DOJ/FTC Joint 2020 Vertical Merger Guidelines: Comments of CAP Economics

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February 26, 2020

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The U.S. Department of Justice Antitrust Division and Federal Trade Commission ("FTC") jointly issued draft Vertical Merger Guidelines ("VMG") on January 10,

stream merging partner competes with another un-integrated competitor in its stage of a supply chain and with two vertically (backward-)integrated competitors, i.e, the vertically integrated competitors also supply relevant inputs to themselves and their downstream rivals. In this hypothetical, the unintegrated downstream merging partner acquires one of two unintegrated input suppliers. Pre-merger, both vertically integrated input suppliers and both un-integrated input suppliers trade with all (four) downstream customers. Although the number of competitors does not change in either the upstream or downstream stages post-merger, input supply is controlled by three vertically integrated rms and an un-integrated supplier post-merger. Depending on purchasing patterns and technology, prices, and margins, an analysis of unilateral e   ects may indicate that post-merger input foreclosure is unlikely to be pro table to the merged rm, whereas total or partial input foreclosure conditional on post-merger coordination among the vertically-integrated rms may be found to generate substantially higher pro ts.

Indeed, the Agencies have analyzed the potential that a vertical merger may result in coordinated adoption of RRC strategies and these concerns have not been limited to situations where the merger eliminates a maverick.[6] The courts have found both

Also, Michael H. Riordan and Steven C. Salop, “Evaluating Vertical Mergers: A Post-Chicago Approach.” Antitrust Law Journal, Vol. 63, No. 2 (Winter 1995). “... vertical mergers can lead to exclusionary e ects by increasing rivals' costs of doing business. This may involve raising their input costs by foreclosing their access to important inputs or foreclosing their access to a su cient cus-
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false positives and false negatives in the Agencies' vertical merger enforcement with respect to the Agenices' analysis of the likelihood of coordination over RRC strategies post-merger.[7]

In addition to resorting to maverick theories, the Agencies could assess the likelihood of coordinated effects from vertical mergers based on (1.) the level of industry concentration post-merger, (2.) whether the industry is susceptible to coordination, and (3.) whether the merger is likely to enhance that vulnerability, including whether the merger increases the gains from coordination,[8] For example, the Agencies could extend the economic modeling described in §5.a of the draft VMG to quantify the likely gains from coordination, using sensitivity analysis to address uncertainty as to the duration and number of rivals that engage in coordination. Evidence that the expected gains are sensitive to small changes in assumptions tends to suggest that coordination is unlikely to be enhanced by the merger, while a finding

[7] In the proposed merger of AT&T and TimeWarner, the court rejected the Division's claim that the merged firm would likely foreclose the supply of content to online distributors in coordination with Comcast, so this is a false positive. Memorandum Opinion (ECF #146), United States v. AT&T Inc., Case 1:17-cv-02511-RJL, (D.D.C. 6/12/2018): "The Government posits that the challenged merger would also create a likelihood that AT&T would coordinate with Comcast-NBCU to harm virtual MVPDs. ... neither ... expert testimony nor its other evidence is even close to sufficient to support its coordination claim (p. 157)."

In 2018, interior molded door manufacturer Steves and Sons won a jury verdict against Jeld-Wen, Inc., which was vertically integrated into the supply of interior molded doorskins and the downstream product, interior molded doors. Steves and Sons claimed that Jeld-Wen had gained market power through its 2012 merger with CMI, which was cleared by the Division, and that Jeld-Wen then coordinated with rival Masonite to partially foreclose the supply of interior molded doorskins to un-integrated downstream rivals including Steves and Sons. Memorandum Opinion (ECF #1783), Steves and Sons, Inc. vs. Jeld-Wen Inc., Case 3:16-cv-00545-REP (E.D. Va. 10/5/2018). The Division reviewed the transaction in 2012, and retrospectively in 2015 upon a complaint from Steves and Son, but did not find that the merger enhanced the likelihood of coordination, so this is a false negative. See also, Steven C. Salop, "Analyzing Vertical Mergers to Avoid False Negatives: Three Recent Case Studies." Antitrust, Vol. 33, No. 3, 2019 (Summer); pp. 27 - 36.

[8]

of positive expected gains from coordination under a range of alternate assumptions likely competitive e ects of a proposed merger.[11]