Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission’s Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement

September 15, 2021

Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies.¹ Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division (“2020 Guidelines”) and the Commentary on Vertical Merger Enforcement (“Commentary”),² with the minimum notice required by law, virtually no public input, and no analysis or guidance.

Sowing confusion regarding the legality of vertical mergers is particularly troublesome at this time, given American businesses’ ongoing attempts to shore up supply chain vulnerabilities exposed during the COVID-19 pandemic. Today’s action, together with other recent attacks on the Hart-Scott-Rodino merger review process,³ threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.


We believe that American consumers, businesses, and taxpayers deserve better. For these reasons, we dissent.

The Majority’s Decision Will Chill Procompetitive Deals and Hurt Consumers

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars transactions where “the effect may be substantially to lessen competition”. Vertical mergers are not mergers of competitors. Rather, they combine firms that are in a buyer-seller relationship. Suppose a company that specializes in manufacturing only smartphones merges with a company that specializes in manufacturing only smartphone chips, some of which it was selling to the smartphone manufacturer. That is a vertical merger. It does not directly eliminate competition, as the companies were not competing (or about to compete) with each other before they merged.

Vertical integration is a common “make or buy” phenomenon similar to choices that consumers make daily—it’s one way that companies grow. When considering what to have for dinner, a consumer may choose to outsource food preparation by eating at a restaurant or getting take-out; alternatively, he may rely on groceries in his refrigerator and pantry to make dinner himself. When discovering a leak in her home, a consumer can outsource the repairs by hiring a plumber; alternatively, a handy consumer may fix the leak herself.

One immediate and positive effect of a vertical merger is that transactions (e.g., chip sales) that were occurring at arm’s length in the market now take place within the merged firm. As a consequence, the merged firm is no longer paying a markup on the product it is now supplying to itself (e.g., smartphone chips), a phenomenon that economists call the “elimination of double marginalization”. The merged firm benefits from a lower manufacturing cost for each unit it produces (e.g., each smartphone), allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off. Vertical mergers can also increase efficiency and competitiveness in other ways, like saving the substantial time and money that often go into finding reliable trading partners, negotiating terms of sale, coordinating R&D and product design, and writing contracts that cover multiple contingencies but can never capture them all. Take Disney’s 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar’s films; but once combined, Pixar revitalized Disney’s animation department, while Disney used its resources to expand Pixar’s production, resulting in several beloved movies.

Comm’n, Statement Regarding the Indefinite Suspension of Early Terminations (Feb. 4, 2021),


https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf

As the 2020 VMGs correctly point out, “[t]he elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms.” See also Roger D. Blair, Christine S. Wilson, et. al, Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff & Thinking Holistically About Efficiencies, 27 Geo. Mason L. Rev. 761 (2020).

Brooks Barnes, Disney and Pixar: The Power of the Prenup, NY TIMES (June 1, 2008),
https://www.nytimes.com/2008/06/01/business/media/01pixar.html
If you or your children watched a Pixar film on Disney+ during the pandemic, you benefited directly from a vertical integration.

Not all vertical mergers are benign. Some may harm competition and consumers. The 2020 Guidelines describe how such harm can occur and the framework that the FTC and DOJ have developed, over decades of experience, to analyze both the anti- and procompetitive effects of vertical mergers. Contrary to decades of established case law, the Majority claim that the 2020 Guidelines “contravene the text of the statute” by recognizing the “procompetitive effects, or efficiencies, of vertical mergers.” The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies. Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole. Similarly, a successful efficiency defense, i.e., that the proposed merger’s efficiencies would likely offset the merger’s potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers. As such,
they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

The Majority Discards Transparency in Favor of Uncertainty

The 2020 Guidelines marked an important development in U.S. merger enforcement and provided needed transparency into the agencies’ evaluation of vertical (and other non-horizontal) mergers. They are well founded, based on accepted economic principles, reflect precedent from courts and the agencies, and were the result of robust public comment.

The 2020 Guidelines incorporate the federal antitrust agencies’ accumulated knowledge from nearly four decades of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. By laying out the analytic framework the agencies use to evaluate non-horizontal mergers, the 2020 Guidelines are a useful guidepost for businesses that seek to ensure their conduct is lawful.

The 2020 Guidelines also benefitted from well-informed, substantial, and valuable public input in response to the draft Vertical Merger Guidelines released for comment on January 10, 2020, the FTC’s Competition and Consumer Protection Hearings for the 21st Century, and a public workshop the FTC and Department of Justice hosted on March 11, 2020. The Majority discards the 2020 Guidelines today with zero public input.

While the 2020 Guidelines reflect the agencies’ current enforcement practices and policy, the Commentary provides a historical description of the Commission’s analysis in non-horizontal merger cases. This document promotes agency transparency and facilitates the predictability, credibility, and integrity of the Commission’s merger review process. Withdrawing the 2020 Guidelines and Commentary leaves the business community without clarity as to how we will carry out vertical merger enforcement. Our colleagues have yet to articulate any new proposals or guidance for a new approach to vertical merger enforcement. We do not know whether the Majority intends to issue new guidance. We can only hope that they propose a path forward and will take into account and grapple with sound law and the economics in doing so.

benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases”)


14 Vertical Merger Hearing.

The Majority’s decision to foster uncertainty at this time is particularly pernicious. The COVID-19 pandemic exposed supply chain vulnerabilities in many sectors of the American economy.\(^\text{16}\) Impacted businesses are now attempting to adapt.\(^\text{17}\) Some of these businesses seek to bring in-house supply chain functions upstream or downstream from their operations – in other words, they seek to engage in vertical mergers. Other impacted businesses may enter into new contracting arrangements. The uncertainty imposed on businesses – by today’s action regarding vertical mergers and recent Commission actions regarding contracting\(^\text{18}\) – threatens to slow unnecessarily the American economy’s recovery by denying law-abiding businesses the guidance they need to know what actions are permissible as they try to respond to supply shortages.

The Majority’s decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC’s merger enforcement program.\(^\text{19}\) More recently the concerns have led members of Congress to discuss transferring the FTC’s competition authority to DOJ.\(^\text{20}\) Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.

The Majority Prefers Unchecked Regulatory Power Over Guidance

The uncertainty the Majority creates today is particularly troubling in light of the administration’s promises to increase merger enforcement,\(^\text{21}\) and to impose punitive penalties on parties proposing

\(^{16}\) See Juliana Kaplan & Grace Kay, Can’t find chicken wings, diapers, or a new car? Here’s a list of all the shortages hitting the reopening economy, Insider (May 25, 2021), https://www.businessinsider.com/why-supply-shortages-economy-inventory-chips-lumber-cars-toilet-paper-2021-5.


\(^{19}\) See SMARTER Act, S. 4876, 116th Cong. (2020).


mergers that the Majority believes are anticompetitive. The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainty in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority’s repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.

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We lament the majority’s continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

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