Vertical Merger Guidelines

U.S. Department of Justice
&
The Federal Trade Commission

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U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION

VERTICAL MERGER GUIDELINES

1. OVERVIEW

These Vertical Merger Guidelines outline the principal analytical techniques, practices, and enforcement policies of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to a range of transactions often described as vertical mergers and acquisitions.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1–2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits any merger or acquisition if, "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." This provision applies to vertical mergers, as Congress made plain in the 1950 amendments to the Clayton Act.

These Guidelines describe how the agencies analyze a range of non-horizontal transactions. Where they use the term "vertical," that term should not be read to narrow the applicability of these Guidelines. The analytical techniques, practices, and enforcement policies described in these Guidelines apply to strictly vertical mergers (those that combine firms or assets at different stages of the same supply chain), "diagonal" mergers (those that combine firms or assets at different stages of competing supply chains), and vertical issues that can arise in mergers of complements. In describing a vertical relationship, a stage closer to final consumers (such as a distributor, retailer, or finished goods manufacturer) is termed "downstream," and a stage further from final consumers (such as a supplier, wholesaler, or input manufacturer) is termed "upstream."

Mergers often present both horizontal and vertical elements, and the Agencies may apply both the Horizontal Merger Guidelines[2] and the Vertical Merger Guidelines in their evaluation of a transaction. In addition, if one of the parties to a transaction could use its pre-existing operations to facilitate entry into the other's market, the Agencies may consider whether the merger removes competition from a potential entrant, using the methods described in the Horizontal Merger Guidelines.

These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement

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[1] These Guidelines supersede the extant portions of the Department of Justice's 1984 Merger Guidelines, which are now withdrawn and superseded in their entirety. They reflect the ongoing accumulation of experience at the Agencies. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning.

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010).

decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws to the types of transactions discussed herein.[3]

These Guidelines should be read in conjunction with the Horizontal Merger Guidelines. Many of the principles and analytic frameworks used to assess horizontal mergers apply to vertical mergers. For example, Section 1 of the Horizontal Merger Guidelines—describing in general terms the purposes and limitations of the Horizontal Merger Guidelines and the goals of merger enforcement—is also relevant to the consideration of vertical mergers. Other topics addressed in the Horizontal Merger Guidelines, but not addressed herein – such as the analytic framework for evaluating entry considerations, the treatment of the acquisition of a failing firm or its assets, and the acquisition of a partial ownership interest – are relevant to the evaluation of the competitive effects of vertical mergers as well.

Vertical mergers, however, also raise distinct considerations, which these Guidelines address. For example, vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm. While the agencies more often encounter problematic horizontal mergers than problematic vertical mergers, vertical mergers are not invariably innocuous. These Guidelines describe the framework applied by the Agencies in distinguishing anticompetitive from procompetitive (and competitively neutral) vertical mergers.

As with horizontal mergers, the Agencies normally examine effects on the actual and potential direct customers of the merging parties, and, if different, the final consumers of firms that utilize the goods or services of the merging parties. The Agencies are concerned with harm to competition, not to competitors. When a merger involves products at different levels of a supply chain, the direct customers the Agencies will consider are actual and potential buyers of the downstream products. Absent convincing evidence to the contrary, the Agencies presume that adverse effects on these direct customers lead to adverse effects on final consumers.

The enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to the enhancement of market power by sellers. The Agencies employ an analogous framework to analyze vertical mergers that may enhance the market power of buyers.

In evaluating effects, the Agencies focus on the likely changes in competitive outcomes caused by a merger. Therefore, the Agencies focus on competitive outcomes caused by conduct that would be compatible with firms' abilities and incentives following a vertical merger, but would not be in the absence of the merger. To the extent practicable, the Agencies use a consistent set of facts and assumptions to evaluate both the potential competitive harm from a vertical merger and the potential benefits to competition.

[3] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a vertical merger may substantially lessen competition. The types of evidence described in Section 2.1 of the Horizontal Merger Guidelines can also be informative about the effects of vertical mergers, including actual effects observed in consummated mergers, direct comparisons based on experience, and evidence about the disruptive role of a merging party. The Agencies may also consider evidence about the disruptive role of non-merging firms – for example, when evaluating a theory that a vertical merger may allow the merged firm to discipline disruptive rivals. The Agencies may also consider market shares and concentration in relevant markets (*see* Section 3), and may rely on evidence of head-to-head competition between one merging firm and rivals that trade with the other merging firm when evaluating unilateral effects (*see* Section 4). The sources of evidence on which the Agencies rely are the same as those set forth in Section 2.2 of the Horizontal Merger Guidelines and include documents and statements of the merging parties, their customers, and other industry participants and observers.

3. Market Definition, Related Products, Market Shares, and Concentration

In any merger enforcement action involving a vertical merger, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Many of the general purposes and limitations of market definition described in Section 4 of the Horizontal Merger Guidelines are also relevant when the Agencies define markets for vertical mergers, and the Agencies generally use the methodology set forth in Sections 4.1 and 4.2 of the Horizontal Merger Guidelines to define relevant markets for vertical mergers.

When the Agencies identify a potential competitive concern in a relevant market, they will also specify one or more related products. A related product is a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market. For example, a related product could be an input, a means of distribution, access to a set of customers, or a complement. The same transaction can give rise to more than one vertical concern, and different concerns may affect different relevant markets.

> **Example 1: Relevant markets can be upstream or downstream**
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> *Situation*: A retail chain buys the manufacturer of Brand A cleaning products.
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> *Discussion*: In this example, the merged firm's supply of Brand A cleaning products (the related product) could affect downstream competition between retailers in a given geographic area (the relevant market). The Agencies may also consider whether the merged firm's retailing of cleaning products in a given geographic area (the related product) could affect competition between manufacturers of cleaning products in that area (the relevant market).

The Agencies may consider measures of market shares and market concentration in a relevant market in their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

The Agencies use the methodology set out in Section 5 of the Horizontal Merger Guidelines to measure shares and concentration in a relevant market, but do not rely on the thresholds in Section 5.3 as screens for or indicators of competitive effects from vertical theories of harm. Existing levels of concentration may nonetheless be relevant. For example, high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market.

4. UNILATERAL EFFECTS

A vertical merger may diminish competition between one merging firm and rivals that trade with, or could trade with, the other merging firm. This section discusses common types of unilateral effects arising from vertical mergers. Section (a) discusses foreclosure and raising rivals' costs. Section (b) discusses competitively sensitive information. These effects do not exhaust the types of possible unilateral effects.

a. Foreclosure and Raising Rivals' Costs

A vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market. For example, a merger may increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product. The merged firm could also refuse to supply rivals with the related products altogether ("foreclosure").

In identifying whether a vertical merger may diminish competition due to unilateral foreclosure or raising rivals' costs,[4] the Agencies generally consider whether the following conditions are satisfied:

(1) *Ability*: By altering the terms by which it provides a related product to one or more of its rivals, the merged firm would likely be able to cause those rivals (a) to lose significant sales in the relevant market (for example, if they are forced out of the market; if they are deterred from innovation, entry, or expansion, or cannot finance those activities; or if they have incentives to pass on higher costs through higher prices) or (b) to otherwise compete less aggressively for customers' business.

[4] For ease of exposition, the principal discussion is about input foreclosure and raising rivals' input costs following a merger between vertically related firms, where the concern is that the merged firm could profitably use its supply of an input (the related product) to weaken the competitive constraint it faces from rivals in the downstream market (the relevant market). Examples in this section discuss the analogous analysis for foreclosure or raising rivals' costs that raise barriers to entry, customer foreclosure and raising rivals' distribution costs, and mergers of complements.

This element would not be satisfied, and in turn a merger would rarely warrant close scrutiny for its potential to lead to foreclosure or raising rivals' costs, if rivals could readily switch purchases to alternatives to the related product, including self-supply, without any meaningful effect on the price, quality, or availability of products or services in the relevant market.

The Agencies' review of the merged firm's rivals' ability to switch to alternatives to the related product may include, but is not limited to, the types of evidence the Agencies use to evaluate customer switching when implementing the hypothetical monopolist test, listed in Section 4.1.3 of the Horizontal Merger Guidelines.

(2) *Incentive*: The merged firm, as a result of the merger, would likely find it profitable to foreclose rivals, or offer inferior terms for the related product, because it benefits significantly in the relevant market when rivals lose sales or alter their behavior in response to the foreclosure or to the inferior terms.

This element would not be satisfied, and in turn a merger would rarely warrant close scrutiny for its potential to induce foreclosure or raise rivals' costs, if the merged firm would not benefit from a reduction in actual or potential competition with users of the related product in the relevant market.

The Agencies' assessment of the effect of a vertical merger on the incentive to foreclose rivals or raise their costs by changing the terms of the related product will be fact-specific. For example, in the case of foreclosure, the Agencies generally consider whether the merged firm's gains in the relevant market would likely outweigh any losses from reduced sales of the related product.

Mergers for which these conditions are met potentially raise significant competitive concerns and often warrant scrutiny.

For mergers that warrant scrutiny, the Agencies will determine whether, based on an evaluation of the facts and circumstances of the relevant market, the merger may substantially lessen competition. This evaluation will generally include an assessment of the likely net effect on competition in the relevant market of all changes to the merged firm's unilateral incentives. The merged firm may foreclose its rivals or raise their costs by changing the terms offered for the related product, but a vertical merger can also change other incentives. The elimination of double marginalization, for example, can confer on the merged firm an incentive to set lower downstream prices. The price that a downstream firm pays for an input supplied by an independent upstream firm may include a markup over the upstream firm's marginal cost. If a downstream and an upstream firm merge, and the merged firm supplies itself with its own related product, it will have access to the input at cost. (*See* Section 6.) The likely merger-induced increase or decrease in downstream prices would be determined by considering the impact of both these effects, as well as any other competitive effects.

To the extent practicable and appropriate, the Agencies will use the same set of facts and assumptions to evaluate both the potential harm from a vertical merger and the potential benefits of the elimination of double marginalization, and will focus on evaluating conduct that would be most profitable for the merged firm as a whole.

Where sufficient relevant data are available, the Agencies may construct economic models designed to quantify the net effect on competition. The Agencies may employ merger simulation models to assist in this quantitative evaluation. These models often include independent price responses by non-merging firms and may incorporate feedback from the different effects on incentives. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether merger simulations using reasonable models consistently predict substantial price increases than on the precise prediction of any single simulation. The Agencies may also determine that a merger may substantially lessen competition based on an evaluation of qualitative evidence of all potential effects.

The next paragraphs provide illustrative examples of the application of this general framework. The examples do not exhaust the types of possible foreclosure concerns.

Example 2: Input foreclosure and raising rivals' costs

Situation: Upstream firms supply oranges to downstream firms, which use the oranges to produce orange juice. All orange suppliers make take-it-or-leave-it offers to sell at constant unit prices.[5] A supplier of oranges (the related product) merges with a producer of orange juice (the relevant market) that buys its entire orange demand from the supplier.

Discussion: The merged firm may have the ability to restrict the supply of oranges to rival orange juice producers. If those rivals lack alternative sources of oranges to those of the merged firm in sufficient quantity at comparable price and quality, the merged firm may be able to increase their costs by raising the price at which it sells them oranges or by refusing to sell them oranges altogether.

The Agencies may assess whether the merged firm would likely have an incentive to raise the price at which it supplies oranges to rivals. This assessment may focus on the resulting reduction in competition, including any reduction due to the diversion of sales of orange juice to the merged firm. Capturing the downstream margin on the diverted sales through merger may make a price increase profitable, even though the price increase would not be profitable for the orange supplier absent the merger. The effect on the price the merged firm charges for oranges depends on the merged firm's gains from diverted sales in the relevant market and from increased prices in the relevant market.

The Agencies may also consider whether the merged firm may have an incentive to stop supplying oranges to rival orange juice producers altogether. In doing so, the merged firm would lose the margin on the forgone sales of oranges, but may benefit from a higher margin and increased sales of orange juice diverted from its rivals. If the benefits from

[5] By "constant unit prices," we refer to a simple linear price per-unit with no other fees or offsets. The pricing structure is relevant to the likelihood and the degree of both raising rivals' costs and the elimination of double marginalization.

increased downstream sales outweigh the costs of the forgone upstream sales, the merged firm may find it profitable to foreclose.

In either case, the merged firm will likely source its oranges at reduced cost rather than paying a price that includes a margin to an independent firm, giving it an incentive to set lower prices on its own orange juice products (the effects of eliminating double marginalization). To determine whether the merger may substantially lessen competition, the Agencies would analyze the specific facts and circumstances, including in particular the relative magnitude of these offsetting incentives.

Example 3: Raising the input costs of rivals with bargaining

Situation: A firm supplies Product A to a number of competing downstream retailers, each of which would lose significant business overall if it did not stock Product A. Terms are set through bargaining, and contracts take the form of constant unit wholesale prices. The supplier of Product A merges with one of the retailers.

Discussion: The vertical merger may diminish competition between retailers (the relevant market) by giving the merged firm the leverage to raise its rivals' costs by negotiating increased wholesale prices for the firm's supply of Product A (the related product) from its rival retailers. Compared to the manufacturer of Product A acting independently, the merged firm may benefit downstream if it refuses to supply one or more of its downstream rivals and if such rivals lose sales as a result. This benefit improves the merged firm's alternative to a supply agreement should negotiations take time to resolve, or fail altogether, and thus may increase the merged firm's bargaining leverage with rival retailers.

Rivals that pay higher wholesale prices for Product A would likely set higher retail prices. In contrast, the merged firm will likely lower its costs for sourcing Product A because it will not pay a wholesale price to a third party that includes a markup over cost, providing the merged firm with an incentive to lower its retail price for Product A. It is a factual question whether competition in the retail market would be substantially lessened, such that consumers in the retail market would pay higher prices, on average, after the merger.

Example 4: Creating the need for two-level entry

Situation: Company A is the sole supplier of an active ingredient required to make an off-patent pharmaceutical drug produced only by Company B. Company A's supply of the active ingredient is the related product. It sets a constant unit price. Company C is considering entering the relevant market with its own version of the drug. Were it to enter, head-to-head competition with Company B would be significant and prices for the drug would likely fall significantly, leading to increased sales. Company B buys Company A. In the absence of the merger, Company A would benefit from Company C's entry.

Discussion: The merger may diminish competition in the relevant market by making entry by Company C less likely. In the absence of the merger, Company A would likely have an incentive to facilitate the entry of Company C and to supply Company C if it did enter. The merged firm, on the other hand, may have the ability to prevent Company C from successfully entering the relevant market by refusing to supply Company C with any active ingredient. In this case, Company C's successful entry into the relevant market may require Company C to produce the active ingredient as well. This two-level entry may be more costly and riskier than entering the relevant market alone, and thus may deter Company C from entering. Moreover, the merged firm may have an incentive to refuse to supply Company C unless it is markedly more efficient or targeting additional customer groups or markets.

The Agencies would also consider the effects on competition if the merged firm would eliminate double marginalization by sourcing the active ingredient at cost rather than paying a price that included a markup. The likely net effect on competition in the relevant market would depend, in part, on the extent to which entry was likely absent the merger.

Example 5: Raising rivals' costs of distribution

Situation: A distributor of components to customize trucks for different uses offers competing liftgates for loading. Liftgates are supplied at a constant unit wholesale price. The distributor buys a manufacturer of liftgates. The distributor has developed a strong position in Region X based on offering superior support and developing close customer relationships. Many customers consider other distributors to be inadequate substitutes for the merged firm's distribution of liftgates in Region X (the related product).

Discussion: The Agencies may consider whether the merger would harm competition in the market for the manufacture of liftgates in Region X (a relevant market). Because customers prefer the merged firm's superior distribution service, the merged firm may be able to disadvantage manufacturers of rival liftgates by setting higher retail prices for their products. The profitability of such a strategy would depend on diversion to the merged firm's liftgates as well as sales lost to rival distributors.

A potential harm in this example is diminished competition between manufacturers of liftgates (a relevant market upstream from the market for the distribution of liftgates). The Agencies, however, may consider the impact on retail prices when evaluating the effects on competition in the relevant market. The competitiveness of upstream manufacturers depends, in part, on the derived demand from customers of the downstream distributors, who choose among manufacturers' products based on downstream retail prices. Competition in the retail sale of liftgates may be harmed if the merged firm raises retail prices for rival brands, even though rival manufacturers may respond to the change in the merged firm's incentives by setting lower, not higher, wholesale prices. The Agencies would also evaluate the extent of the merged firm's incentive to set a lower price for liftgates because of the elimination of double marginalization.

Example 6: Merger of complements raising vertical issues

Situation: Manufacturers use batteries and motors when making electric scooters. Electric scooter manufacturers use different batteries and motors based on their production technologies. The two components are complements: manufacturers make more scooters, and demand more of both components, when the price of either component falls. All components are sold under contracts that specify a constant unit price. The leading maker of motors for scooters merges with a manufacturer of batteries for scooters.

Discussion: Motors and batteries are complementary inputs into the production of electric scooters. Neither input is upstream nor downstream from the other in the supply chain. The Agencies may investigate whether the merged firm would have the ability and incentive to disadvantage rival manufacturers of batteries. For example, the merged firm might do so by increasing the price of its motors (the related product) to its customers (*e.g.*, electric scooter manufacturers) that do not also buy the merged firm's batteries. The merged firm may also have an incentive to offer lower prices for batteries to its customers that do buy both components from it. If the Agencies conclude that both countervailing price effects are likely to be present post-merger, the Agencies will conduct a balancing of the effects to determine the net effect on the prices customers will likely pay.

The Agencies may also use an analysis similar to the above to investigate whether the merged firm would have the ability and incentive to disadvantage rival manufacturers of motors (in an additional relevant market) by increasing the price of batteries (the related product) to its customers that do not also buy the merged firm's motors.

Example 7: Diagonal merger

Situation: An electronics firm develops a component that enhances the wireless capability of low-end laptop computers. This component intensifies competition between low-end laptop computers that incorporate the component as an input and high-end laptop computers that already provide premium wireless capabilities without the component. The largest manufacturer of high-end laptop computers with premium wireless capability acquires this electronics firm. The acquisition neither expands nor improves the functionality that the acquiring firm can provide. The acquired technology is not compatible with the acquiring firm's products, and redesigning its products to incorporate the acquired technology would neither lower its marginal costs nor improve the wireless capabilities of its laptops.

Discussion: The Agencies may investigate whether the merged firm would have the ability and incentive to reduce competition in the market for laptop computers (a relevant market) by increasing the price, degrading the quality, or reducing the availability of the component providing wireless capability (the related product). The incompatibility between the technologies of the merging firms strongly suggests that this merger is unlikely to generate any benefits due to the elimination of double marginalization.

b. Access to Competitively Sensitive Information

In a vertical merger, the transaction may give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger. For example, a downstream rival to the merged firm may have been a premerger customer of the upstream firm. Post-merger, the downstream component of the merged firm could now have access to its rival's sensitive business information. In some circumstances, the merged firm can use access to a rival's competitively sensitive information to moderate its competitive response to its rival's competitive actions. For example, it may preempt or react quickly to a rival's procompetitive business actions. Under such conditions, rivals may see less competitive value in taking procompetitive actions. Relatedly, rivals may refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information as described above. They may become less effective competitors if they must rely on less preferred trading partners, or if they pay higher prices because they have fewer competing options.

5. Coordinated Effects

In some cases, a vertical merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Section 7 of the Horizontal Merger Guidelines describes how the Agencies evaluate coordinated effects. In particular, Section 7.1 notes that the Agencies are more likely to challenge a merger on the basis of coordinated effects when the relevant market shows signs of vulnerability to coordinated conduct, and the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. Section 7.2 sets forth evidence relevant to evaluating whether a market is vulnerable to coordination. The theories of harm discussed in the Horizontal Merger Guidelines, as well as those discussed below, are not exhaustive, but rather are illustrations of the manner in which a merger may lessen competition due to coordinated effects.

A vertical merger may enhance the market's vulnerability to coordination by eliminating or hindering a maverick firm that otherwise plays or would play an important role in preventing or limiting anticompetitive coordination in the relevant market. For example, the merged firm could use its control over a related product or service to harm the ability of a non-merging maverick to compete in the relevant market, thereby increasing the likelihood of coordinated interaction among the merged firm and rivals participating in that market.

Coordinated effects may also arise in other ways, including 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.

Example 8: Vertical merger raising coordinated effects issues

Situation: A merger combines a manufacturer of components and a maker of final products.

Discussion: Where the component manufacturer supplies rival makers of final products, it will have information on the rival's volume of final product, and thus will be better able to detect cheating on a tacit agreement to limit the output of final products. As a result, the merger may make an agreement to limit supply more effective.

Some effects of a vertical merger may make the market less vulnerable to coordination. For example, a vertical merger's elimination of double marginalization (*see* Section 6) may increase the merged firm's incentive to cheat on a tacit agreement, thereby reducing the risk of coordinated effects.

6. PROCOMPETITIVE EFFECTS

Vertical 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. Vertical mergers combine complementary assets, including those used at different levels in the supply chain, to make a final product. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution. It may also be able to create innovative products in ways that would not likely be achieved through arm's-length contracts.

The Agencies evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines, as elaborated here. Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. The Agencies do not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market.[6]

Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger. This is because the merged firm will have access to the upstream input at cost, whereas often the downstream firm would have paid a price that included a markup. The 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. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.

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[6] The Agencies in their prosecutorial discretion may also consider efficiencies that are not strictly in the relevant market, using the principles set out in footnote 14 of the Horizontal Merger Guidelines.

Mergers of firms that make complementary products can lead to a pricing efficiency analogous to the elimination of double marginalization. Absent the merger, the merging parties would set the price for each complement without regard to the impact of lower prices for one on demand for the other. If the two merge, the merged firm has an incentive to set prices that maximize the profits of the firm as a whole, which may result in lower prices for each component. Any incentive to offer lower prices may be more pronounced if the merged firm can target lower prices at customers that buy both components from it.

While it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from the elimination of double marginalization, the Agencies may independently attempt to quantify its effect based on all available evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs. In verifying the elimination of double marginalization, the agencies typically examine the likely cost saving to the merged firm from self-supplying inputs that would have been purchased from independent suppliers absent the merger. Creditable quantifications of the elimination of double marginalization are generally of similar precision and reliability to the Agencies' quantifications of likely foreclosure, raising rivals' costs, or other competitive effects.

In assessing the merger-specificity of the elimination of double marginalization, the Agencies typically examine whether it would likely be less costly for the merged firm to self-supply inputs following the merger than for the downstream firm to purchase them from one or more independent firms absent the merger. The merging parties' evidence about existing contracting practices is often the best evidence of the price the downstream firm would likely pay for inputs absent the merger. The Agencies also consider other evidence, such as contracts between similarly situated firms in the same industry and contracting efforts considered by the merging firms. The Agencies do not, however, reject the merger specificity of the elimination of double marginalization solely because it could theoretically be achieved but for the merger, if such practices are not reflected in documentary evidence. The Agencies will generally take the same approach to evaluate the likely contractual arrangements absent the transaction as the one they use when evaluating raising rivals' costs or foreclosure.

The Agencies' assessment of the effects of the elimination of double marginalization on competition in the relevant markets relative to unilateral and coordinated effects is described further in Sections 4 and 5.