

## Comments on the Draft Vertical Merger Guidelines

A few years ago, a satirical [ad](#) ran as part of a Parks and Recreation episode. It announced the fictional merger of Verizon, Exxon, and Chipotle, three companies that, according to the ad, all give people energy in different ways. The fake ad ended with the tagline “Proud to be one of America’s 8 companies.”<sup>1</sup>

It is against this backdrop of increasing consolidation and market power across many sectors of the American economy that we provide these comments on the Agencies’ draft vertical merger guidelines. The Center for Democracy & Technology is a non-profit advocacy organization working to promote democratic values online and in new, existing, and emerging technologies. We believe in the power of the internet, and we seek policy outcomes that keep the internet open and innovative.

We appreciate the Agencies’ efforts to update their guidance about vertical mergers. We submit, however, that the draft guidelines omit many important points. We urge the Agencies to consider

well as how the Agencies balance econometric studies with other forms of evidence. We also note that the draft guidelines do not mention a history of collusion in either the upstream or downstream markets as a relevant point of evidence and suggest that the draft be updated to include that explicitly as a factor.

## 2. Unilateral effects.

The draft guidelines discuss a few categories of anticompetitive unilateral effects: foreclosure, raising rivals' costs, and access to competitively sensitive information. We agree that those are all areas of potential concern and appreciate the Agencies' efforts to explain them in clear, simple terms.

The Agencies state in the draft that those three categories of competitive harm "do not exhaust the types of possible unilateral effects." We agree. We are concerned that the failure to enumerate additional types of unilateral effects may be confusing to courts and practitioners alike. We encourage the Agencies to add descriptions of more categories of unilateral effects to the draft guidelines to provide greater clarity to lawyers, companies, and other advocates.

Specifically, we note that there are several categories of unilateral effects that were included in the 1984 Guidelines but are missing from the current draft, including but not limited to:

- a. Harm to potential competition . A vertical merger can have a horizontal effect if either one of the merging parties was a potential entrant into the other's market. The current draft guidelines do not address this possibility. It is, however, potentially a very significant merger effect, and one that has been part of the Agencies' merger analysis for years. For example, potential entry was one of the reasons that the Department of Justice sought relief in the Ticketmaster/LiveNation merger. As it stated in that 2010 Competitive Impact Statement: "By 2008, Ticketmaster's longstanding dominance faced a major threat. Live Nation was better positioned to overcome the entry barriers ...than any other existing or potential competitor because it could achieve sufficient scale to compete effectively with Ticketmaster simply by ticketing its own venues."<sup>2</sup>

Potential competition issues can be assessed in vertical merger cases by examining whether either party was likely to enter the other's markets, including whether any actual plans to do so had been developed by the merging parties prior to their deal announcement. Of course, the fact of potential entry itself is not dispositive; the Agencies should investigate whether the potential entry is competitively significant, whether there are other likely entrants, and any other relevant factors to the competitive analysis. For example, if the target of the acquisition was

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<sup>2</sup> <https://www.justice.gov/atr/case-document/competitive-impact-statement-209>

particularly well-situated to enter the acquirer's market, the potential for anticompetitive unilateral effects is greater. In addition, markets with high levels of concentration may be more significantly affected in anticompetitive ways if potential competitors are purchased and eliminated as a competitive threat in either the upstream or downstream market.

- b. Two level entry issues. Standard competitive effects analysis includes assessing whether markets are characterized by barriers to entry. Where barriers to entry are high, it is more difficult for potential new entrants to provide a strong competitive effect on anticompetitive conduct. While this may be primarily viewed as a horizontal merger concern, it also arises in the vertical merger context if the acquisition makes entry harder by requiring c 0.007 w [(ondu--on7a[(m)-6 (10.(



What do the Agencies think are the best measures for market power in emerging tech markets, where nascent firms may have few users or revenues?

Do the Agencies have special concerns about vertical mergers involving large tech companies and nascent potential competitors?

Does the elimination of double marginalization apply differently in vertical tech mergers where marginal costs are low?

Do “winner-take-all” issues in digital platforms raise particular vertical merger concerns?

Can remedies about disclosure and transparency help guard against potential anticompetitive harm in high tech vertical mergers?

### Conclusion

While the content of the current draft guidelines reflects some of what is true about vertical mergers, there is much more that might be added. The antitrust community would benefit in particular from specific guidance about some of the emerging issues related to technology.

In short, the draft guidelines are too short.