
the alarm that the most dangerous mergers are those that likely result in the exit of rival firms or increased barriers to entry.¹⁰ To illustrate by using an example from the Guidelines, if the merging orange supplier has the ability and incentive to raise the cost of oranges to rival orange-juice producers, or completely foreclose rival orange-juice producers, and the effect of this act is to cause the exit of one or more rival orange-juice suppliers because continued operation is unprofitable, the merger may be particularly problematic. Clearly articulating conditions under which the most problematic mergers are likely to be found would provide

circumstances under which EDM will not be achieved in a vertical merger would provide better guidance for the courts and the marketplace.

Merger specificity is required for efficiencies to be deemed cognizable in the Horizontal Merger Guidelines.¹⁹ How to apply such merger specificity in the context of vertical mergers is an issue that would also benefit from additional public comment. Some commenters say that, if we are truly importing Section 10 of the Horizontal Merger Guidelines and truly committed to scrutinizing EDM, the evaluation of EDM requires addressing the same questions and evidence of cognizability and pass-through.²⁰ Others say that EDM should be presumed merger-specific and cognizable if the merging parties failed to achieve EDM through contracting before the merger.²¹ That is, if the merging firms have not achieved EDM prior to the merger, that should be sufficient to prove that EDM is unlikely to occur absent the merger.

Next, I am concerned that, in balancing EDM against the harms from a vertical merger as described in the Guidelines, the Agencies may be trading short-term EDM benefits for long-term harm to competition.²² Specifically, even for a vertical merger in which our analysis indicates that the procompetitive benefits such as EDM just offset the harm due to raising rivals' cost for foreclosure, there may still be a significant shift in profits from the rivals to the merged firm. In this case, consumers may be unharmed (on balance) in the short run, but there still may be a significant shift in profits among suppliers. This reduction in profits for the rivals may adversely affect their ability to finance innovation or expansion activities. So competition and consumers may still be harmed in the end. The Guidelines are silent on this possibility.

establishments do not report making shipments inside their firms.”). *See also* Beck & Scott Morton, *supra* note 6 (reviewing the academic literature on vertical mergers).

¹⁹ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, *supra* note 13, § 10 (“The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies. Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination.”).

²⁰ *See, e.g.*, State Attorneys General, *supra* note 15, at 20–21 (arguing that the merging parties' burden to demonstrate EDM “applies as much to vertical as to horizontal mergers”); Steven C. Salop, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 18 (Mar. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/salop_suggested_vertical_merger_guidelines.pdf (“The Agencies will not presume merger-specificity simply because it was not achieved in the pre-merger market, but will expect the parties to provide credible evidence of pre-merger impediments and how the merger will eliminate the impediments.”).

²¹ *See, e.g.*, Comm'r Christine S. Wilson, Fed. Trade Comm'n, Remarks at the DOJ Workshop on Draft Vertical Merger Guidelines: “Reflections on the 2020 Draft Vertical Merger Guidelines and Comments from Stakeholders” (Mar. 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1568909/wilson_-_vertical_merger_workshop_speech_3-11-20.pdf (“For me, the relevant question is whether the firms *did* achieve efficient contracting before merging, not whether they *could*.”); Geoffrey A. Manne & Kristian Stout, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 1 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/icle_vmg_draft_comments_0.pdf (“[The agencies should clearly disavow . . . the implications of the presumed functional equivalence of vertical integration by contract and by merger.”).

²² *See* Delrahim, *supra* note 15 (“Longer term harms to competition may support challenging a merger even if the effect of EDM is greater than the price effect from foreclosure or raising rivals' costs in the short term.”).

In addition to questions regarding whether EDM can be achieved and is merger specific, the Guidelines do not discuss theories of harm that may at least partially offset the effect of EDM on the downstream price of the merged firm. Specifically, if the merged firm raises its price in the downstream market, downstream rivals may increase their sales, which could increase their demand for inputs from the merged firm's upstream business. Capturing this benefit through merger may make a downstream price increase more profitable, thereby offsetting the effect of EDM on the prices consumers pay at least to some degree. The extensive nature of these questions and concerns regarding the treatment of EDM alone merit another comment period. I would have liked to also receive reactions from commenters about the placement of the EDM discussion in both the Unilateral Effects section (Section 4) and the new "Procompetitive Benefits" section (Section 6).

Failure to discuss buy-side concerns, remedies, regulatory evasion

Finally, three additional important topics are omitted from the Guidelines. First, the Guidelines make only a passing reference in the Overview to the relevance of monopsony, or buy-side, concerns. The Guidelines should explicitly explain, for example,
