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The Latest “Hipster Antitrust” Battleground – Vertical Merger Enforcement

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On January 10, 2020, the Department of Justice and the Federal Trade Commission released for comment a draft of their Vertical Merger Guidelines, the first update since 1984. Vertical mergers involve a firm acquiring another in its supply chain, i.e., a supplier or customer. One recent and notable transaction, for example, involved AT&T (a distribution platform) acquiring Time Warner (content). While such mergers are generally pro-competitive or neutral, under certain conditions vertical integration can foreclose rivals of the acquired or acquiring firm, raise consumer prices, or lower quality. The draft guidelines are intended to reflect how enforcers seek to separate benign transactions from the suspect.

One could spend the entirety of the ABA’s Antitrust Law Annual Spring Meeting searching for a full-throated supporter of the current Vertical Merger Guidelines and come up empty. After all, antitrust law, and related economic theory, has undergone a sea change since the Reagan era. Vertical practices, including mergers, have been a significant focus of that change. Rules governing vertical practices once adjudged as per se illegal — like conditioning the sale of one product on the purchase of another (tying), or on the buyer’s resale of the product at a certain price (resale price maintenance) — now require at least some consideration of the practice’s likely impact on consumers. More globally, antitrust law and economics have in substantial part caught up with each other. The “consumer welfare” standard, according to which the lawfulness of a challenged practice is weighed based on its likely impact on consumer prices, is the sole and undisputed liability standard among agencies and courts alike. And it is well understood that, if only by eliminating “double marginalization” (the need for each firm in the supply chain to earn a profit to stay in business) through the acquisition of a firm in the supply chain, the average vertical merger can be expected to reduce costs, and therefore prices, and benefit consumers.

On the surface, the revised draft guidelines continue, albeit modestly, the liberalization of the law of vertical restraints. Their most notable addition is the introduction of a “safe harbor” for merging

parties. Specifically, the draft guidelines introduce the concept of a "related product," or a product "that is supplied by the merged firm, is vertically related to the products … in the relevant market, and to which access by the merged firm's rivals affects competition in the relevant market." If the market share of the merging parties in the relevant market is "less than 20 percent, and the related product is used in less than 20 percent of the relevant market," the agencies are "unlikely" to challenge the merger.

Otherwise, the draft guidelines do little more than memorialize existing agency practice regarding vertical theories of harm, market definition, and consideration of efficiencies. As a result, the most notable aspect of the agencies' release is that the FTC's two Democratic commissioners, Rohit Chopra and Rebecca Kelly Slaughter, abstained from the vote in written statements. Both agreed that the 1984 guidelines should be rescinded, but believe the draft guidelines are too permissive.

Their critiques set the stage, during the 30-day comment period provided and beyond, for a battle between supporters of a new mode of antitrust thinking — popularly known as "Hipster Antitrust" — and more traditional antitrust thinkers. To mainstream theorists, on the right and left, the consumer welfare standard is settled law, and sound economics and empirical evidence should dictate whether the standard has been violated in a given case. Supporters of Hipster Antitrust argue that, in addition to protecting consumers, antitrust law can and should be used to remedy a menu of societal ills, including income inequality, workers' rights, and concentrations of political power. Ironically, the enshrinement of the consumer welfare standard as antitrust's lodestar was a *response* to decades of flailing attempts to deploy antitrust law to various political ends. The abstaining commissioners' statements imply that the FTC could be a single vote away from going back to the future.

Commissioner Chopra's statement is the more striking. It begins with a roster of complaints about "today's economy," including high corporate profits, outsourcing, private equity, and new modes of corporate control. Yet none of these observations has *anything* to do with whether a merger offends Section 7 of the Clayton Act, which authorizes government intrusion into private business arrangements only when a transaction may substantially lessen competition in a relevant market. The kind of merger review he prefers would consider a merging firm's "reach" and "size," and the market's "structure," concepts familiar to those who have studied antitrust's dark ages, when "big is bad" was the animating feature of merger enforcement. Most ominously, he warns that merger review should be updated to prevent "risks to national security," "an erosion of our democratic values," and "rights to free speech" — problems that antitrust law, and the government's competition attorneys, are incapable of solving.

Commissioner Slaughter's statement, while more measured and less ambitious, registers objections to the very concept of a safe harbor for merging parties (let alone the 20% threshold, which she rejects). It further critiques the draft guidelines for failing to focus on the "full range" of harms that could be caused by vertical integration, although they devote significant space to the well-settled

types of harms such practices can impose: foreclosure of rivals, and the facilitation of post-merger, coordinated conduct at one level of the supply chain or another.

These battle lines, especially in an election year, are likely to be a focus of commenters, who have until February 11, 2020, to submit their thoughts. If your firm would like assistance preparing comments, or is interested in how the new guidelines may impact a contemplated transaction, please contact the author of this article.

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