

# Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings

**Koren W. Wong-Ervin**

The generally accepted belief underlying modern antitrust analysis of vertical mergers (i.e., acquisitions that combine companies at different levels of the same supply chain) has been that they are generally procompetitive or neutral. This belief is supported by a significant body of empirical evidence. For example, in a meta-study surveying the empirical work, former Director of the U.S. Federal Trade Commission's Bureau of Economics, Francine Lafontaine, and her co-author Professor Margaret Slade, concluded: "consistent with the large set of efficiency motives for vertical mergers . . . the [empirical] evidence on the consequences of vertical mergers suggests that consumers mostly benefit from mergers that firms undertake voluntarily."<sup>1</sup>

This view of the empirical evidence is consistent with other meta-studies by leading industrial organization economists from academia and the U.S. antitrust agencies.<sup>2</sup> It is perhaps not surprising, then, that the U.S. antitrust agencies have challenged vertical mergers only infrequently. When the agencies have done so, they have tended to resolve any concerns with narrowly tailored behavioral remedies, such as firewalls to prevent the sharing of rivals' competitively sensitive information, non-discrimination clauses to counter incentives to disfavor rivals, and requirements to supply and/or license competitors.

Professor Steven Salop and Daniel Culley found that between 1994 and July 2018 the U.S. Department of Justice's Antitrust Division and the FTC collectively conducted in-depth reviews of 58 deals involving vertical integration (or approximately 2.4 reviews per year).<sup>3</sup> Of these, six were abandoned prior to the imposition of remedies, and one (AT&T/Time Warner) was approved without conditions following a loss by the DOJ at the trial court level.<sup>4</sup> Of the 51 remaining deals, 6 resulted in both structural and behavioral remedies; 8 resulted in structural remedies only; 36 resulted in behavioral remedies only; and 1 did not require any remedies to address vertical concerns (although divestitures were required to resolve horizontal overlaps).

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<sup>1</sup> Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 663 (2007).

<sup>2</sup> See, e.g., James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 642, 658 (2005) (surveying the empirical literature, concluding that although "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition," and, "in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects"); Global Antitrust Inst., *The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers*, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University 6–8 (Sept. 6, 2018) [hereinafter Global Antitrust Institute Comment], <https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf>; see also Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in *THE PROS AND CONS OF VERTICAL RESTRAINTS* 40, 72–76 (2008).

<sup>3</sup> Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* Georgetown University Law School Working Paper (Aug. 23, 2018), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2541&context=facpub>.

<sup>4</sup> The AT&T/Time Warner case is now on appeal before the U.S. Court of Appeals for the District of Columbia. See <https://www.justice.gov/atr/case/us-v-att-inc-directv-group-holdings-llc-and-time-warner-inc>.

In recent years, the consensus view of vertical integration as typically beneficial or competitively benign has been challenged by certain commentators (as discussed below) and, in 2017, the DOJ brought the first litigated vertical merger case in 40 years (against AT&T/Time Warner). The U.S. antitrust agencies have also announced a “return to the preferred focus on structural [over behavioral] relief.”<sup>5</sup>

In a 2017 speech, DOJ Assistant Attorney General Makan Delrahim stated: “antitrust is law enforcement, it’s not regulation,” and described behavioral remedies as “fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market.”<sup>6</sup> He went on to say:

That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there’s a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It’s a high standard to meet.<sup>7</sup>

The FTC’s Bureau of Competition Director Bruce Hoffman has explained that, while the “FTC prefers structural remedies to structural problems, even with vertical mergers,”<sup>8</sup> “in some cases we believe that a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration.”<sup>9</sup> Hoffman pointed to the FTC’s recent Remedy Study, which covered four orders related to vertical mergers, noting that in all four, behavioral remedies “succeeded in maintaining competition at premerger levels.”<sup>10</sup> Hoffman concluded that, while “[t]his is a small sample, it does suggest that we can, and we do, and we have fashioned conduct remedies in vertical mergers that curtail opportunities and incentives for anticompetitive behavior.”<sup>11</sup>

These statements from the DOJ and the FTC are significant given the importance of not categorically precluding narrowly tailored behavioral remedies, particularly when they are likely the best way to preserve the generally procompetitive benefits of vertical mergers.

As explained below, in my view, if anything, the existing empirical evidence would tend towards a presumption of procompetitive effects (and thereby, a presumption of legality). It is important to keep in mind that vertical mergers do not involve any competitive overlaps or the associated loss of a least some degree of rivalry between actual or potential competitors. Instead, “[v]ertical integration is a decision by a firm about how to organize production, so that the firm might harness productive efficiencies from coordinating production within a single entity and reduce the trans-

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<sup>5</sup> Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust and Deregulation, Remarks Before the American Bar Association Antitrust Section Fall Forum 2 (Nov. 16, 2017) [hereinafter Delrahim Speech], <https://www.justice.gov/opa/speech/file/1012086/download>; see also D. Bruce Hoffman, Dir., Bureau of Competition, Fed. Trade Comm’n, Vertical Merger Enforcement at the FTC, Remarks Before the Credit Suisse 2018 Washington Perspectives Conference 8 (Jan. 10, 2018) [hereinafter Hoffman Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf).

<sup>6</sup> Delrahim Speech, *supra* note 5, at 1.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Hoffman Speech, *supra* note 5, at 7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 8; see also FED. TRADE COMM’N, THE FTC’S MERGER REMEDIES 2006–2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS (Jan. 2017), [https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

<sup>11</sup> Hoffman Speech, *supra* note 5, at 8.

action costs of trying, in the alternative, to achieve these efficiencies of vertical coordination through contract.”<sup>12</sup>

With respect to structural versus behavioral remedies, I recommend clearer thinking and guidance on how remedies are classified. For example, is a third-party arbitration dispute mechanism (which AT&T offered, and the DOJ rejected, in AT&T/Time Warner) really an unwieldy and costly regulatory scheme that requires monitoring and ongoing enforcement? And, regardless of how we categorize a remedy, limiting the availability of behavioral remedies risks sacrificing the significant efficiencies generally created by vertical mergers.

### Empirical Evidence on Vertical Integration

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Empirical evidence indicates that vertical mergers generally result in significant efficiencies. These can include the elimination of double-marginalization (or double markups in price by separate firms each with market power at different levels in a supply chain); quality improvements and faster and/or better innovation from coordination in product, design, and innovation efforts; elimination of free-riding from the harmonization of incentives; and the creation of a maverick (i.e., a firm that plays a disruptive role in the market to the benefit of customers). While there is considerable theoretical work describing potential anticompetitive effects (namely concerns that vertical integration increases incentives for post-merger firms to foreclose rivals, including through raising rivals costs),<sup>13</sup> there is only limited empirical evidence supporting that finding in real markets.

There are two leading surveys that summarize the empirical literature on vertical integration and, relatedly, vertical contracts.

The first, authored by a group of DOJ and FTC economists, reviews 24 papers published between 1984 and 2005 providing analysis of empirical effects of vertical integration and vertical restraints.<sup>14</sup> The survey offers a careful synthesis of the evidence and observes that “[e]mpirical analyses of vertical integration and control have failed to find compelling evidence that these practices have harmed competition, and numerous studies find otherwise.”<sup>15</sup> The authors conclude that, while “[s]ome studies find evidence consistent with both pro- and anticompetitive effects[,] . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”<sup>16</sup>

The second survey, by Professors Francine Lafontaine and Margaret Slade, reviews 23 empirical papers, including some of those in the study prepared by the DOJ and FTC economists.<sup>17</sup> Lafontaine and Slade reach a similar conclusion, stating:

[I]t appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and

<sup>12</sup> Brief of Amici Curiae of 37 Economists, Antitrust Scholars, and Former Government Antitrust Officials in Support of Appellees and Supporting Affirmance at 5, *United States v. AT&T, Inc.*, No. 18-5214 (D.C. Cir. Sept. 26, 2018), ECF No. 1752798. See also generally George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 185 (1951).

<sup>13</sup> See, e.g., Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988); see also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

<sup>14</sup> Cooper et al., *supra* note 2, at 642, 658.

<sup>15</sup> *Id.* at 658.

<sup>16</sup> *Id.*

<sup>17</sup> Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391–414 (Paolo Buccirossi ed., 2008).

better service provision . . . . The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned.<sup>18</sup>

In addition to these two surveys, in 2018, a group of scholars, including Judge Douglas Ginsburg (a former head of the DOJ's Antitrust Division) and Professor Joshua Wright (a former FTC Commissioner), released a summary of published research in peer-reviewed journals since 2008 that empirically analyzed the welfare effects of vertical mergers in the United States.<sup>19</sup> Their analysis of papers from 2009 through 2018 supports the earlier conclusions of Lafontaine and Slade and Cooper et al.

Ginsburg et al. note the likelihood that the set of papers examined “is not exhaustive,” and thus they consider their summary to be merely a “snapshot of the likely larger empirical literature.”<sup>20</sup> They found:

Of the thirteen papers examined, we can directly or indirectly infer the welfare effects identified by the authors as a result of vertical integration in eleven of them. Of these eleven, six had results that indicated vertical integration resulted in positive welfare changes; four had results with either no change, a mixed change, or no economically meaningful change in welfare; and only one (and perhaps two) had results that are consistent with a negative impact.<sup>21</sup>

Some commentators, such as Professor Jonathan Baker (also a former Director of the FTC's Bureau of Economics), have criticized the meta-studies on the ground that the authors include in their review empirical studies of firms that do not possess market power.<sup>22</sup> In particular, Baker contends that studies of more competitive market structures are not informative about whether oligopolists can use vertical integration to harm competition.<sup>23</sup> This critique is limited in force.

Although not all of the markets captured in the studies examined by Lafontaine and Slade involve durable market power at one or both levels—that is, markets likely to result in antitrust scrutiny—the critics ignore the fact that at least some of those markets do involve market power. Perhaps more importantly, the meta-studies by Lafontaine and others (discussed above) do not find that vertical integration systematically creates significant anticompetitive effects in any market. The criticism would have greater force if the various meta-analyses found that vertical integration involving firms with market (or, more importantly, monopoly) power was more likely to result in harm than vertical integration involving firms without market (or monopoly) power. But that is not what the surveys find. Rather, these surveys show that the plurality of empirical evidence suggests regarding vertical mergers as generally procompetitive or benign—whether the firms involved have market power or not. If the critics were correct that vertical integration harmed consumers and resulted in anticompetitive effects, these results would surely show up more systematically in the dozens of product markets studied.

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<sup>18</sup> *Id.* at 409.

<sup>19</sup> Global Antitrust Institute Comment, *supra* note 2, at 6. The author is the former Director of the Global Antitrust Institute.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 6–7.

<sup>22</sup> Transcript at 112–24, Fed. Trade Comm'n, Competition and Consumer Protection in the 21st Century (Sept. 13, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1398386/ftc\\_hearings\\_session\\_1\\_transcript\\_9-13-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_events/1398386/ftc_hearings_session_1_transcript_9-13-18_0.pdf); Fed. Trade Comm'n, Hearing #1 on Competition and Consumer Protection in the 21st Century (Baker PowerPoint) 29 (Sept. 13, 2018) [hereinafter Baker PPT], [https://www.ftc.gov/system/files/documents/public\\_events/1398386/georgetown-deck-913.pdf](https://www.ftc.gov/system/files/documents/public_events/1398386/georgetown-deck-913.pdf) (“Many studies that identify procompetitive benefits of vertical practices do not provide good guides for antitrust enforcement policy.”).

<sup>23</sup> *See, e.g.*, Baker PPT, *supra* note 22, at 29.

Baker also criticizes reliance on these studies on the ground that they are not informative on whether to modify antitrust policy because they do not control for the possibility that firms are deterred from anticompetitive vertical conduct by the threat of antitrust enforcement.<sup>24</sup> Baker relies on a recent unpublished study in which the authors compared states that retain per se illegality for resale price maintenance (RPM) after the U.S. Supreme Court's decision in *Leegin Creative Leather Products v. PSKS, Inc.*<sup>25</sup> (in which the Court held that RPM is subject to the rule of reason) with states in which that practice would be reviewed under the rule of reason. The study purports to demonstrate that, in the years since *Leegin*, price increases for household consumer goods have been larger, and output growth smaller, in rule of reason states than in states retaining the per se rule against minimum RPM.<sup>26</sup> According to Baker, "[t]his study suggests that the rule of reason did not deter anticompetitive uses of resale price maintenance that the per se rule deterred."<sup>27</sup>

However, as Thomas Lambert and Michael Sykuta have explained, the study is flawed for a number of reasons: First, it fails to account for the fact that anticompetitive theories of RPM predict both a reduction in output and an increase in price (only 1.6 percent of the product categories surveyed had both an increase in price and a decrease in quantity in states that shifted to the rule of reason); and second, the study "systematically disregards information on transactions likely to reflect a procompetitive use of minimum RPM."<sup>28</sup>

### Antitrust Analysis of Vertical Mergers

Horizontal mergers involve the combination of businesses that are either actual or potential competitors. Thus, they result in at least some loss of rivalry and a combination of actual or potential substitutes. Vertical mergers, by contrast, involve the integration of complements, which does not reduce competition on its face. If anything, the existing empirical evidence would tend towards a presumption of procompetitive effects (and thereby, a presumption of legality).<sup>29</sup>

There are a number of economic theories for vertical integration as a response to market inefficiencies. For example, when there is market power in both upstream and downstream markets, it follows that price will be greater than the marginal cost of production at both stages. Known as double marginalization, the downstream firm adds a markup to the price it pays the upstream supplier that ignores the upstream firm's true cost of production.<sup>30</sup> Vertical integration allows the two firms to maximize joint profits and increase output (e.g., lower retail prices).

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<sup>24</sup> See Jonathan B. Baker, *Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 20 (2015) (internal citations omitted).

<sup>25</sup> 551 U.S. 877 (2007).

<sup>26</sup> Alexander MacKay & David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance on Prices and Output* (Kilts Booth Mkt. Series, Paper No. 2-006, 2014), <https://ssrn.com/abstract=2513533>.

<sup>27</sup> Baker, *supra* note 24, at 21 (citing Alexander MacKay & David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance on Prices and Output* (Kilts Booth Mkt. Series, Paper No. 2-006, 2014), <https://ssrn.com/abstract=2513533>).

<sup>28</sup> Thomas A. Lambert & Michael Sykuta, *Why the New Evidence on Minimum Resale Price Maintenance Does Not Justify a Per Se or "Quick Look" Approach*, CPI ANTITRUST CHRON., Nov. 2013, at 7–8, <https://www.competitionpolicyinternational.com/assets/Uploads/LambertSykutaNOV-131.pdf>.

<sup>29</sup> Global Antitrust Institute Comment, *supra* note 2, at 3 (citing David Reiffen & Michael Vita, *Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917 (1995)).

<sup>30</sup> See, e.g., JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* ch. 4 (1988).

[V]ertical mergers enhance efficiency when firms at varying levels of production must cooperate in order to design, produce, and distribute goods. Whereas merger-specific efficiencies are important in the analysis of horizontal mergers, cost-reductions are inherent in vertical mergers.

Similarly, vertical mergers can reduce or eliminate transaction costs associated with contract writing and monitoring between firms at different levels of the supply chain, as well as the costs associated with ex ante investment and ex post performance.<sup>31</sup> More generally, vertical mergers enhance efficiency when firms at varying levels of production must cooperate in order to design, produce, and distribute goods.<sup>32</sup> Whereas merger-specific efficiencies are important in the analysis of horizontal mergers, cost-reductions are inherent in vertical mergers.

There are also numerous specific theories of harm from vertical mergers. Broadly, the question is whether the vertically integrated firm is likely to exclude or collude. One traditional concern, called two-stage entry, was that a vertical merger could deter entry because any firm seeking to enter the market post-merger would need to enter at both levels.<sup>33</sup> A more nuanced concern is that when two firms are well positioned to enter each other's market, a vertical merger might eliminate the competitive constraint of a potential entrant (similar to the potential competition theory in the horizontal context).<sup>34</sup>

Another more prevalent concern is whether the vertically integrated firm will substantially foreclose competition and raise its rivals' costs, or make entry more difficult.<sup>35</sup> For example, an upstream firm might supply inputs to multiple downstream companies. After merging with one of those downstream companies, the upstream firm might refuse to supply the remaining downstream rivals or supply them only on substantially unfavorable terms. Of course, there still exists the countervailing incentive for the vertically integrated firm to charge a lower price for its own downstream product.

The FTC's challenge to the proposed \$420 million acquisition by Cytoc of Digene is a good example of a vertical transaction that presented a clear potential for consumer harm.<sup>36</sup> Cytoc at the time accounted for 93 percent of U.S. liquid-based Pap tests used for the detection of cervical cancer. Digene was the only company in the United States selling a DNA-based test for the human papillomavirus (HPV), which was believed to cause nearly all cervical cancer cases. Digene's HPV test relied on samples obtained from a liquid Pap test, and any liquid Pap test supplier competing with Cytoc required access to Digene's HPV test. Thus, by purchasing Digene, the FTC alleged Cytoc would be in a position to eliminate its only existing liquid Pap competitor as well as thwart the entry. The FTC also alleged that the Digene was positioned to develop a competitive test and ultimately that the potential competitive harm was real.<sup>37</sup>

In an article discussing Cytoc/Digene, Joseph Simons (now FTC Chairman) contrasted Cytoc to another vertical merger, Synopsys/Avant!, noting that the threat to consumers in the latter case

<sup>31</sup> See, e.g., Paul L. Joskow, *Vertical Integration*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 319–48 (Claude Menard and Mary Shirley eds., 2005).

<sup>32</sup> See Lafontaine & Slade, *supra* note 1, at 680 (“[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms’ but also from the consumers’ points of view. . . . we have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions.”).

<sup>33</sup> U.S. Dep’t of Justice, Non-Horizontal Merger Guidelines § 4.2 (1984) [hereinafter Non-Horizontal Merger Guidelines], <https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf>.

<sup>34</sup> See Competitive Impact Statement, *United States v. Ticketmaster Entm’t, Inc.*, No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010), ECF No. 2.

<sup>35</sup> Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018).

<sup>36</sup> Press Release, Fed. Trade Comm’n, FTC Seeks to Block Cytoc Corp.’s Acquisition of Digene Corp. (June 24, 2002), <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytoc-corps-acquisition-digene-corp>.

<sup>37</sup> *Id.*

was “considerably more speculative and distant.”<sup>38</sup> That transaction involved software used to design software chips. Synopsys had a 90 percent share of front end-tools for chip design and Avant! had a 40 percent share of back-end tools. Among the theories that FTC staff investigated was whether the merger would give Synopsys the incentive and ability to enhance Avant!’s market power by restricting back-end competitors from communicating with the Synopsys front end.<sup>39</sup> Ultimately, the FTC unanimously cleared the transaction because (1) customer power would preclude foreclosure, (2) Synopsys did not have a clear incentive to deny access to its front end, and (3) there was apparent widespread believe among customers that the merger would speed integration in ways that would benefit customers.<sup>40</sup>

It is clearly inaccurate to say that vertical mergers can never be anticompetitive. But it is equally clear that the starting point for determining net price effects in a vertical merger case is more difficult than in a horizontal merger case.<sup>41</sup> Moreover, while the focus of the analysis in any combination (regardless of form) is to determine whether or not the transaction will lead to higher prices or other harmful effects in the relevant market(s), vertical mergers invite more complex questions.<sup>42</sup> For example, vertical mergers typically have competitive effects in multiple markets—how does one resolve a situation in which the merger harms competition in one market, but enhances competition in another? Or, when the exclusionary effects of vertical integration harm competitors through higher input costs but nonetheless result in lower or unchanged downstream prices for consumers, why should we infer that harm to competitors is harm to competition?

We also lack a “rough screening” technique for vertical mergers. Despite the fact that there is no systematic relationship between market concentration and competitive effects,<sup>43</sup> there remains a presumption of illegality against any merger that threatens to create “undue concentration.” But vertical mergers do not increase market concentration and therefore do not trigger the structural presumption. Tasked with analyzing a proposed vertical merger, agencies and the courts must look to evidence beyond market shares to estimate likely competitive effects.

The overall problem with the theoretical work is that it fails to generate administrable tests for real-world cases.<sup>44</sup> As FTC’s Hoffman recently stated, “the problem is that theories don’t generally predict harm from vertical mergers; they simply show that harm is possible under certain conditions.”<sup>45</sup>

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<sup>38</sup> Joseph J. Simons & David Scheffman, *Nonmerger Enforcement at the FTC: An Aggressive Proconsumer Agenda*, 49 ANTITRUST BULL. 471, 497 (Sept. 2004).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 497–98; see also Press Release, Fed. Trade Comm’n, Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc. (July 26, 2002), <https://www.ftc.gov/news-events/press-releases/2002/07/federal-trade-commission-votes-close-investigation-acquisition>.

<sup>41</sup> See Dissenting Statement of Commissioner Joshua D. Wright at 1, Par Petroleum Corp./Koko’oha Investments, Inc., FTC File No. 141 0171 (Mar. 18, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/630951/150318parpetroleumwrightstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/630951/150318parpetroleumwrightstatement.pdf) (“competitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, though empirical evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign”).

<sup>42</sup> See, e.g., Hoffman Speech, *supra* note 5, at 5 (describing the FTC’s willingness to challenge the proposed merger discussed above between Digene Corporation and Cytyc Corporation. The Commission determined that a merger would “eliminate Digene’s incentive to cooperate with Cytyc’s rivals, who needed access to Digene’s product and also Digene cooperation to obtain FDA approval” thus raising entry barriers. *Id.*).

<sup>43</sup> See Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 380 (2015).

<sup>44</sup> It is also worth noting that economic tools designed specifically for certain functions, such as GUPPI for evaluating horizontal mergers, can lead to misleading results when used in the wrong context, such as in vertical mergers.

<sup>45</sup> Hoffman Speech, *supra* note 5, at 3.

In addition, vertical integration characteristically has extremely powerful justifications, including a firm's choice of organization and extent of rapid product or geographic expansion, enhanced control of upstream or downstream functions, and—perhaps most commonly—avoiding the costly processes of forming, administering, and enforcing contracts with independent suppliers and customers. As Benjamin Klein, Robert Crawford, and Armen Alchian have explained, even with long-term contracts that explicitly include price and price protection clauses, not all elements of future performance can be specified.<sup>46</sup> “Due to uncertainty and the difficulty of specifying all elements of performance in a contractually enforceable way, contracts will necessarily be incomplete to one degree or another. This creates the possibility for transactors to take advantage of the contract to hold-up their transacting partner” in order to appropriate quasi-rents.<sup>47</sup> As Klein further suggests in a later work, “transactors choose contract terms, including vertical integration, in order to economize on their limited (and often unequal) amounts of private enforcement capital and thereby to define an optimal self-enforcing range for their contractual relationship.”<sup>48</sup> Within Klein's framework, the primary advantage of vertical integration is the increased flexibility that transactors gain by avoiding the use of rigid long-term contracts to supplement their reputation-capital.

Indeed, the primary result of vertical integration is the substitution of direct management for reliance on the external market. The costs and benefits of such integration depend on a wide range of circumstances that agencies and courts are unlikely to be able to adequately evaluate and make judgments superior to those of the merging parties. As Klein explained, “It is difficult for judges, as it is for economists, no matter how smart and well-intentioned they may be, to understand fully the economic intent and purpose of all the complex contractual terms [including vertical integration] transactors use in their contracts.”<sup>49</sup>

## 2018 FTC Hearings and the Call for Updated Guidance

Antitrust practitioners recently gathered to discuss vertical merger policy as part of the FTC's Hearings on Competition and Consumer Protection in the 21st Century.<sup>50</sup> Some participants

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<sup>46</sup> See, e.g., Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297–326 (1978) (explaining the use of vertical integration as an efficient contract response to potential holdup problems associated with firm-specific investments and the appropriability of quasi-rents); see also Benjamin Klein, *Vertical Integration as Organizational Ownership: The Fisher Body-General Motors Relationship Revisited*, 4 J.L. ECON. & ORG. 1, 199–213 (1988) [hereinafter Klein, *Vertical Integration as Organizational Ownership*].

<sup>47</sup> Klein, *Vertical Integration as Organizational Ownership*, *supra* note 46, at 201. Klein then explains:

Even though contracts are incomplete, the reputations of the transacting parties limit the economic feasibility of hold-up threats. It is the magnitude of these reputations and the corresponding costs that can be imposed on a transactor that attempts a hold-up that define what can be called the “self-enforcing range” of the contractual relationship. Transacting parties enter contractual arrangements by making specific investments and setting contract terms in such a way so that they are likely to be within this self-enforcing range where a hold-up will not occur. However, there is some probability that market conditions may change (for example, the value of the quasi-rents accruing to one of the parties unexpectedly increases) so that it pays for one transactor to hold-up the other in spite of the loss of reputation.

*Id.* at 201–02.

<sup>48</sup> Benjamin Klein, *Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444, 462 (1996) (“Because private enforcement capital is limited and written contract terms are necessarily imperfect, transactors must optimally combine court-enforced written terms together with privately enforced unwritten terms to define what I call the self-enforcing range of their contractual relationship. Hold-ups occur when unanticipated events place the contractual relationship outside the self-enforcing range.” *Id.* at 444.).

<sup>49</sup> *Id.* at 462.

<sup>50</sup> *FTC Hearing No. 5 on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM’N (Nov. 1, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

encouraged a revamping of policy and analytic tools for evaluating vertical mergers, including a rewriting and invigoration of the Non-Horizontal Merger Guidelines. For instance, Professor Steven Salop rejected the premise that antitrust review of vertical mergers should be “systematically more permissive,”<sup>51</sup> and instead advocated a more rigorous standard of review, particularly in oligopoly markets.<sup>52</sup> He reasoned that vertical mergers in oligopoly markets tend to result in horizontal harm. Salop emphasized that this is particularly relevant in instances in which the acquiring firm is vertically integrated, creating at least a horizontal component to the analysis. Salop also warned that elimination of double marginalization (EDM) resulting from vertical mergers is neither certain nor merger-specific,<sup>53</sup> a point upon which Professor Carl Shapiro concurred, explaining that “EDM can sometimes be eliminated with non-linear prices or quantity-forcing contracts.”<sup>54</sup>

*[T]he agencies’*

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*Non-Horizontal Merger*

*Guidelines.*

Other panel participants disagreed with Salop and advised caution on establishing new standards or eliminating presumptions of procompetitiveness when these presumptions are warranted. For instance, Lafontaine added that the only thing worse than a monopoly is a “succession of monopolies.”<sup>55</sup> In response to Salop’s suggestion that EDM could be achieved via contract, Lafontaine elaborated that this argument suffers from a lack of real-world application. Simply put, if eliminating double marginalization were easily achieved via contract, it would occur more often; the existence of double marginalization in a world presuming two profit-maximizing firms confirms that its elimination absent a merger is unlikely.<sup>56</sup> Moreover, as Lafontaine pointed out, there are antitrust restrictions against the types of contracts that would be required to achieve the benefits of EDM.<sup>57</sup> Embracing the role of contract would require a lessening of antitrust enforcement in vertical restraints.

The divide between Salop’s views on the one hand and Lafontaine’s on the other has implications beyond academia, especially in the context of whether regulators should update and reinvigorate the Non-Horizontal Merger Guidelines.<sup>58</sup> For example, how could the DOJ and FTC, or the antitrust bar at large, reach a consensus on new guidelines when there is such little agreement about the underlying principles?

One additional complexity comes from the observation that many “vertical mergers” are in fact only partially vertical, making it especially difficult for economists and practitioners to devise models and templates that are widely predictive and therefore useful. Before this can be done, wider consensus must be reached and applicable standards must be crafted.

One of the great strengths of the U.S. antitrust laws is the tethering of the consumer welfare standard to economic learning. To be sure, the agencies’ thinking on vertical mergers has evolved beyond the existing Non-Horizontal Merger Guidelines. In the context of vertical mergers, how-

<sup>51</sup> Transcript at 19, Fed. Trade Comm’n, Competition and Consumer Protection in the 21st Century (Nov. 1, 2018) [hereinafter Transcript], [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_session\\_5\\_transcript\\_11-1-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf).

<sup>52</sup> *Id.* at 14.

<sup>53</sup> *Id.* at 15.

<sup>54</sup> *Id.* at 28.

<sup>55</sup> Hearing #5 on Competition and Consumer Protection in the 21st Century—Presentation Slides 86 (Nov. 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_5\\_georgetown\\_slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf).

<sup>56</sup> *See, e.g.*, Benjamin Klein, *The Economic Lessons of Fisher Body–General Motors*, 14 INT’L J. ECON. BUS. 1 (2011) (illustrating the costs of using inherently imperfect long-term contracts to solve potential holdup problems, and therefore the advantages of vertical integration.).

<sup>57</sup> Transcript, *supra* note 51, at 73–74.

<sup>58</sup> *See* Non-Horizontal Merger Guidelines, *supra* note 33.

ever, significant consideration should be given to the purpose underlying guidelines. In drafting guidelines, the agencies generally focus on circumstances under which they *will* bring enforcement actions, rather than when they will not. That can be dangerous given the obvious consumer benefits inherent in vertical combinations. Thus, any undertaking to update the guidelines should consider equally the efficiencies and benefits to be recognized as well as the possible harms. Along these lines, it is also imperative that if the agencies do decide to update their Non-Horizontal Merger Guidelines, they resist the temptation to consider and address novel and purely theoretical theories of harm that are not substantiated by existing empirical evidence. Antitrust laws can and should evolve alongside evolution in our economic understanding to better address both new and existing business models and practices, but only when the empirical evidence supports doing so.

With or without updated guidelines, the question remains what facts and economic analyses should be considered in the case of a vertical merger? Agencies and courts can consider ordinary course documents as they always do, but such qualitative evidence usually cuts both ways and is not reliable for inferring competitive effects. Instead, sound economic evidence and fact-specific analysis are critical to the evaluation of vertical mergers. As stated in an article authored by a group of economists including both former and current enforcers, “A major difficulty in relying principally on theory to guide vertical enforcement policy is that the conditions necessary for vertical restraints to harm welfare generally are the same conditions under which the practices increase consumer welfare.”<sup>59</sup>

In the vertical merger context, theories of harm generally lack any clear “likelihoods,” and (as with all antitrust analysis) each case requires a fact-intensive analysis. The strength and methodology of economic models must be tested against alternatives and economic testimony. Appropriately calibrated, natural experiments that analyze the actual effects of prior vertical constraints in a similar competitive setting can be invaluable. Existing empirical evidence makes clear that vertical combinations offer myriad consumer benefits, and it is entirely appropriate that challengers to a vertical merger be required to present evidence sufficient to show that the transaction will likely substantially lessen competition.

Indeed, the real-world effects of vertical integration found in the meta-study surveys discussed above suggest that, if anything, enforcement policy (and perhaps the law) should include a presumption of legality for vertical integration. Shorthand analytical tools based upon judicial and market experience and accumulated economic knowledge serve to help identify conduct that is either likely or unlikely to harm competition. Truncated analysis (here, a presumption of legality) is appropriate when it, rather than the full-blown rule of reason in every case, can save administrative costs while minimizing error costs. The benefit of truncation is that it takes advantage of existing judicial and economic knowledge to produce more efficient legal rules. In short, truncated analysis is at its core intended to be an easily administrable, effects-based application of the rule of reason.<sup>60</sup>

In its recent case against AT&T/Time Warner, the DOJ stated that “[t]here is no presumption *in the law* that vertical mergers are ‘presumed procompetitive,’ or ‘presumptively efficient,’ such

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<sup>59</sup> Cooper, et al., *supra* note 2, at 641.

<sup>60</sup> See generally ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 185–87 (2d ed. 2008); Timothy J. Muris & Brady P.P. Cummins, *Tools of Reason: Truncation Through Judicial Experience and Economic Learning*, ANTITRUST, Summer 2014, at 4647, 50.

that the government would face a heightened burden of proof.”<sup>61</sup> The DOJ acknowledged that “[t]he cases cited by Defendants make the well-accepted point that vertical integration often is procompetitive—while acknowledging that it can be anticompetitive.”<sup>62</sup> Yet, the DOJ went on to note that “[s]ome scholars have in fact suggested the opposite.”<sup>63</sup> In support of this, the DOJ relied on the following quote from George Stigler over 60 years ago: “Where a firm has a fifth or more of an industry’s output, its acquisition of more than five to ten per cent of the output capacity of industries to which it sells or from which it buys in appreciable quantities shall be presumed to violate the statute.”<sup>64</sup> (Of note, while Stigler had structuralist views of antitrust early in his career—likely as a product of the time—he later rejected those views.<sup>65</sup>) While a legal presumption, particularly given the empirical evidence, is worthy of consideration, it is important to recognize the distinction between a presumption in the law and reliance on real-world empirical evidence to guide enforcement priorities and decisions. At a minimum, the evidence suggests that the latter is warranted.

### Remedies in Vertical Merger Cases

Remedies must be tailored to address either the structure of the market or the post-merger conduct of the merged firm. Structural remedies generally require merging firms to sell their physical or intangible assets, while behavioral remedies impose conditions that regulate the merged firm’s actions after the merger is consummated.

In an important speech at the beginning of his term, AAG Delrahim reinvigorated the preference for structural remedies and skepticism of behavioral remedies. Delrahim lamented that, “[i]nstead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.”<sup>66</sup> Delrahim went on to explain that behavioral remedies not only created unwieldy and costly regulatory schemes, but often prove counterproductive because they “require companies

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<sup>61</sup> Proposed Conclusions of Law of the United States at 10, *United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. May 8, 2018), ECF No. 127 (emphasis added) (internal citations omitted).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (quoting George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 183 (1955)).

<sup>65</sup> As former FTC Chairman Timothy Muris noted in a 2003 speech:

Many today probably do not know that George Stigler called for economy-wide industrial deconcentration in the early 1950s. Stigler’s recommendation was based on existing empirical economic research on economies of scale at the plant level in manufacturing that appeared to indicate that American industry was concentrated far beyond “efficiency requirements.” Stigler changed his position when he learned of various analytical flaws in the research and of empirical work inconsistent with deconcentration.

Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, Remarks Before George Mason University Law Review’s Winter Antitrust Symposium (Jan. 15, 2003), <https://www.ftc.gov/public-statements/2003/01/improving-economic-foundations-competition-policy> (internal footnotes omitted) (“Stigler himself created the ‘survivorship’ analysis for identifying efficient firm size. See George J. Stigler, *The Economies of Scale*, 1 J.L. & ECON. 54 (1958) (introducing ‘survivor principle’).”). Stigler’s views changed significantly over the course of his career. In his memoirs, he explained “[u]ntil the 1950s I accepted the prevailing view of my profession that monopoly was widespread. . . . I was an aggressive critic of big business.” GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 97 (1988). After discussing his prior belief in the wisdom of breaking up U.S. Steel, Stigler confessed, “I now marvel at my confidence at that time in discussing the proper way to run a steel company. . . . What is still more embarrassing is that I no longer believe the economics I was preaching.” *Id.* at 99.

<sup>66</sup> Delrahim Speech, *supra* note 5, at 5.

to make daily decisions contrary to their profit-maximizing incentives, and [] demand ongoing monitoring and enforcement to do that effectively.”<sup>67</sup>

*When competition  
concerns can be  
resolved with a*

During this same speech Delrahim announced that the Antitrust Division would seek to reduce the number of long-term consent decrees and “return to the preferred focus on structural relief to remedy mergers that violate the law.”<sup>68</sup> Delrahim’s comments signal a perhaps modest, yet still significant, departure from the prior administration’s views that, though structural remedies are preferred, behavioral remedies “can effectively address anticompetitive issues raised by vertical mergers.”<sup>69</sup>

*narrowly tailored  
behavioral commitment,  
the result benefits*

In accordance with the DOJ’s stance on remedies, AAG Delrahim announced that the DOJ is withdrawing its 2011 Policy Guide to Merger Remedies<sup>70</sup> and that the 2004 Policy Guide to Merger Remedies<sup>71</sup> will be in effect until further guidance is released.<sup>72</sup> Delrahim explained that the withdrawal of the 2011 Remedies Guide stems from the Division’s commitment to shortening the duration of merger reviews,<sup>73</sup> with the thinking that the 2011 Policy Guide’s more flexible approach to conduct remedies has prolonged review processes while regulators tried to dream-up perfect regulatory fixes to small competition concerns. Under the 2004 policy, behavioral remedies are appropriate only when required to ensure an effective structural remedy or when “significant efficiencies” would be lost if a structural remedy were imposed or the deal were blocked altogether.<sup>74</sup>

*consumers by  
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the downsides.*

In my view, narrowly tailored behavioral remedies should not be eliminated as a viable option to resolve concerns with vertical mergers. The baby, as the saying goes, should not be thrown out with the bathwater, and antitrust enforcers should not unreasonably prevent themselves from requiring small behavioral conditions when the situation and context are appropriate. When competition concerns can be resolved with a narrowly tailored behavioral commitment, the result benefits consumers by embracing the benefits of vertical integration while also mitigating the downsides. The distinction lies in understanding the differences shown in the sweeping, business-altering requirements in cases such as Comcast/NBC-Universal,<sup>75</sup> Google/ITA,<sup>76</sup> and Live Nation/

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (June 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (Oct. 2004) [hereinafter 2004 REMEDIES GUIDE], <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf>.

<sup>72</sup> Makan Delrahim, It Takes Two: Modernizing the Merger Review Process, Remarks Before the 2018 Global Antitrust Enforcement Symposium 11–12 (Sept. 25, 2018), <https://www.justice.gov/opa/speech/file/1096326/download>.

<sup>73</sup> *Id.*

<sup>74</sup> 2004 REMEDIES GUIDE, *supra* note 71, at 17–18. The 2004 Remedy Guide expressed a clear preference for structural remedies in merger cases “because they are relatively clean and certain, and generally avoid costly government entanglement in the market.” *Id.* at 7. The Guide suggests that divestiture decrees are relatively simple and swift to administer, and provide more certainty in preserving competition than conduct remedies. By contrast, conduct remedies are “more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.” *Id.* at 8.

<sup>75</sup> Final Judgment, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Sept. 1, 2011), ECF No. 28 (requiring, *inter alia*, Comcast to license its broadcast, cable, and film content to OVDs on terms comparable to those on which it licensed to MVPDs).

<sup>76</sup> Final Judgment, *United States v. Google Inc.*, No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011), ECF No. 13 (requiring, *inter alia*, Google to honor existing QPX licenses, renew existing licenses under similar terms and conditions, and offer licenses to other online travel intermediaries on reasonable and nondiscriminatory terms).

Ticketmaster.<sup>77</sup> In this respect, the recent comments of the FTC's Bureau of Competition Director Bruce Hoffman that "a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration" ring true.<sup>78</sup>

### Conclusion

Vertical integration characteristically has extremely powerful justifications including, perhaps most commonly, avoiding the costly and risky processes of forming, administering, and enforcing contracts with independent suppliers and customers. Given the numerous advantages on the plus side (supported by empirical evidence) and very few on the minus side (hypothesized by theoretical models), a presumption of procompetitive effects for vertical mergers is worthy of consideration.

This is particularly so given the likely comparative advantage of merging parties over agencies and courts in evaluating the costs and benefits of vertical integration. The primary result of vertical integration is the substitution of direct management for reliance on the external market. The costs and benefits of such integration depend on a wide range of circumstances that agencies and courts are unlikely to be able to adequately evaluate and make judgements superior to those of the merging parties. This, combined with the empirical evidence discussed above, indicates that we should be extremely careful about exposing vertical mergers to routine government examination without at least some significant qualifying conditions suggesting that, unlike the vast majority of vertical mergers, the particular merger at issue may pose a competitive problem. ●

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<sup>77</sup> Final Judgment, *United States v. Ticketmaster*, No. 1:10-cv-00139 (D.D.C. July 30, 2010), ECF No. 15 (requiring, *inter alia*, Ticketmaster to license its platform software used to sell tickets to AEG and give AEG the option to acquire a copy of the source code after four years).

<sup>78</sup> Hoffman Speech, *supra* note 5, at 8.