the 2010 HMGs discusses how mergers among competing buyers can harm input suppliers, including workers. The HMGs properly state that the “these effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.” However, the HMGs do not explain whether the merger would be permitted if these lower prices were passed on or if efficiency benefits achieved in the downstream market would lead to decreases in the downstream price. Because Section 7 is violated if there are market power harms in “any” relevant market, and because merger law rejects the assertion of out-of-market efficiency benefits to justify a merger that creates market power harms in the relevant market, this downstream price decrease is not a cognizable justification. Thus, it follows that the merger should be enjoined even if the downstream price would fall. It would be useful to make this conclusion explicit in the HMGs. It also would be important to explain this position in speeches and reports. The HMGs also might make explicit that point that an increase in “bargaining leverage” by buyers resulting from a merger that leads to lower prices amounts to a market

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4 For a detailed economic analysis of these incentives, albeit in the context of exclusionary conduct litigation, see Erik Hovenkamp and Steven C. Salop, Strategic Incentives in Non-Coasian Litigation (April 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821133


6 See C. Scott Hemphill and Nancy L. Rose, Mergers that Harm Sellers, 127 YALE L.J. 1742 (2018). See also Jonathan B. Baker, THE ANTITRUST PARADIGM 193 (2019). Baker notes the possibility of permitting such mergers as a matter of prosecutorial discretion when the harms to input suppliers are very small and the benefits to consumers are very large. This is the same qualitative exception flagged in the HMGs for out-of-market but inextricably linked efficiencies. 2010 HMGs at note 14.
power harm. (The same point applies to a merger that leads to increased bargaining leverage by sellers, as analyzed in Section 6.2 of the HMGs.)

The RFI invited comment on the impact of mergers that eliminate excess capacity. It specifically raised the question of whether the elimination of this capacity should be viewed as an efficiency benefit. To the contrary, elimination of excess capacity increases the likelihood that prices will rise if there is a sudden increase in demand or a sudden decrease in capacity from a supply shock. This impact suggests a way in which mergers can increase systemic risks.

In addition, elimination of excess capacity can facilitate anticompetitive effects. It can incentivize unilateral output reductions by reducing the ability of competitors to replace the lost output. Elimination of excess capacity may have more complicated effects with respect to coordinated effects. On the one hand, if one or more firms reduce excess capacity, that can facilitate coordination by reducing those firms’ incentives to defect from the “collusive” price. On the other hand, it can incentivize defection by other firms in that the firms with the previous excess capacity now have less ability to “punish” defections by increasing output. Finally, I note that elimination of excess capacity is not always associated with significant real resource savings. For example, if a firm scraps a machine, the only savings will be the scrap value, not the original cost.

**Improving Vertical Merger Analysis**

I have written a number of articles on vertical merger analysis, both individually and with various co-authors. These articles may be useful to the drafters of the new guidelines. Some of the articles amount to criticisms of the 2020 Vertical Merger Guidelines (VMGs). They also provide suggestions for revisions. I also have recently revised my draft *Suggested VMGs* article, which also might be useful to the drafters of the new guidelines. These materials identify gaps in the 2020 VMGs. They include suggestions for adopting anticompetitive

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7 For further analysis, see Hemphill & Rose, *supra* note 6. In this regard, the Guidelines should make clear that relevant “monopsony” concerns involve more than what might be called “classical” monopsony, but also an increase in bargaining leverage arising from mergers or other restraints.

8 The FTC’s 1998 “invitation to collude” case against Stone Container included allegations that it attempted to induce higher prices by temporarily shutting down its production and buying up competitors’ excess inventories. Federal Trade Commission, In the Matter of Stone Container (June 3, 1998); https://www.ftc.gov/legal-library/browse/cases-proceedings/9510006-stone-container-corporation


presumptions applied to vertical mergers and for expanding the analysis of coordinated effects. They also suggest a more skeptical stance towards claims of elimination of double marginalization (EDM), including placing a greater evidentiary burden on the merging parties, not the Agencies.\textsuperscript{11} The guidelines also should emphasize the fact that there is an “opportunity cost” of reducing the downstream price that can mitigate or even eliminate EDM-driven price reductions, if the upstream merging firm is making profitable sales to other downstream competitors. While this opportunity cost was explicitly taken into account in Carl Shapiro’s analysis in \textit{AT&T/Time Warner} and was recognized decades ago by Yongmin Chen, it was not flagged in the 2020 VMGs.\textsuperscript{12}

It has been claimed that there is empirical economic evidence that vertical mergers deserve a procompetitive presumption and a “light touch” merger policy. It would be useful for the VMGs or an associated commentary explicitly to explain the flaws in this claim. In this regard, I recommend that the drafters rely heavily on the excellent econometric survey published by Marissa Beck and Fiona Scott Morton.\textsuperscript{13} (An earlier version of that survey was submitted as a comment on the “Draft VMGs” in March 2020.)

It similarly would be useful for new guidelines to note that a so-called “purely vertical” merger can have “horizontal” effects. While this is now obvious to almost all economists and antitrust lawyers, there may be some dead-enders that need to be reminded. And it may be helpful to lay judges or those who were instructed by dead-enders.

The “single monopoly profit” theory has long been discredited in economics. It was not embraced in the 2020 VMGs and it obviously did not deter the recent FTC complaints involving the proposed mergers of Illumina/Grail,\textsuperscript{14} NVIDIA/ARM,\textsuperscript{15} and Lockheed Martin/Aerojet Rocketdyne.\textsuperscript{16} Nor did it apparently deter the 2016 DOJ investigation of the proposed

\textsuperscript{11} For a set of possible investigation questions on elimination of double marginalization, see Salop, \textit{Getting Your Deal Done}, supra note 9 at 11-12.


\textsuperscript{13} Marissa Beck & Fiona Scott Morton, \textit{Evaluating the Evidence on Vertical Mergers}, 273 REV. IND. ORG. (2021)


\textsuperscript{16} \textit{FTC Sues to Block Lockheed Martin Corporation’s $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.} Federal Trade Commission Press Release (January 25, 2022),
LAM/KLA merger. However, the theory may still be asserted by dead-enders and advocates for merging firms. It also may still carry some weight with lay judges and other regulatory Agencies.

I therefore suggest that revised guidelines explain why this theory is incorrect under most market conditions, including the following: when the competing products are differentiated; when the products sold by the competing firms are homogeneous, but the firms face imperfect information about each other’s costs and prices; when one or both of the merging firms are significant potential entrants (or entry sponsors) into each other’s market; or when there are regulatory evasion concerns. Nor can there be a valid procompetitive presumption for vertical mergers under any of these normal conditions.

Product differentiation in the downstream market increases the potential for merger-specific elimination of double marginalization, even while raising rivals’ costs. It also raises the possibility that a merger may benefit the customers who purchase from the merged firm while harming the customers who preferred purchasing from the foreclosed competitors. In that the consumers who purchase from the foreclosed firm comprise a relevant targeted customer (price discrimination) market, their harms normally would be sufficient to render the merger in violation of Section 7 of the Clayton Act. As noted earlier, multi-market balancing of benefits and harms is not permitted under Philadelphia National Bank. To the extent that the Agencies decide in their prosecutorial discretion to balance under the “inextricably linked” proviso in the HMGs (at note 14), I agree that the merger should only be permitted if the benefits are highly disproportionate to the harms.


18 For example, the ICC and Surface Transportation Board (STB) used the single monopoly profit theory to define a “one-lump” presumption that end-to-end railroad merger normally would not have any possible anticompetitive effects. The continued validity of this one-lump presumption is an issue in the proposed acquisition of the Kansas City Southern by the Canadian Pacific now being evaluated by the STB. In my Verified Statement submitted on behalf of the Union Pacific, I explain why the one-lump presumption is not valid when there is imperfect information or product differentiation. Verified Statement of Steven C. Salop, UNION PACIFIC RAILROAD COMPANY’S COMMENTS AND REQUEST FOR CONDITIONS (February 28, 2022), https://www.railwayage.com/wp-content/uploads/2022/03/304028.pdf. See also Serge Moresi, David Reitman, Steven C. Salop & Yianis Sarafidis, Vertical Mergers in a Model of Upstream Monopoly and Incomplete Information, 59 REV. IND. ORG. 363 (2021).

19 Stated differently, the existence of significant perceived potential entrants may prevent the sole incumbent (i.e., the putative monopolist) from exercising monopoly power in the pre-merger market.
Integrated vs. Linked Merger Guidelines

The potential economic harms from vertical and horizontal mergers are identical in the sense that both can lead to the achievement, enhancement or maintenance of market power, that is, the power to increase prices, reduce quality, or reduce innovation. This observation might suggest that the HMGs and VMGs must be fully integrated, not just that they would be part of a single document or analytically linked. While this may be a worthy aspiration in principle, I recommend that such a full integration be approached with substantial caution.

In my view, creating a fully integrated set of merger guidelines will substantially increase the drafting workload and may have little value-added. It may even create confusion for businesses and courts looking for guidance. Full integration also may be confusing to readers if a merger is solely vertical or horizontal rather than both.

Full integration is not necessary to observe that both types of mergers may lead to coordinated and/or unilateral effects, or that these anticompetitive effects may be more significant in a horizontal merger when one or both merging firms are vertically integrated. Nor is full integration of the guidelines necessary to take account of the various analytic linkages discussed below. Nor is full integration necessary to explain how market definition analysis changes when one or both merging firms are vertically integrated.

However, it certainly is important to note the linkages between the two sets of Guidelines. In fact, while the 2020 VMGs were significantly flawed, they did draw some important linkages in a useful way.

My recently co-authored article with Serge Moresi studies one key linkage that may be overlooked – the fact that upstream firms inherently support downstream competition by selling to multiple competing downstream firms. By eliminating this support, input foreclosure thus inherently reduces competition in the downstream market analogously to the way that a horizontal merger inherently reduces competition. Our article also shows that the reduction in competition from input foreclosure can be represented as equivalent to the effect of a partial ownership acquisition, and that the magnitude of this effect can be proxied with a modified HHI measure.20

Competitive effects analysis can and should account for the fact that one of the merging parties in a horizontal merger may be vertically integrated. When a merger is both horizontal and vertical, it certainly is not necessary for the Agency to choose to treat it solely as one or another, as the DOJ did in the Sabre/Farelogix merger litigation. Instead, both the vertical and horizontal

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20 Serge Moresi & Steven C. Salop, How Vertical is Horizontal: How Vertical Mergers Lead to Increases in “Effective Concentration, 59 REV. IND. ORG. 177 (2021). This article also develops “Simultaneous” vGUPPIs that account for the interaction effects between the upward pricing pressure on input prices charged by the merged firm to downstream rivals and the possible downward pricing pressure on the downstream price of the merged firm from merger-specific EDM (after netting out the “opportunity cost” (Chen) effect).
elements can be integrated into a combined competitive effects analysis, relying on both the horizontal and vertical merger guidelines. And both sets of guidelines should make that observation.

I can illustrate this type of integrated competitive analysis for the case of potential input foreclosure concerns that can arise on top of the standard horizontal effects. Suppose that a vertically integrated firm acquires a downstream competitor. Because the horizontal overlap involves the downstream market, input foreclosure by the upstream merger partner directed at other downstream firms will lead to diversion to the now-two downstream divisions of the merged firm. This factor will make input foreclosure more profitable than it would be absent the merger. In an upward pricing pressure analysis, a hypothetical price increase by the previously un-integrated downstream merging firm that causes diversion to the other previously integrated downstream merging firm will involve a margin that includes both levels. At the same time, merger-specific elimination of double marginalization also will be relevant to even a straight horizontal analysis, assuming that the newly-merging downstream firm now would obtain the input at a lower price. The integrated firm also would no longer have any incentive to engage in input foreclosure tactics against the downstream firm it is acquiring.

Analogously, suppose a vertically integrated firm acquires an upstream competitor. Because the horizontal overlap involves the upstream market, input foreclosure may be more effective because it may reduce the ability of the foreclosed downstream competitors to substitute to this alternative input supplier. This factor will make input foreclosure more profitable than it would be absent the merger. Again, there also potentially could be elimination of double marginalization if the downstream division purchased any inputs from the now-merging upstream firm. Customer foreclosure incentives against the now-merging upstream firm also would be eliminated.

Customer foreclosure analysis similarly is affected when one or both of the merging firms are vertically integrated. And, for both input and customer foreclosure, the fact that one or both of the firms are vertically integrated also can increase the likelihood of coordinated effects at either level, whether on the buy-side or the sell-side.

However, integrating the economic analysis of competitive effects in this way does not require a fully integrated set of guidelines. Most mergers will be solely horizontal or solely vertical and the linkages can be drawn without a full integration.

Merger Remedies

The RFI also asked for comments on several issues involving merger remedies. I will address two of them here.

I agree with Kwoka and Weber Waller that it would be better if courts did not require the Agencies to litigate the impact of fix-it-first remedies that are only proposed post-complaint or at the end of the HSR period. This process reduces deterrence because it allows the merging

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parties to take the risk that the Agency will overlook a competitive problem recognized by the merging firm. It also reduces the merging parties’ downside risk of litigation, which can discourage stronger settlements.  

If the parties were only permitted to use fix-it-first remedies as a backstop when they were proposed in advance in the initial HSR filing (or perhaps immediately after the second request), that process would encourage voluntary “self-disclosure” of competitive problems. If the parties were only permitted to use fix-it-first remedies as a backstop when they were proposed in advance in the initial HSR filing (or perhaps immediately after the second request), that process would encourage voluntary “self-disclosure” of competitive problems.

Insufficient remedies also would be less of a concern if consent decrees were able to be modified more easily if they turn out to fail to achieve their objectives. This suggests that consent decrees might be framed in terms of required performance outcomes instead of simply particular divestitures or specific behavioral constraints. While such consent decrees would increase the monitoring burden on the Agencies, they would lead to better merger outcomes. If there were less risk of failed consent decrees, Agencies also could more safely accept decrees and costly litigation could be avoided. Thus, I hope that Agencies explore this alternative.

Modern Market Realities

The RFI explained that merger analysis and the merger guidelines should “reflect current learning about competition based on modern market realities.” In light of the concerns about false negatives that lead to long term competitive harms, I have recommended more merger enforcement and various anticompetitive presumptions. However, I do not recommend merger enforcement policy designed to return to the enforcement levels implied by Brown Shoe and Vons (or the new legislation that likely would be needed to convince courts to go along with this proposed enforcement regime).

I do not recommend this drastic change in enforcement regime because it does not seem consistent with modern market realities. The U.S. economy has now irreversibly changed from the economy of my youth. It seems unlikely that consumers would opt for a merger policy that ignores the impact on prices, quality and innovation. For example, when faced with the choice, most U.S. consumers opt for the lower costs and greater variety of chain supermarkets over small shops. While I agree that the merger policy should serve the interests of workers as well as downstream purchasers, I fear that this policy would not strike the right balance.

https://www.competitionpolicyinternational.com/fix-it-or-forget-it-a-no-remedies-policy-for-merger-enforcement/

22 For a contrary view, see David Gelfand and Leah O. Brannon, Litigating the Fix, 10 ANTITRUST 15 (2016).

23 Salop, Merger Settlements, supra note 5.


25 RFI, supra note 1 at 1.