U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION

DRAFT VERTICAL MERGER GUIDELINES

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1. OVERVIEW

These Guidelines outline the principal analytical techniques, practices and enforcement policy of the Department of Justice and the Federal Trade Commission (the “Agencies”) with respect to vertical mergers and acquisitions (“vertical mergers”) under the f

effects of vertical mergers as well. Vertical mergers, however, also raise distinct considerations, which these Guidelines address.

These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the vertical merger context.[4]

2. MARKET DEFINITION AND RELATED PRODUCTS

In any merger enforcement action involving a vertical merger, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Many of the general purposes and limitations of market definition described in Section 4 of the Horizontal Merger Guidelines are also relevant when the Agencies define markets for vertical mergers, and the Agencies use the methodology set forth in Sections 4.1 and 4.2 of the Horizontal Merger Guidelines to define relevant markets for vertical mergers.

When the Agencies identify a potential competitive concern in a relevant market, they will also specify one or more related products. A related product is 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. A related product could be, for example, an input, a means of distribution, or access to a set of customers.

> *Example 1: A retail chain buys a manufacturer of cleaning products. In this example, the Agencies may identify two relevant markets. The first potential relevant market is the supply of cleaning products to retail customers in a given geographic area. For this relevant market, the related product is the supply of the cleaning products by the manufacturer to retailers in the geographic area. The second potential relevant market is the supply of cleaning products to retailers in a given geographic area. For this relevant market, the t4 (t)- (c 0.004.2o r)-1 (e(ke--2 (al)-2 0*

3. Market Participants, Market Shares

4. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central

the merger may increase the incentive or ability of the merged firm to raise its rivals' costs or decrease the quality of their rivals' products or services, thereby reducing the competitive constraints imposed by those rival firms. In identifying whether a vertical merger is likely to result in unilateral harm to competition through foreclosure or raising rivals' costs

doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information as described above. They may become less effective competitors if they are forced to rely on less preferred trading partners, or if they pay higher prices because they have fewer competing options.

6. Elimination of Double Marginalization

Elimination of double marginalization can occur when two vertically related firms that individually charge a profit-maximizing margin on their products choose to merge. Absent the merger, the downstream merging firm would ignore any benefit to the upstream merging firm from setting a lower downstream price and making higher sales. But if the two merge, the resulting firm will benefit from both margins on any additional sales, and capturing the upstream margin, through merger, may make the price reduction profitable even though it would not have been profitable prior to the merger. Elimination of double marginalization may thus benefit both the merged firm and buyers of the downstream product or service.

The agencies generally rely on the parties to identify and demonstrate whether and how the merger eliminates double marginalization. There will be no elimination of double marginalization if the downstream firm cannot use the inputs from the upstream one, for example, because it uses an incompatible technology. The effects of the elimination of double marginalization may be lower if, prior to the merger, the merging parties already engaged in contracting that aligned their incentives, for example by using two-part tariff with a fixed fee and low unit prices that incorporate no, or a small, margin. The effects of the elimination of double marginalization in the downstream market may also be offset by a change in pricing incentives working in the opposite di

7. Coordinated Effects

In some cases, a vertical merger may diminish competition by enabling or encouraging post merger coordinated interaction among firms in the relevant market that harms customers. Section 7 of the Horizontal Merger Guidelines

8. EFFICIENCIES

Because vertical mergers combine complementary economic functions and eliminate contracting frictions, they [illegible]