USCIB

Re: USCIB Comments on the U.S. Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines

The United States Council for International Business ("USCIB") is pleased to submit these comments on the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together the "Agencies") Draft Vertical Merger Guidelines ("Draft VMGs") issued on January 10, 2020.

USCIB promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of the economy, with operations in every region of the world, generating $5 trillion in annual revenuerv thgVf•USCIB members

understand the tremendous procompetitive benefits and efficiencies that can be associated with vertical mergers. Our members value transparency and predictability in vertical merger enforcement policy and welcome the Agencies' joint effort to clarify the analytic framework and methods they employ to review vertical mergers. We applaud the Agencies for proposing Draft VMGs based on the well-established economics of vertical relationships and grounded in the consumer welfare standard.

USCIB submits these comments to support the Agencies in their effort to issue final Vertical Merger Guidelines that foster transparency and eliminate unnecessary regulatory obstacles to efficient vertical transactions. We respectfully recommend that the Agencies clarify and amend certain sections of the Draft VMGs as described below.[2]

I. Affirm That The United States Does Not Recognize Conglomerate Theories of Harm in Merger Analysis.

The conglomerate theory of harm in merger review was introduced in two high profile European Commission cases. First, in 2001 the Commission acted to block a merger between General Electric and Honeywell,[3]

<u>bold underline</u>; proposed deletions are noted with ~~strikethrough~~.

[3] Case No. COMP/M.2220 General Electric/Honeywell (July 3, 2001) https://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf.

divergence between U.S. and European merger enforcement law and policy.[4] Then in 2002, the Commission made the decision to block the Tetra Laval/Sidel deal.[5] Although in both cases the European Court of Justice later rejected the vertical and conglomerate effects theories, parties facing a merger review in Europe today continue to face uncertainty and enforcement risk based on a conglomerate theory of harm.[6]

Since most antitrust regimes around the world follow the European competition law model, dozens of newer antitrust agencies are watching these cases with interest. While we do not believe it is the Agencies' intention, USCIB members are concerned that the discussion of "related products" in the Draft VMGs may be misunderstood or misread by newer antitrust agencies as an endorsement of the conglomerate merger theory of harm. We therefore encourage the Agencies to add a footnote to make clear that the guidelines are not an endorsement of the so-called conglomerate merger theory of harm.[7]

II. Emphasize That the Agencies Will Focus on Harm to Competition Not Harm to a Competitor.

USCIB is similarly concerned that international competition enforcers, particularly at newer agencies, may misunderstand the distinction we be[(a)4(ge)4(nc)45 0.161 RG[(mi)-3(sunde)-6(rs)-7(tand the)4(

5. UNILATERAL EFFECTS

A vertical merger **raises competitive concerns only where it is likely to harm competition. While harm to competitors alone does not raise competitive concerns, a vertical merger that harms a rival may also harm competition by diminishing an important competitive constraint on the decisions on price, quality, or other dimensions of competition.** ~~may diminish competition between one firm and rivals that trade with, or could trade with, the other merging firm.~~ Whether the elimination of double marginalization…

III. No Presumption of Harm Applies in the Case of a Vertical Merger

In the discussion of unilateral effects in Section 5.a., the Agencies identif0 g0 G 0.012 Tc[(I.)] TJETQq0.000009

> are met potentially raise significant competitive concerns and often warrant scrutiny.[13]

IV. The Agencies Should and Provide a More Definitive Safe Harbor for Unconcentrated Markets.

USCIB strongly supports the idea of a safe harbor for vertical transactions that are unlikely to cause competitive harm. However, to provide effective guidance, a safe harbor must be clear and based on statistics or data that are both good predictors of likely competitive harm and easy to compile or calculate. USCIB is concerned that, as drafted, the safe harbor does not meet these goals. In particular, parties in some markets or sectors may find it difficult to identify the related product or understand how to determine if "the related product is used in less than 20 percent of the relevant market."[14] And in other cases, "use" may not be the most relevant measure of likely competitive harm.

The Agencies define a "related product" as "a product or service that is supplied by the merged firm, is vertically related to the products and services in the relevant market, and to which access by the merged firm's rivals affects competition in the relevant market."[15] The concept is central to the proposed guidance on both unilateral and coordinated effects theories of harm, including application of the proposed quasi-safe harbor.

USCIB recommends that the Agencies clarify their definition and explanation of the concept of a related product. For instance, in the hypothetical merger between a downstream retail chain and an upstream manufacturer of cleaning products in Example 1, the description of the related product is confusing and appears internally inconsistent. Where the relevant market is at the downstream retail level, the Agencies define the related product as the merging firm's supply of cleaning products to the downstream market ("the related product is the supply of the cleaning products by the manufacturer to retailers…"). But where the relevant market is the upstream manufacturing level, the related product is purchase or distribution of "that manufacturer's cleaning products," rather than the merging firm's purchase from, or supply of distribution services to, the upstream relevant market. We respectfully request that the Agencies clarify this example.

The Agencies' application of the concept of the related product to the proposed quasi-safe harbor is also confusing.

manufacturer of cleaning products.[17] If the Agencies define the downstream retail supply of cleaning products as the relevant market, and the merging firm's supply of cleaning products to retailers as the related product, how should the merging parties calculate use in the relevant market? Assuming that the merging retailer represents less than 20 percent of the relevant market, does the safe harbor apply if retailers that represent more than 20 percent of the relevant market offer the manufacturer's product(s), but the product(s) account for less than 20 percent of revenue in the relevant market? The analysis gets even murkier in markets where goods, services, or content is supplied in bundles, such as, for example, video or music streaming services, or cloud or enterprise IT services. Where products are offered in bundles, sales of the bundle may not reflect the competitive significance of each element of the bundle. But if the downstream seller accounts for at least 20 percent of the relevant market, "use" appears to assign equal competitive significance to each element of the bundle, regardless of whether that particular product or service is widely used or drives demand for the bundle in the downstream market.

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