Dechert LLP

COMMENTS OF DECHERT LLP

ON THE

DOJ/FTC DRAFT VERTICAL MERGER GUIDELINES

February 26, 2020

Dechert LLP

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I. Introduction

Dechert LLP submits these comments to the Draft Vertical Merger Guidelines ("Draft Guidelines") released by the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "agencies") on January 10, 2020.[1] The views expressed herein are those of Dechert and not any of the firm's clients. Dechert partners James Fishkin and Craig Falls would welcome the opportunity to discuss our comments on the Draft Guidelines with the agencies at the public workshops in March 2020.[2]

We applaud the agencies for seeking to update their guidance on antitrust analysis of vertical mergers. Joint vertical merger guidelines will be helpful to both the business and legal communities. As with the horizontal merger guidelines, vertical merger guidelines should provide clarity regarding the agencies' current enforcement practices and reduce uncertainty with proposed mergers.

Reducing uncertainty in the evaluation of vertical mergers is critically important given the dearth of case law over the last 40 years, the limited number of enforcement actions by the agencies, and the fact that the agencies have not had any working vertical merger guidelines in many years. These Draft Guidelines are coming at the right time, with increased attention on vertical mergers in recent years[3] and contemporaneous media interest brought on by blockbuster vertical mergers like *CVS Health/Aetna*[4] and *AT&T/Time Warner*.[5]

Based on Dechert attorneys' extensive experience representing merging companies in more than one third of all significant merger investigations involving vertical issues since 2017, we believe businesses and the legal community could benefit from additional guidance above and beyond the general analytical framework laid out in the Draft Guidelines. We provide

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[1] Mike Cowie, Craig Falls, James Fishkin, Rani Habash, Blair Kuykendall, Greg Luib, Brian Rafkin, and Michael Weiner contributed to these comments.

[2] Neither Mr. Fishkin nor Mr. Falls is affiliated with any entity that has provided funding for research, analysis, or commentary on relevant topics.

[3] *See, e.g.*, Press release, Dep't of Justice, Antitrust Division, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017) (discussing DOJ vertical merger enforcement and behavioral remedies); Bruce Hoffman, Acting Director, Bureau of Competition, FTC, Remarks on Vertical Merger Enforcement at the FTC (Jan. 10, 2018) (discussing FTC vertical merger enforcement).

[4] Dechert served as antitrust counsel to CVS Health on that vertical merger.

[5] *See, e.g.*, Michael J. de la Merced, Emily Steel, Andrew Ross Sorkin, and Cecilia Kang, *Justice Department Says Not So Fast to AT&T's Time Warner Bid*, N.Y. TIMES, Nov. 8, 2017, https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html; Reed Abelson, *CVS Health and Aetna $69 Billion Merger Is Approved With Conditions*, N.Y. TIMES, Oct. 10, 2018, https://www.nytimes.com/2018/10/10/health/cvs-aetna-merger.html.

specific recommendations that, if implemented in the final Vertical Merger Guidelines, will provide additional clarity. In Section II, we first explain that guidance on vertical mergers is particularly helpful because vertical investigations take longer and are more complex than horizontal merger investigations. Next, in Sections III and IV, we recommend that the agencies provide more guidance on the role of market concentration in their analysis (Section III) and how they analyze foreclosure and raising rivals' costs (Section IV). Finally, in Sections V through VII, we explain how the agencies can provide greater clarity into their analysis of business records (Section V), firewalls (Section VI), and merger retrospectives (Section VII).

II. Guidance is Particularly Helpful Because Significant Investigations with Vertical Aspects Take Longer and Are More Complex

Vertical merger investigations often take longer than horizontal merger reviews and are more burdensome on businesses. The Dechert Antitrust Merger Investigation Timing Tracker (DAMITT) observed that from 2018-2019 significant vertical merger investigations averaged 13.7 months from deal announcement to the conclusion of the investigation—3.0 months longer than those without vertical aspects.[6] During this same period, 60 percent of the significant investigations that lasted more than 18 months involved vertical aspects, even though such reviews accounted for only a fraction (16 percent) of all significant investigations. These data suggest there may be room for the agencies to better focus the scope of their in-depth vertical merger investigations.

Dechert recognizes that the longer review times may be driven by the additional layers of analysis required for vertical merger investigations. Instead of analyzing only those markets in which the merging parties compete with each other, the agencies may need to analyze the structure and competitive dynamics of all upstream and downstream product and geographic markets that are touched by either of the merging party's operations. This makes vertical merger analysis significantly broader than horizontal merger analysis. More markets to be analyzed in vertical merger reviews mean more company custodians, more data, more documents, more time, and more costs and burdens on the merging companies.

For example, in the predominantly vertical *CVS Health/Aetna* merger review, DOJ's second request probed 10 different product markets, requiring the companies to produce more than 25 million pages of documents, more than 10 terabytes of data, and more 300 pages of interrogatory responses with hundreds of accompanying exhibits.[7] More than 350 CVS and Aetna employees from nearly all of the companies' business units contributed to second request compliance efforts even though the companies overlapped in only one market—the sale of standalone Medicare Part D plans, which represented "only one-tenth of one percent" of the $70

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[6] Dechert LLP, *DAMITT 2019 Year in Review*, https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html.

[7] CVS Health Response to Order to Show Cause, at 7, *United States v. CVS Health*, No. 18-cv-2340 (Dec. 14, 2018).

billion transaction.[8] Yet, multiple special interest groups opposing the merger erroneously told a federal judge during the Tunney Act proceedings that DOJ did not dig enough. We believe the opposite is true.[9] More guidance on how the agencies determine which markets in vertical mergers require in-depth probes would result in a better use of resources for all sides compared to the shotgun approach of conducting in-depth reviews of all relevant and all related markets touched by the merging parties' operations.

III. The Agencies Should Explain the Role of Market Concentration

Vertical mergers that may substantially lessen competition typically require, among other things, that the merged firm have substantial market shares in both the upstream and downstream markets and that these markets must be highly concentrated.[10] At issue is whether the Draft Guidelines should consider market concentration in addition to market shares. While Section 3 of the Draft Guidelines provides some guidance regarding the likelihood of enforcement based on market shares, it does not provide corresponding guidance regarding the likelihood of enforcement based on market concentration levels. We recommend providing greater clarity on the market share analysis in Section 3 by including guidance based on corresponding market concentration levels.

A. Market Concentration Levels Are Important to Vertical Merger Analysis

Commissioner Wilson and Commissioner Slaughter acknowledge the importance of market concentration levels, not just market shares, in evaluating vertical mergers. In her statement regarding the Draft Guidelines, Commissioner Wilson asks whether the agencies should "limit the area of antitrust concern to oligopoly markets, and … establish a definitive safe harbor when a merger involves only relatively unconcentrated markets?"[11] Commissioner Slaughter also "agree[s] that market shares and concentration in the upstream and downstream markets are relevant to vertical merger analysis and that vertical mergers among firms in

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[8] *Id.*; *see also* Emily Baumgaertner, *Judge Seeks Monitoring of CVS and Aetna During Antitrust Review*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/health/cvs-aetna-merger-antitrust.html.

[9] Given the unprecedented public scrutiny of the deal, Dechert acknowledges that DOJ needed to leave no stone unturned in its review—a prophetic decision given the first-ever Tunney Act proceeding with live witnesses and one that covered issues beyond the scope of the settlement. And we appreciate that despite the massive scope, DOJ efficiently concluded its investigation approximately 10 months after signing—significantly faster than the average for other significant investigations with vertical aspects.

[10] *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, IVA ¶ 1032a (4th ed. 2016).

[11] Concurring Statement of Christine S. Wilson Concerning the Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, at 1 (Jan. 10, 2020) (footnotes omitted).

unconcentrated and highly competitive markets are unlikely to pose competitive problems."[12] Participants in the FTC's Hearing on Vertical Merger Analysis similarly recognized the importance of analyzing market concentration levels in vertical mergers and recommended including concentration levels in any guidelines.[13]

Antitrust treatises also identify market concentration levels as a key component in analyzing vertical mergers.[14] As Professor Hovenkamp notes, without both highly concentrated upstream and downstream markets, "a vertical merger cannot cause significant foreclosure of existing firms, increase significantly barriers to entry that already exist, or significantly raise the costs of existing rivals."[15]

The European Commission's Non-Horizontal Merger Guidelines similarly acknowledge that "[m]arket shares and concentration levels provide useful first indications of the market power and the competitive importance of both the merging firms and their competitors."[16] These guidelines also state that the European Commission "is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000."[17]

B. Proposed Analytical Framework Based on Market Shares and Concentration

Section 3 of the Draft Guidelines states that the agencies are "unlikely to challenge a vertical merger 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 percent of the relevant market." The Draft Guidelines should provide greater clarity by stating that, where the merged firm's market share is

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[12] Statement of Commissioner Rebecca Kelly Slaughter on the FTC-DOJ Draft Vertical Merger Guidelines, at 3 (Jan. 10, 2020).

[13] *See e.g.*, Margaret Slade, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing No. 5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Tr. at 55:12-17 (Nov. 1, 2018) (vertical merger guidelines "should provide, first of all, clear guidance about the sort of mergers that are unlikely to be challenged and that may be based on concentration ratios").

[14] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, IVA¶ 1032a (4th ed. 2016).

[15] *Id.*; s*ee also id.* ¶ 1032b1 (footnotes omitted).

[16] European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. C 265/6 (published on Oct. 18, 2008) ¶ 24 (footnote omitted).

[17] *See id.* at ¶ 25 (footnote omitted).

less than 20 percent, the agencies are unlikely to challenge a proposed vertical merger regardless of the market concentration levels.

Section 3 also states that “a share of 20 percent or more…does not, on its own, support an inference that the vertical merger is likely to substantially lessen competition.” Section 3 further explains that where shares of the merged firm are greater than 20 percent, “it is particularly important to examine other competitive factors to arrive at a determination of likely competitive effects.” At the same time, Section 3 does not provide any information regarding the relationship between market shares and specific market concentration levels (*e.g.*, highly concentrated or not highly concentrated). Since market concentration levels are one of the key “other competitive factors,” the Draft Guidelines should provide greater clarity by stating that, where the merged firm’s market share is 20 percent or more and the upstream and downstream markets are not highly concentrated (*e.g.*, HHI less than 2500), the agencies are unlikely to challenge the merger.[18] If the agencies decide to forego such an approach, they should provide more guidance on how concentration levels factor into their vertical merger analysis.

The Draft Guidelines should also provide greater clarity by stating that where the merged firm’s market share is greater than 20 percent and the upstream or downstream markets are highly concentrated (*e.g.*, HHI greater than 2500), the higher market concentration levels do not on their own support an inference that the merger is likely to substantially lessen competition and that it is important to examine other competitive factors.

The following table summarizes our proposed recommendation.

Merged Firm’s Market Share In Relevant Market	**Related Market Not Highly Concentrated (HHI Less Than 2500)**	**Related Market Highly Concentrated (HHI Greater Than 2500)**
Less than 20%	Agencies unlikely to challenge	Agencies unlikely to challenge
Greater than 20%	Agencies unlikely to challenge	Higher share and market concentration level does not on its own support an inference that the vertical merger is likely anticompetitive; it is important to examine other competitive factors

Section 3 should also cite to sections of the 2010 Horizontal Merger Guidelines that provide insights into evaluating market concentration levels. Section 5.3 of the Horizontal Merger Guidelines, for example, states: “The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs.”[19] Section 5.3 also states that “even a highly concentrated

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[18] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, IVA¶ 1032a (4th ed. 2016) (anticompetitive vertical mergers require, among other things, “that both markets are highly concentrated”).

[19] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010) (“Horizontal Merger Guidelines”).

market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings."[20]

This proposed analytical framework will provide greater clarity regarding the importance of market concentration levels and will better identify when the agencies are more likely to further investigate or ultimately challenge a vertical merger.

IV. The Agencies Should Provide More Guidance on How They Analyze Foreclosure and Raising Rivals' Costs

The Draft Guidelines identify foreclosure and raising rivals' costs as potential unilateral effects of a vertical merger. The agencies explain that foreclosure can occur when the merged firm refuses to supply rivals in the relevant market with related products and that raising rivals' costs can occur when the merged firm supplies rivals at a higher price or lower level of quality. The concern expressed about such conduct is that, "by changing the terms of those rivals' access to one or more related products," it may enable the merged firm to "weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market."[21]

What is perhaps implicit, but not explicit, in the Draft Guidelines is that such a strategy by the merged firm would not be effective if those rivals could readily turn to alternative sources of supply for the related products. We suspect that this rationale is what is driving the conclusion that "the Agencies are unlikely to challenge a vertical merger 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 percent of the relevant market.*"[22]

The ability of rivals to substitute to alternatives of the merged firm for related products is an important concept in analyzing theories of harm based on foreclosure or raising rivals' costs. Rather than leaving this concept implicit in the Guidelines, the agencies should elaborate on it, including with respect to the following issues:

A. Not All Refusals to Supply Rivals Will Result in Unilateral Effects

The Draft Guidelines recognize that a vertical merger may enable the merged firm to "streamline production" or to "create innovative products in ways that would have been hard to achieve through arm's lengths contracts."[23] The investments required to achieve these efficiencies, however, may be undermined if the merged firm is required to share these benefits with its rivals. The Guidelines should be careful not to create the misimpression that a vertical

[20] *Id.*

[21] Draft Guidelines § 5(a), at 5.

[22] *Id*. at § 3, at 3 (emphasis added).

[23] *Id*. at § 8, at 9.

merger will be deemed anticompetitive solely on the basis that it gives the merged firm an incentive to refuse to supply related product to rivals.

It is well settled that exclusive supply arrangements can be, and often are, procompetitive. If the merging parties could have lawfully entered into an exclusive dealing contract for the related product, it is difficult to understand why the same exclusivity would be unlawful if achieved through a vertical merger. Indeed, the very motivation for the parties to the vertical merger may be to obtain exclusive access to some technology or other input that helps the company differentiate itself in competition with rivals in the relevant market. Consider a manufacturer of a wireless tablet that merges with a company developing improved graphics for tablet screens or a car manufacturer that merges with a company developing a new type of higher-efficiency engine. If such related products must continue to be available to all rivals in the relevant market, the merged firm may underinvest in the development of that technology post-merger, thus reducing innovation and consumer benefits in the relevant market. Exclusivity can thus *enhance* competition in the relevant market, especially when the market is characterized by competition on product features.

The agencies should thus clarify that they do not end their analysis of unilateral effects with the question of whether the transaction enables the merged firms to refuse to supply rivals or to raise prices to rivals. There is a second question to be answered, which is whether such actions will actually weaken rivals or reduce competition in the relevant market. This second step in the analysis is omitted from the agencies' Draft Guidelines and should be included to explain what factors the agencies consider in determining whether such exclusivity would harm, as opposed to benefit, competition.

B. The Agencies Should Explain How to Apply the "Used in Less Than 20 Percent of the Relevant Market" Test

It is helpful that the agencies have explained that they are unlikely to challenge a vertical merger where the "the related product is used in less than 20 percent of the relevant market."[24] The agencies, however, should explain why they adopt this particular framing of the question which focuses on "share of the output in a relevant market that uses the related products" as opposed to the more traditional analysis, which would ask what share of inputs are under control of the merged firm.[25]

This is not just a matter of semantics. It can make a difference in outcome. Consider a not uncommon situation in which the related product is used as an input in multiple downstream markets of which the merged firm only participates in one.

Take for example a vertical merger between a producer of chocolate chips (Company A) and a producer of ice cream (Company B). Company A sells its chocolate chips to ice cream producers, but it also sells the same chocolate chips to producers of cookies, brownies, snack

[24] *Id*. at § 3, at 3.

[25] *Id*.

bars, and packaged cookie dough. Imagine that Company A controls only 10% of all U.S. supply of chocolate chips that could be used by ice cream producers that compete with Company B, but for historical contracting reasons, Company A's chocolate chips are used in 30% of the ice cream produced in the country. The Draft Guidelines would look to Company A's 30% "share of output in the relevant market that uses the related products" instead of Company A's 10% share of all related product sales that could be used by Company B's rivals.

In addition, the "share of output" focus is confusing to apply when the theory of harm is customer foreclosure. Are customer purchases "used" in the share of "output" in the relevant upstream market?

It is not clear whether the agencies' framing of the question to focus on "share of outputs" is an intentional departure from how they analyze foreclosure theories of harm in Sherman Act cases. If so, the agencies should explain why this divergence is necessary in the vertical merger context.

V. The Agencies Should Explain the Key Role of Business Records

Commentary on the significance of business records—both ordinary-course and merger planning documents—is absent from the Draft Guidelines. In the horizontal context, the agencies rely on business records to provide evidence of how companies compete, deeming them "more probative than documents created as advocacy materials in merger review."[26] The agencies should provide clarity on the role that ordinary course documents play in vertical merger analysis as well.

Under the Horizontal Merger Guidelines, ordinary-course documents describing industry conditions inform the agencies how a market functions and how a firm identifies and assesses its rivals.[27] These documents are authoritative particularly when senior executives make decisions in reliance on the accuracy of their content.[28] The agencies value the views of individuals who have decision-making responsibility for the financial and strategic evaluation of a proposed transaction.[29] The agencies use business records to find evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development.[30] The agencies also use business records to probe any merger-specific efficiencies.[31]

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[26] Horizontal Merger Guidelines § 2.2.

[27] *Id.* at § 2.2.1.

[28] *Id.* at § 2.2.1.

[29] *Id.* at § 2.2.1.

[30] *Id.* at § 2.2.

[31] *Id.* at § 2.2.

The FTC has also highlighted the importance of "hot documents" in explaining merger enforcement decisions.[32] Hot documents are records that predict that a merger will produce an adverse price or non-price effect on competition.[33] For example, business records that discuss ending price wars are evidence of potential post-merger price effects.[34] The FTC's analysis of data on the presence of hot documents in cases where FTC sought relief or closed an investigation demonstrates the emphasis that FTC places on these materials.[35] FTC data showed that in a merger where four significant competitors would become three, the FTC sought relief in 80% of transactions where hot documents were present, and only 42% when hot documents were not present.[36]

The agencies cite to business records that raise vertical issues in their enforcement decisions, but could provide more guidance on both positive and negative documents that inform their vertical merger analysis. Negative documents in the vertical merger context would discuss raising rivals' costs, foreclosing access of competitors to inputs, gaining access to competitors' competitively-sensitive information, or the inability of rivals to turn to alternative suppliers of related products. For example, the agencies have cited to documents that an acquisition would "temper" or cut the sale of a key input to a downstream competitor.[37] Also probative would be documents showing that the merged firm would access information on its competitors' pricing or performance and that it would use that information to change its competitive performance.[38] The guidelines would aid the business community in spelling out types of documents that are likely to carry the most weight in an investigation.

Documents could also prove that a vertical transaction is unlikely to harm consumers. In the vertical merger context, some firms will conduct channel conflict analyses and discuss strategies to retain customers who compete with a company they are acquiring. Business records or financial modeling may show that the merged firm expects to or wants to continue to sell high-quality, competitively priced inputs to downstream rivals. Firms may also discuss lowering prices to customers post-merger because of the elimination of double marginalization. Or the

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[32] FTC, Horizontal Merger Investigation Data, at 4 (Jan. 2013) ("Horizontal Merger Investigation Data").

[33] *Id.*

[34] Complaint at 3, *United States v. Bazaarvoice, Inc.*, No. 13-cv-0133 (N.D. Ca. Jan. 10, 2013).

[35] Horizontal Merger Investigation Data, at 17.

[36] *Id.*

[37] *See, e.g.*, Complaint at ¶ 5, *United States v. Deere & Company*, No. 16-cv-08515 (N.D. Ill. Aug. 31, 2016). Dechert served as antitrust counsel to the seller, Monsanto, in that matter.

[38] Complaint at ¶ 29, *In the Matter of The Coca-Cola Company*, FTC No. C-4305 (Nov. 5, 2010).

documents may reflect that the vertical integration will enable the development of new products or product features that will enhance competition in the relevant market. Documents can also demonstrate that competitively-sensitive information is likely to be safeguarded and not misused, and could discuss existing firewall policies.

VI. The Agencies Should Explain How They Analyze Firewalls, Contractual Restraints, and Commercial Incentives as Barriers to Improper Information Sharing

The Draft Guidelines identify access to competitively-sensitive information as a potential concern raised by vertical mergers. In Section 5(b), for example, the Draft Guidelines state that a vertical merger may allow a firm to "gain access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger."[39] Access to such information "can, in some circumstances, be used by the merged firm to moderate its competitive response to its rival's competitive actions."[40] Similarly, Section 7 of the Draft Guidelines states that coordinated effects may arise from a vertical merger "when changes in market structure or the merged firm's access to confidential information facilitate (a) reaching a tacit agreement among market participants, (b) detecting cheating on such an agreement, or (c) punishing cheating firms."[41]

Yet, in many cases, existing firewalls, contractual restraints, and commercial incentives are likely to serve as effective barriers to improper information sharing following a vertical merger. In our experience, such commercial measures and incentives may prevent any unilateral or coordinated effects based on the improper exchange of competitively-sensitive information in a vertically-merged firm, obviating the need for any remedy to address such competitive concerns. The agencies should explain how these measures and incentives factor into their analysis of the likelihood of anticompetitive effects from improper information sharing in vertical mergers.

For many companies, customers or suppliers may also be competitors. Sometimes referred to as channel conflict, this situation arises frequently in the health care industry, among many others. Companies often address this issue through internal firewall policies designed to prevent the improper exchange of competitively-sensitive information within a particular enterprise. In our experience, keys to a successful firewall policy include a robust compliance program, technological barriers to information exchange, meaningful consequences for violations, and regular training programs for relevant employees. When properly implemented, firewalls can serve as an effective deterrent to the exchange of competitively-sensitive information within a vertically-integrated firm.

Regular-course-of-business contractual restrictions are another means of preventing improper information exchange. A company that buys services from one part of an enterprise but

[39] Draft Guidelines § 5(b), at 6.

[40] *Id.*

[41] *Id.* at § 7, at 8.

competes with another business unit within that enterprise may insist on certain contractual restrictions as a condition of doing business. These can include firewalls and other restrictions on accessing the company's data, limitations on how the company's data are used, and the use of dedicated employees to service the company (and no other clients). In some cases, failure to comply with such provisions is deemed a material breach of the parties' agreement.

Even in the absence of such contractual provisions, there may be compelling commercial incentives on the part of vertically-integrated firms to ensure the confidentiality of their customers' or suppliers' competitively-sensitive information. Losing the trust of, and potentially the commercial relationships with, customers or suppliers of one business unit within an enterprise in order to gain competitive advantage for another unit may be economic suicide.

Accordingly, installing effective firewalls is not just a matter of good compliance, but it can be a commercial necessity. In industries where these commercial incentives reinforce the compliance incentives, and in which it is demonstrated that firms are regularly erecting such firewalls in the ordinary course of business, there should be no concern that a vertical merger will likely lead to exchange of competitively sensitive information.

Existing firewalls, contractual restrictions, and commercial incentives can serve as effective barriers to improper information exchanges within vertically-integrated firms. The agencies should explain how they analyze such factors in their assessment of the likely competitive effects of vertical mergers.

VII. The Agencies Should Explain the Role of Merger Retrospectives

There is no discussion of the significance of merger retrospectives in the Draft Guidelines. In the horizontal merger context, the agencies "look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger."[42] The competitive effects (or lack thereof) of previous mergers in the industry is a frequent subject of horizontal merger reviews, both during the investigation and in litigation phases.[43] The agencies should provide clarity on the role that merger retrospectives play in vertical merger analysis as well. For example, the agencies may examine how firewalls were implemented following a prior merger in the same industry. They may also examine whether prior vertical transactions in the same industry led to cost savings or the development of new products.

Indeed, Commissioner Slaughter agreed that merger retrospectives can be highly probative in analyzing vertical mergers. At the FTC's Hearings on Competition and Consumer Protection in the 21st Century, she remarked that merger retrospectives "may be particularly

[42] Horizontal Merger Guidelines § 2.1.2.

[43] *See, e.g.*, Defendants Pretrial Brief at 27, *United States v. AB Electrolux*, No. 1:15-cv-01039, (Oct. 26, 2015) ("The 2006 Whirlpool-Maytag Merger Is Strong Empirical Confirmation That the Post-Merger Concentration Levels Are Not Likely to Cause Anticompetitive Effects In the Overall Cooking-Appliances Markets."). Dechert served as antitrust counsel to the seller, General Electric, in that matter.

useful in vertical cases when our merger analysis rests on assumptions not merely about price but also about the behavior of the merged firm."[44] Commissioner Slaughter specifically identified retrospectives' potential to inform the agencies' foreclosure and entry analyses.[45] A merger retrospective also proved important in the only litigated vertical merger of the modern era, *AT&T/Time Warner*. There, DOJ and the merging parties battled over the probative value of a previous vertical merger between Comcast and NBC Universal that was subject to a DOJ consent decree.[46]

Merger retrospectives can inform the agencies' assessment of potential competitive effects arising from vertical mergers. The agencies should explain how they will weight such retrospectives in their Draft Guidelines.

[44] Rebecca Slaughter, Commissioner, FTC, "Merger Retrospective Lessons from Mr. Rogers," Remarks at FTC Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives (Apr. 12, 2019).

[45] *See id.*

[46] *See, e.g.*, Pretrial Brief of Defendants AT&T Inc., DIRECTV Group Holdings, and Time Warner, Inc., at 11, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (Mar. 9, 2018) ("This Court approved the Comcast/NBCU merger on the government's representation that a virtually identical arbitration/no-blackout mechanism would prevent the combined entity from inflating prices or withholding content. The government was right. The trial evidence will show that the Comcast/NBCU merger resulted in no harm to competition whatsoever. Nothing is materially different here.").