FTC Announces Withdrawal of Vertical Merger Guidelines

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September 23, 2021 - On September 15, 2021, the Federal Trade Commission—by a 3-2, party-line vote—withdrew the revised Vertical Merger Guidelines (the "Guidelines") that the FTC and the Department of Justice jointly issued in June 2020.

In a statement announcing the withdrawal, FTC Chair Lina Khan and Commissioners Rohit Chopra and Rebecca Kelly Slaughter argued that the Guidelines include flawed provisions and said that their withdrawal was part of a larger review of the FTC's approach to the enforcement of the U.S. antitrust laws. They maintained that greater consolidation in the economy over the past several decades has led to increased prices and shrinking wages, both a result of a decline in competition. FTC Commissioners Noah Joshua Phillips and Christine Wilson issued a dissenting statement.

The FTC did not issue new vertical merger guidelines. Instead, the three commissioners stated that the FTC would work with the DOJ to issue updated merger guidance with respect to both horizontal and vertical mergers. They also said that, in the interim, the FTC would continue to review vertical mergers pursuant to its statutory mandate. For its part, the DOJ said it would continue using the revised Vertical Merger Guidelines for the time being, but that it would work with the FTC on drafting new guidelines. Neither agency announced a timeline for issuance of revised merger guidelines.

Reasons for Withdrawing the Vertical Merger Guidelines

The primary reason the three commissioners voting to withdraw the Guidelines gave for their decision was the Guidelines' focus on the procompetitive effects of vertical mergers. Despite many courts' having considered potential efficiencies in evaluating the competitive effects of vertical mergers under Section 7 of the Clayton Act, First, they claimed that the economic model the Guidelines used to justify the treatment of EDM was valid only in certain circumstances and that "economic theory does not predict that EDM will create downward pricing pressure" in all cases. Second, the three commissioners argued that empirical evidence shows that in some circumstances vertical mergers may well result in higher prices, citing several studies showing that some hospital and physician group vertical mergers have resulted in "increased physician costs, hospital prices, and per capita medical spending."

Some Key Issues the FTC Will Consider in Developing New Vertical Merger Guidelines

In withdrawing the Vertical Merger Guidelines, the three commissioners previewed some of the key issues pertaining to vertical mergers they believe the DOJ and FTC should address in developing revised merger guidelines for both horizontal and vertical mergers.

First, the three commissioners recommended that the two agencies seek to develop screens for vertical mergers based on market structure and other readily observable market characteristics, such as the ones they use for horizontal mergers. They argued that, because they can be applied objectively by the enforcement agencies and do not require "complex economic modeling and self-interested testimony about future business plans," such screens would provide clearer guidance to market participants, reduce the burden of merger review, and conserve judicial resources.

Second, the three commissioners recommended that the two agencies re-evaluate the remedies they apply to problematic vertical mergers, particularly where remedies have proved ineffective in the past in maintaining pre-merger levels of competition. They argued that "[p]roviding clear[er] guidance on when remedies are unlikely to be effective will help identify scenarios where a challenge is more likely than settlement," thereby deterring anticompetitive mergers in order to "avoid the wasted resources associated with their attempt."

Finally, the three commissioners recommended that the two agencies endeavor to improve their vertical merger analysis as applied to digital markets. In particular, they noted that market characteristics such as network effects enable dominant firms in digital markets to capture markets and discourage entry. These network effects, therefore, give dominant firms strong incentives to acquire or exclude nascent competitors, which they argued should be considered when dominant platforms acquire vertically related start-ups. They suggested that the revised guidelines should also focus on a broader range of non-price tactics that digital platforms might use to raise rivals' costs, such as degrading interoperability, reneging on access policies, and denying their competitors access to capital.

Dissenter's Concerns

In their dissenting statement, FTC Commissioners Noah Joshua Phillips and Christine Wilson strongly criticized the majority's withdrawal of the Guidelines. They noted that, although the Guidelines were issued jointly by the FTC and the DOJ, only the FTC has withdrawn the Guidelines. In addition, they lamented the majority's

Conclusion

The withdrawal of the Vertical Merger Guidelines, coupled with the FTC's rescission of its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act earlier this year, clearly indicates that the FTC intends, under its new leadership, to be much more aggressive in its enforcement of the antitrust laws, especially with respect to vertical mergers, than it has been in many decades. Clients should take this into account when considering transactions or other business activities that may give rise to antitrust issues.

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For more information on this issue, please refer to our commentary on the matter linked below.

Trust on the Market: Kolasky: The DOJ and FTC Should Revise Their Proposed Vertical Merger Guidelines to Emulate the EU's

HHR Client Alert: DOJ and FTC Jointly Announce Vertical Merger Guidelines

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References

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1 The dissenting statement from Commissioners Noah Phillips and Christine Wilson disagreed, maintaining that EDM often occurs in vertical mergers because it internalizes within the merged firm transactions that had previously been conducted at arms' length. The merged firm supplies the product to itself, eliminating markups associated with arms' length transactions. This reduces manufacturing costs and allows for increased competition in the form of lower consumer prices, in their view.

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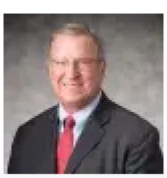

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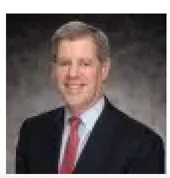

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