

# Legal Update

## DOJ Test Drives New Vertical Merger Guidelines in Closure of LSEG/Refinitiv Deal

In an early use of its newly issued Vertical Merger Guidelines (the "Guidelines"),<sup>1</sup> the Antitrust Division of the US Department of Justice ("DOJ") announced on July 31, 2020, the closure of its investigation into the London Stock Exchange Group's ("LSEG") proposed acquisition of Refinitiv.<sup>2</sup> The DOJ cited the Guidelines as a factor in its assessment, explaining that any vertical component of the deal likely would not lead to a reduction in competition.<sup>3</sup>

### Lack of Unilateral Effects Supports Conclusion That LSEG/Refinitiv Deal Would Not Impact Competition

The DOJ's vertical analysis focused on whether the LSEG/Refinitiv deal could lead to unilateral effects, which is one of two theories of harm discussed in the Guidelines.<sup>4</sup> Essentially, the DOJ questioned whether the combined LSEG/Refinitiv entity could harm its competitors by refusing to supply a product or service or otherwise be able to increase its competitors' costs.<sup>5</sup> The DOJ looked at whether LSEG/Refinitiv had the ability and incentive to alter licensing terms for proprietary data feeds used by their competitors to provide competing products.<sup>6</sup> The DOJ determined, however, that the competitors of LSEG/Refinitiv likely would be able to maintain their pre-merger bargaining leverage because (1) these same competitors typically sold products/services back to LSEG/Refinitiv; and (2) LSEG/Refinitiv products were not as competitive in the US as similar products sold by their rivals.<sup>7</sup> This bargaining leverage decreased the ability of LSEG/Refinitiv to benefit from any potential post-transaction price increases. Without this benefit, the DOJ concluded that the LSEG/Refinitiv deal likely would not have an anticompetitive impact.<sup>8</sup>

### Guidelines Solidify Agencies' Current Approach Towards Vertical Transactions

The Guidelines formalize the recent enforcement approach of the Federal Trade Commission ("FTC") and the DOJ (together with the FTC, the "Agencies") towards vertical mergers, which has been decidedly more aggressive. In the last several years, vertical transactions (or vertical components of transactions) have been challenged by both Agencies, including: AT&T/Time Warner (DOJ); CVS/Aetna (DOJ); Staples/Essendant (FTC); Fresenius/NxStage (FTC); and UnitedHealth Group/Davita (FTC). The Guidelines reflect the Agencies' concerns raised in these matters, namely that vertical mergers can harm competition by: (1) enabling the combined entity to increase the costs of its competitors; (2) providing the combined entity with competitively sensitive information that may be used inappropriately; and (3) encouraging collusive activity that harms consumers. And while traditionally, vertical mergers generally were viewed as being unlikely to raise antitrust concerns,<sup>9</sup> the Guidelines make clear: "vertical mergers are not invariably innocuous."<sup>10</sup>

## “Vertical” Does Not Mean What You Think It Means

Starting with the premise that “vertical” really means “non-horizontal,”<sup>11</sup> the Guidelines apply to more transactions than just the typical manufacturer-buys-supplier deals. The Guidelines apply to “diagonal” mergers, which involve companies at different stages of the supply chain, and to vertical elements in mergers of complements.<sup>12</sup> The Guidelines also make clear that they apply to vertical aspects of otherwise horizontal mergers. The LSEG/Refinitiv deal had horizontal components, which did not result in harm because the parties’ products did not actually compete against each other in the US and, in any event, any post-transaction changes to market share concentration were small.<sup>13</sup>

## Guidelines v. HMGs—Similarities and Distinctions

The Guidelines borrow heavily from the tried-and-true analytical framework of the 2010 Horizontal Merger Guidelines (“HMGs”), with several notable differences.<sup>14</sup> First, the Guidelines introduce the concept of Related Products, which are products supplied or controlled by the merged entity and that are vertically related to, or are complementary to, the relevant product.<sup>15</sup> Additionally, while the Agencies will consider market shares in vertical mergers, they will not rely on the market share screening analysis of the HMGs as evidence of anticompetitive harm (i.e., the Agencies will not conduct an HHI analysis).<sup>16</sup> Noticeably absent from the final Guidelines is the Market Share Safe Harbor that appeared in the draft version, which would have precluded review of any deals where the combined market share was less than 20 percent.

## Guidelines Recognize Pro-Competitive Benefits of Vertical Mergers, but Will the Agencies?

The Guidelines recognize that vertical mergers can lead to pro-competitive benefits for consumers. Notably, the Agencies acknowledge the “elimination of double marginalization” or “EDM,” which occurs when the merged entity lowers downstream prices it charges to consumers because it has captured any margin at the upstream level.<sup>17</sup> Other pro-competitive effects include the combination of complementary assets and cognizable, merger-specific efficiencies.<sup>18</sup> But pro-competitive benefits or efficiencies often are discounted by the Agencies as “vague, suggestive, or presumed,” and they rarely are strong enough to overcome a determination that the merger may be anticompetitive.<sup>19</sup> Thus, the utility of any pro-competitive defenses likely will be marginal, just as in traditional horizontal mergers.<sup>20</sup>

## Guidelines Generate Dissents

The Guidelines’ publication generated contention from the start. FTC Commissioners Slaughter and Chopra have made no secret of their beliefs that the antitrust laws have been woefully under-enforced for many years. So, perhaps it should not have surprised people that each found the new Guidelines insufficiently suspect of vertical mergers. They issued separate dissents in response to the publication of the draft Guidelines,<sup>21</sup> and, on February 4—just three weeks into the 30-day notice and comment period—the Agencies announced a two-week extension and that each would hold workshops to discuss comments from the public.<sup>22</sup> And while the revisions to the Guidelines purportedly address concerns that were raised, the pair remained firm in their opposition to the Guidelines.<sup>23</sup>

Commissioner Slaughter questioned whether the substantial revision of the Guidelines warranted a second notice and comment period. She also found the Guidelines to be too lenient and “unbalanced” in their treatment of potential harm.<sup>24</sup> Finally, she raised concerns regarding failures to discuss buy-side concerns, remedies or the potential for regulatory evasion.<sup>25</sup>

Commissioner Chopra discussed that the Guidelines do not address the impact of vertical transactions on the digital economy or the “decline of entrepreneurship.”<sup>26</sup> Like Commissioner Slaughter, he lamented that the

Guidelines support the view that vertical mergers are “benign.”<sup>27</sup> Vertical mergers also can lead to “conflicted gatekeepers” and high barriers to entry for new participants.<sup>28</sup> At bottom, Chopra argued that the Guidelines are based on an “antiquated” view that has “little basis in modern market realities.”<sup>29</sup>

The question remains as to the impact of these dissents going forward. It is unlikely that the Agencies will revisit the Guidelines in the near future; after all the last iteration was in 1984. But with an election in a little over three months and widespread criticism in Congress of (supposedly) lax antitrust enforcement,<sup>30</sup> it would not be unreasonable to suspect that vertical merger enforcement could be tougher in a Biden administration with Democrats running both the DOJ and FTC.

## Guidelines or Bust?

The Agencies’ Horizontal Merger Guidelines are a tool routinely relied on and invoked by practitioners, enforcement officials and courts. The Vertical Merger Guidelines never achieved the same level of prominence. Will the major, joint agency effort that went into revising the Guidelines elevate their importance in the antitrust world? Perhaps. While the LSEG/Refinitiv statement is a good start towards general acceptance, because of the dissents issued by FTC Commissioners, it is questionable the extent to which the Guidelines will become the same analytical staple as the HMGs. Acceptance by federal courts also will be key to the Guidelines’ future. Absent Agency cohesion and regular treatment and consideration by the courts, the Guidelines may get relegated to being an analytical afterthought to the HMGs.

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## Endnotes

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<sup>1</sup> Federal Trade Commission Press Release, “FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers,” June 30, 2020, <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>; “Vertical Merger Guidelines,” US Department of Justice & The Federal Trade Commission, June 30, 2020, [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf?utm_source=govdelivery) (hereinafter, the “Guidelines”). Jointly issued on June 30, 2020, by the Federal Trade Commission (“FTC”) and the DOJ, the long-awaited Guidelines replace the DOJ’s heavily criticized Non-Horizontal Merger Guidelines, which were withdrawn in January 2020 when the Agencies initially published a version of the Guidelines for public comment. See DOJ Press Release, “DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment,” Jan. 10, 2020, <https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment>

<sup>2</sup> DOJ Press Release, “Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of London Stock Exchange Group and Refinitiv,” July 31, 2020, <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-closing-its-investigation-london-stock> (hereinafter “LSEG/Refinitiv Press Release”).

<sup>3</sup> *Id.*

<sup>4</sup> Guidelines, § 4. The second theory of harm is coordinated effects, which occurs when a merger enables or encourages coordination or tacit cooperation among competitors that leads to harm to customers. *Id.* § 5. For example, the Agencies might raise coordinated effects arguments if the merger has the potential to harm a so-called “maverick,” which could increase the chances of cooperation among market participants. *Id.* A “maverick” is a firm that is likely to deviate from any proposed or attempted coordinated action and therefore limits such activity.

<sup>5</sup> *Id.* § 4

<sup>6</sup> LSEG/Refinitiv Press Release.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; see also Guidelines, § 4 (where there are no benefits from an actual or potential reduction in competition from users of the relevant or related product, then the transaction is not likely to warrant antitrust scrutiny).

<sup>9</sup> See “Comments on the Draft Vertical Merger Guidelines Issued by the Department of Justice and the Federal Trade Commission,” American Bar Association, Antitrust Law Section, Feb. 24, 2020, at 3 (“Vertical mergers can also engender many competitive and consumer benefits.”).

<sup>10</sup> Guidelines, § 1

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

- <sup>13</sup> LSEG/Refinitiv Press Release.
- <sup>14</sup> “Horizontal Merger Guidelines,” US Department of Justice & The Federal Trade Commission, Aug. 19, 2010, <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>
- <sup>15</sup> Guidelines, § 3.
- <sup>16</sup> *Id.* HHI stands for Herfindahl-Hirschman Index, which is an assessment of market concentration. Where changes in market share concentration are significant, the deal likely will be viewed as presumptively anticompetitive. Notwithstanding the fact that the Agencies will not look at the HHI, current levels of concentration still may be relevant to the analysis. *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.* § 6.
- <sup>19</sup> See Christine S. Wilson, Commissioner, FTC, “Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies,” Bates White Antitrust Webinar, June 24, 2020, [https://www.ftc.gov/system/files/documents/public\\_statements/1577315/wilson\\_-\\_bates\\_white\\_presentation\\_06-24-20\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20_final.pdf)
- <sup>20</sup> See *id.* (noting that even where efficiencies were found, courts have “emphasize[d] that [the] efficiencies were not pivotal to their decision”).
- <sup>21</sup> See “Statement of Commission Rebecca Kelly Slaughter,” Commission File No. P810034, Jan. 10, 2020, [https://www.ftc.gov/system/files/documents/public\\_statements/1561721/p810034slaughtervmgabstain.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf); “Statement of Commissioner Rohit Chopra,” Commission File No. P810034, Jan. 10, 2020, [https://www.ftc.gov/system/files/documents/public\\_statements/1561721/p810034slaughtervmgabstain.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf)
- <sup>22</sup> See DOJ Press Release, “Justice Department and FTC Announce Workshop on Draft Vertical Merger Guidelines, Extend Comment Period,” Feb. 3, 2020, <https://www.justice.gov/opa/pr/justice-department-and-ftc-announce-workshops-draft-vertical-merger-guidelines-extend-comment> More than 70 public comments were filed on the Guidelines, including from the Federal Communications Commission, the Canadian Bar Association, the American Bar Association, and Verizon, as well as numerous noted economists and antitrust scholars. See Public Comments Archive, Draft Vertical Merger Guidelines, <https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines> In addition, on March 12, 43 members of Congress, including ranking members of the House Judiciary Committee, wrote to the Agencies arguing that recent vertical mergers in the health care space allegedly have led to “significant anticompetitive harm” and that therefore the Agencies should “strengthen the proposed Draft Guidelines.” See Ltr to Makan Delrahim and Ian Connor, Mar. 12, 2020, [https://mcusercontent.com/0275399506e2bdd8fe2012b77/files/47c7cab0-611d-4705-b925-b947bf7bf56b/3.12.20\\_DOJ\\_FTC\\_Vertical\\_Merger\\_Pharmacy\\_Letter.pdf?utm\\_source=Collins+Judiciary+Press+List&utm\\_campaign=42df6f93dc-EMAIL\\_CAMPAIGN\\_2020\\_03\\_12\\_04\\_18&utm\\_medium=email&utm\\_term=0\\_ff92df788e-42df6f93dc-](https://mcusercontent.com/0275399506e2bdd8fe2012b77/files/47c7cab0-611d-4705-b925-b947bf7bf56b/3.12.20_DOJ_FTC_Vertical_Merger_Pharmacy_Letter.pdf?utm_source=Collins+Judiciary+Press+List&utm_campaign=42df6f93dc-EMAIL_CAMPAIGN_2020_03_12_04_18&utm_medium=email&utm_term=0_ff92df788e-42df6f93dc-)
- <sup>23</sup> See “Dissenting Statement of Commissioner Rebecca Kelly Slaughter,” Commission File No. P810034, June 30, 2020, [https://www.ftc.gov/system/files/documents/public\\_statements/1577499/vmgslaughterdissent.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf?utm_source=govdelivery) (hereinafter “Slaughter Statement”); “Dissenting Statement of Commissioner Rohit Chopra,” Commission File No. P810034, June 30, 2020, [https://www.ftc.gov/system/files/documents/public\\_statements/1577503/vmgchopradissent.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf?utm_source=govdelivery) (hereinafter “Chopra Statement”).
- <sup>24</sup> Slaughter Statement.
- <sup>25</sup> *Id.*
- <sup>26</sup> Chopra Statement.
- <sup>27</sup> *Id.* Specifically, Commissioner Chopra commented that vertical mergers can restructure markets, make competition difficult or impossible, suppress entry and decrease access to capital. *Id.*
- <sup>28</sup> *Id.*
- <sup>29</sup> *Id.* Commissioner Chopra noted, in particular, the Guidelines’ failure to address labor market concerns or the “perils associated with private equity involvement with vertical mergers.” *Id.*
- <sup>30</sup> Any purported criticism of lax antitrust enforcement is unfounded in light of recently published HSR statistics. See “Hart-Scott-Rodino Annual Report,” Fiscal Year 2019, [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) Although the number of reported deals *decreased* in FY 2019, the number of merger investigations *increased*—45 transactions received Second Requests in FY 2018 (2.2 percent) versus 61 transactions (3 percent) in FY 2019. Nor has the average length of time for a merger investigation decreased. In 2019, the average length of time was 11.9 months; year to date, the current average length of time is 10.2 months. See “DAMITT: How Long Does It Take To Conduct Significant Antitrust Merger Investigations?,” <https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html>

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