

UNITED STATES OF AMERICA Federal Trade Commission WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER FTC-DOJ Draft Vertical Merger Guidelines Commission File No. P810034 January 10, 2020

Introduction

I write separately to explain why I cannot join my colleagues in voting to release these proposed 9 H U W L F D O 0 H U J H U * X L G H O L Q H V ³ * X L G H O L Q H V ′ I R U S X E O L this decision with some reluctance because I believe the 1984 Non-Horizontal Guidelines should be rescinded and rewritten and because I recognize the utility of public comments. I do not object to the public having an opportunity to comment on these proposed Guidelines, however my substantive concerns about the proposal in its current form rise to a level where I am unable to provide an endorsement of it.

General Concerns About Vertical Mergers

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. In 2018, companies announced mergers at record rates,¹ and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.²

DERXW P\YLHZV RQ WKHP LQ UHODWLRQ Mg ByckMnKorfel & RPPLVVL 3DUWQHUV 6WDSOHV ¶ DFTXLVLWLRQ RI (VVHQGDQW WKH F office product wholesale distributors.⁴ In that statement, I emphasized the following points:

The importance of thoroughly investigating all potential theories of harm in vertical mergers in a forward looking manner to prevent anticompetitive mergers in their LQFLSLHQF\DQGZLWKRXWKDYLQJWRZDLWXQWLOWK fruition.

Concern about an approach to vertical mergers that can be too credulous of claimed procompetitive benefits, while being more skeptical about the likelihood of anticompetitive harm.

The requirement for parties, as they do in horizontal mergers, to demonstrate that claimed efficiencies are verifiable, merger-specific, do not arise from anticompetitive reductions in output or service, are not mitigated by any costs necessary to achieve the efficiencies, and fully offset the anticompetitive harm.

The need to do more retrospective reviews of vertical mergers, especially on close cases ² a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge, or where we obtained a limited consent decree ² which would help inform subsequent enforcement decisions, including a decision to challenge a consummated merger if necessary.

Concern that there has been a history of under-enforcement of vertical mergers and that the Commission needs to be more willing to challenge and block vertical mergers.

Support for Updated Guidelines and Positive Aspects of the Current Proposal

Against that general backdrop, I consider the proposed Guidelines. Before outlining my concerns, I want to emphasize the positive attributes of these new Guidelines. First, it is critical

Horizontal Merger Guidelines, the rigorous standard that the Agencies require for parties to substantiate and prove merger-specificity of efficiencies.⁷

Substantive Concerns with Proposed Guidelines

Despite these benefits, I have a number of concerns with the proposed Guidelines. My two primary objections are: (1) the effective safe harbor for firms with less than 20 percent market VKDUH DQG WKH GHSDUWXUH IURP 6HFWLRQ RIWKH & mergers in their incipiency. I am also concerned that certain issues lack sufficient emphasis.

My biggest concern with the Guidelines is that they include what amounts to a safe harbor LQGLFDWLQJ WKDWMikW/Kd-tha\$lenge@vFettileal/metoget Where the parties to the merger have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 SHUFHQW RI WKH UHOHYDQabbutPhDsUaNgutage aré the e-DSSUHKH fold: setting a safe harbor generally, the choice of 20 percent market share for the safe harbor, and the lack of a corresponding presumption of harm, or at a minimum close scrutiny, for mergers involving highly concentrated markets.

I agree that market shares and concentration in the upstream and downstream markets are relevant to vertical merger analysis and that vertical mergers among firms in unconcentrated and highly competitive markets are unlikely to pose competitive problems. However, I worry that

Conclusion

Repealing and replacing the Non-Horizontal Merger Guidelines with updated Vertical Merger Guidelines is a worthy effort. However, it is critical that the Guidelines fully reflect the experience of the agencies and provide sufficient room for the Agencies to enforce the Clayton Act to the fullest extent possible against anticompetitive vertical mergers. The comments we receive will play an important part of this process, and I hope that they will inform additional changes and modifications. Given the importance of the comment period to ensure that all interested stakeholders have sufficient time to respond. It is my hope to be able to support bipartisan Guidelines at the end of this process.