SUPPLY CHAIN RISKS AND VERTICAL MERGER ENFORCEMENT

BY KATE E. GEHL, ELLEN MATHESON & ANNA BUSSE[1]



1 Foley & Lardner LLP.

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By Kate E. Gehl, Ellen Matheson & Anna Busse

This article explores the evolving stance of the Federal Trade Commission and Department of Justice toward vertical mergers, particularly in light of the supply chain uncertainties facing industries today. Historically, the agencies viewed vertical integration as procompetitive, with the potential to generate efficiencies and lower consumer prices. Recently, however, the agencies have raised concerns that vertical mergers have the potential to disadvantage other businesses in the supply chain. Acting on such concerns, the agencies updated the Merger Guidelines in 2023 and the Hart-Scott-Rodino filing requirements in 2025 with an eye toward supply chain preservation. Critical aspects of the agencies' new framework for challenging vertical mergers, moreover, have gained traction in the federal courts. As a result, for any company considering vertical integration, it is imperative to understand the nature of the enforcement tools now at the agencies' disposal.

In recent years both the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") have increasingly focused on the relationship between supply chain disruptions and market competition. The onset of the COVID-19 pandemic exposed vulnerabilities in global supply networks, leading to heightened scrutiny of how certain types of anticompetitive behavior might affect the availability of key inputs such as raw materials, labor, and manufacturing and design technology. As these supply chain-related concerns have taken center stage, antitrust enforcers in the United States have placed more scrutiny on "vertical" mergers — those involving firms at different levels of the supply chain — than in years past.

The most common form of vertical merger is a firm's combination with an upstream supplier or downstream customer. Historically, the FTC and DOJ regarded such vertical integrations as largely procompetitive — potentially generating efficiencies that could result in lower consumer prices, for example. Consistent with that longtime view, an empirical study published in January 2024 in the *Journal of International Economics* confirmed that "[t]he benefits of common ownership of different stages of the production process are expected to increase when there is uncertainty about the availability of inputs."[2] Despite many firms' efforts toward vertical integration in this supply-uncertain era, however, the agencies have recently expressed concerns that the vertically merged entity may attempt to control the pricing and distribution of key inputs, disadvantaging other businesses in the supply chain. To control for this perceived possibility, the agencies revamped the Merger Guidelines in 2023 with an eye, in part, toward supply chain preservation, and in recent months overhauled the HSR filing requirements along similar lines. The FTC and DOJ also filed at least eleven vertical merger actions in federal court in the past five years, several of which resulted in decisions broadly endorsing theories of vertical harm.

Indeed, the agencies now have a full toolbox with which to challenge vertical mergers. The Merger Guidelines explore theories of vertical harm; the new HSR rules require practical engagement with those theories; and the courts — even the Fifth Circuit Court of Appeals — have demonstrated willingness to interpret the antitrust laws in accordance with the agencies' contemporary vertical merger concerns. Whether the agencies will in fact use these tools to challenge vertical mergers remains to be seen, especially since many antitrust observers still regard vertical mergers as presumptively procompetitive. But at least one thing is clear: the agencies have built a new framework within which to review and potentially challenge vertical mergers where there is a meaningful harm to competition. As a result, for any company contemplating a vertical merger, it is imperative to understand the nature of the tools now at the agencies' disposal.

I. NEW MERGER GUIDELINES REFINE THEORIES OF VERTICAL HARM

The previous version of the Vertical Merger Guidelines, enacted in 2020, already laid out the framework for the "ability and incentive" test that the agencies and courts now use to evaluate vertical mergers. The "ability and incentive" test consists of four primary factors, the first being the "availability of substitutes." A merged firm's ability to limit access to a related product is regarded as relatively strong when alternatives to the related product are fewer or lower in quality. The second factor is "competitive significance of the related product." The agencies believe that limiting access to a crucial (versus "nice to have" or discretionary) related product can significantly impair a rival's competitive position. The third factor, "effect on competition in the relevant market," focuses on how important the related product is to competition in the market and whether denying or degrading rivals' access to the product would have the effect of excluding them from the market entirely. The fourth factor, "competition between the merged firm and dependent rivals," suggests that a firm will be regarded as more likely to limit product access to rivals who are direct competitors.

In addition to laying out the ability-and-incentive test, the 2020 Vertical Merger Guidelines recognized that vertical mergers may produce net procompetitive effects. The 2020 Guidelines devoted an entire section to the potential for vertical mergers to create efficiencies: "[v]ertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers."[3]

Just one year after approving the 2020 Vertical Merger Guidelines, however, the FTC withdrew its support, suggesting that the 2020 Guidelines contained a "flawed discussion of the purported procompetitive benefits (i.e. efficiencies) of vertical mergers, especially [their] treatment of double marginalization."[4] The agencies further suggested that "even if a merger does create efficiencies, the [Clayton Act] provides no basis for permitting the merger if it nevertheless lessens competition."[5]

2 Nuri Ersahin et al., *Supply chain risk: Changes in supplier composition and vertical integration*, 147 J. Int'l Econ 103854 at 2 (2024).

3 See U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (2020)

4 See Fed. Trade Comm'n, *FTC P810034: Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines* (Sept. 15, 2021).

5 *Id.*

The agencies thus set out to revise the Guidelines, finally enacting the operative version in 2023. The fifth section of the new merger guidelines now broadly proclaims that "Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals May Use to Compete." These so-called "related" products may take the form of inputs, distribution channels, or sources of sensitive information. The agencies' competition concerns arise when the vertically merged firm can limit access to these related products, thus weakening or "foreclosing" rivals from the relevant market. To address such foreclosure concerns, this section of the Guidelines reiterates that the agencies will assess the "ability" and "incentive" of the merged firm to harm competition. Importantly, the new Guidelines express this analysis in numerical terms: "[t]he Agencies will generally infer, in the absence of countervailing evidence, that the merging firm has or is approaching monopoly power in the related product if it has a share greater than 50% of the related product market."

Section 10 of the Merger Guidelines is less directly concerned with vertical mergers but still helps to illustrate the agencies' contemporary supply-related concerns. Section 10 announces that "When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers." The Guidelines underscore that the agencies will assess mergers based on their impact on supply-side competition — not just from the seller side, but from the buyer side, too. As competing buyers merge, they can reduce competition by eliminating rivalry or increasing coordination, which can lead to higher buyer concentration or entrench a dominant buyer's position. The agencies view this reduction in competition as potentially suppressing input prices or purchase volumes, reducing suppliers' or workers' incentives to innovate or invest.

Some legal commentators have suggested that the agencies under the Trump administration may attempt to repeal or at least curtail the 2023 Merger Guidelines, particularly with respect to the theories of vertical harm expressed therein. The agencies under new leadership may even endeavor to restore the presumption that vertical mergers are procompetitive or at least neutral. Vertical mergers, after all, involve the integration of complementary firms (rather than "competitive" firms), and often result in significant efficiencies. Empirical research has shown that vertical mergers may reduce market inefficiencies through the elimination of "double marginalization" (i.e. reducing the number of profit-takers in the supply chain from two to one), reducing or eliminating transaction costs, and improving efficiency in the design, production, and distribution of goods. Even where a vertical merger poses supply chain concerns, in other words, it may still result in net benefits for competition.[6]

II. NEW HSR REQUIREMENTS FOCUS ON VERTICAL RELATIONSHIPS

Those companies contemplating a vertical merger must also be aware of recent changes to the reporting rules under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act. As part of the premerger notification process, the merging parties must now describe for purposes of agency review any significant existing or potential supply relationships and overlaps in such relationships with top customers or suppliers.

Specifically, where a "supply relationship" exists between the merging parties, the new rules require each party to list and briefly describe any products, services, or assets that they sold, licensed, or otherwise supplied to the other or to any other business that uses those products, services, or assets to compete with the other party and that represented at least $10 million in revenue. For any such "supply relationship," the filing party is required to provide sales or purchase data and a list of its top 10 customers or suppliers. Both parties must also now identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees, and must identify each document produced in the filing that confirms or discusses the stated rationale. These requirements reflect, among other things, the new Guidelines' concern that a vertically merged party will attempt to reduce its rivals' access to key inputs.

The new HSR requirements thus mandate that merging parties assess and report on the potential effects of their proposed merger on the supply chain. The parties' provision of supply-related data and insights will conceivably make it easier (or at least quicker) for the agencies to assess whether a proposed consolidation poses vertical harm. The other side of the coin, of course, means that firms will have to commit significantly more time, effort, and resources to completing the initial HSR filing. To underscore that point, the Chamber of Commerce in January filed a federal complaint against the FTC alleging that the new HSR rules are overbroad and impose excessive burdens on businesses.[7]

6 See e.g. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 626, 663 (2007) and James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 642, 658 (2005).

7 See *Chamber of Commerce of the United States of America et al. v. Fed. Trade Comm'n*, No. 6:25-cv-009 (E.D. Tex. 2025).

III. COURTS ADOPT AGENCIES' ABILITY-AND-INCENTIVE FRAMEWORK

Between the new guidelines and HSR requirements, the agencies have made clear their intentions to meaningfully scrutinize vertical mergers. The enforcement toolbox would not be complete, however, without an aggressive litigation strategy and corresponding judicial validation. The agencies during the Biden administration adopted an aggressive approach to challenging vertical mergers, particularly those it perceived as having the potential to disrupt supply chains and lead to anti-competitive effects in downstream or upstream markets. In several high-profile cases, the FTC sought to block vertical mergers outright. This approach marked a departure from previous administrations, where vertical mergers were often allowed with fewer concerns about anticompetitive effects.

Several courts have already proven receptive to the agencies' heightened scrutiny of vertical mergers. The Fifth Circuit's decision in *Illumina/Grail*, for instance, aligned with the 2023 Merger Guidelines in terms of endorsing an expansive view of antitrust harm — one that considers long-term, "vertical" anticompetitive effects versus more immediate or traditional "horizontal" harm.[8]

Illumina is a leading supplier of a specific DNA sequencing technology that is crucial for multi-cancer early detection tests. When Illumina in September 2020 proposed acquiring Grail, one of the companies working to develop an early detection test, the FTC sought to block the merger. Foreshadowing Section 5 of the 2023 Guidelines, the FTC argued that Illumina had both the ability and incentive to raise prices or limit access to its sequencing technology for Grail's competitors, and that it would "foreclose" other early detection test developers by controlling a critical input.

The litigation continued all the way up to the Fifth Circuit, which finally issued a decision in December 2023 adopting many of the FTC's key arguments and prompting Illumina to divest Grail. Implicitly endorsing the FTC's presumption that certain vertical mergers can denigrate supply chain health, the court observed that Illumina through its acquisition of Grail would not only gain access to Grail's proprietary early detection technology but also increase its control over the supply of sequencing technology essential for such tests. The court's focus on supply-related harm highlights judicial willingness to accept arguments that vertical mergers may threaten the availability of essential inputs.

Illumina so well complemented the FTC's theories of vertical harm, in fact, that the agencies incorporated several parts of the court's opinion into the Guidelines (published just one business day after the Fifth Circuit released its opinion). For example, *Illumina* is cited in support of an expansive concept of the "relevant market," which includes "the products that would result from that innovation if successful, even if those products do not yet exist."[9] Further emphasizing the expansive scope of antitrust harm under *Illumina*, the notes to Section 5 reiterate that "there are myriad ways in which [a vertically merged firm] could engage in foreclosing behavior," which include "making late deliveries or subtly reducing the level of support services."[10]

District courts have signed onto the agencies' theories of vertical harm, too. In *United States v. UnitedHealth Grp. Inc.*,[11] for example, the DOJ argued that UnitedHealth's control over Change Healthcare's electronic data interchange clearinghouse would give United the ability and incentive (1) to use rivals' competitively sensitive information for its own benefit, and (2) to foreclose rivals' access to key inputs on competitive terms by withholding innovations, thereby raising rivals' costs. The court analyzed both theories of vertical harm, accepting the premise that either theory could serve as a valid reason to prevent a merger. The court concluded in the end, however, that the evidence did not support the government's contention that the merged firm would have the ability and incentive to use its rivals' sensitive information or to raise its rivals' costs.[12]

The new merger guidelines, the impending changes to the HSR Act, and judicial endorsement of vertical theories of harm as seen in cases like *Illumina-Grail* signal a supply-motivated shift in antitrust enforcement. These developments collectively create a robust "toolbox" that future administrations may use to challenge vertical mergers that are perceived as having the potential to constrict the supply chain.

8 See *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036 (5th Cir. 2023).

9 U.S. Department of Justice & Federal Trade Commission, Merger Guidelines (2023) at 4.3.D.7 (citing *Illumina*, slip op. at 12 (defining the relevant market as "what . . . developers reasonably sought to achieve, not what they currently had to offer")).

10 Merger Guidelines at 2.5.A.1., n. 28 (citing *Illumina, Inc. v. FTC*, No. 23-60167, slip op. at 17 (5th Cir. Dec. 15, 2023)); see also Merger Guidelines at 2.5.A.2., n. 29 (citing *Illumina*'s reference to the *Brown Shoe* factors).

11 630 F. Supp. 3d 118 (D.D.C. 2022).

12 See also *Fed. Trade Comm'n v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1090 (N.D. Cal. 2023) (crediting the ability-and-incentive test but emphasizing that the FTC must show both ability *and* incentive — not merely one or the other — to support a theory of vertical harm).

IV. PREDICTIONS FOR THE FUTURE

Despite the Biden-era agencies' development of this vertical merger enforcement toolbox, many commentators have suggested that the Trump administration is unlikely to use it. Some have argued that antitrust enforcement during Trump's second term will be less aggressive than under Biden, given the Trump administration's dislike for business regulation. That said, the first Trump administration in 2018 brought the first fully litigated vertical merger challenge in forty years. The challenge to the AT&T and Time Warner merger failed in court on the basis of the government's inability to support its allegations with evidence, but the case was notable for its reliance on theories of vertical harm. The government claimed that by combining AT&T's distribution network with Time Warner's content (e.g. CNN), the merged entity could use its control over both distribution and content to harm competition. Specifically, the DOJ argued that AT&T could use its position to either disadvantage competing distributors by denying or delaying access to Time Warner's content, or charge them higher fees, potentially raising prices for consumers or reducing the availability of content. This theory challenged traditional antitrust assumptions by focusing on the risks of market power resulting not from direct competition, but from a vertically integrated firm's ability to control a distribution network.

There is additional reason to think that the agencies under the second Trump administration may regard at least some vertical mergers with heightened scrutiny, such as those in technology, healthcare, and other rapidly evolving sectors. Consider, for example, the implementation of sweeping tariffs and their effect on the international supply chain. As tariffs raise input prices, businesses that rely on foreign suppliers may face higher costs or limited access to key products, which can slow production and lead to price hikes for consumers. To offset such supply chain problems, the Trump administration may decide to challenge vertical mergers in those industries facing tariff-induced disruptions. The tools for it to do so are all there.