Discussion Points

Presented by the Business at OECD Competition Committee to the OECD Competition Committee

Vertical Mergers in the Technology, Media and Telecom Sector

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I. Introduction

1. *Business at OECD* appreciates the opportunity to submit these comments to the OECD Competition Committee roundtable on vertical mergers in technology, media and telecom sector. This contribution builds on previous contributions of *Business at OECD* in relation to vertical mergers generally, [1] and in relation to competition issues in the television and broadcasting industries specifically.[2]

2. There is a general consensus that vertical mergers result in significant efficiencies and should be presumptively viewed as beneficial to competition. Vertical mergers combine firms that produce complements and thus generally incentivize the merged firm to reduce prices, expand output and increase investment. This is also the case with vertical mergers in the technology, media and telecom sector, which are subject to continuing and rapid technological change that blurs the lines between traditional levels of the supply chain.

3. *Business at OECD* therefore believes that when reviewing vertical mergers in this sector, competition authorities should (i) recognize the significant efficiencies reflected by vertical mergers; (ii) employ a traditional competitive effects analysis, including focusing on theories of harm based on either input or customer foreclosure ; (iii) carefully consider remedies to ensure significant efficiencies are achieved and the remedies do not distort the relevant market, for example, by preventing the merged entity from entering into certain types of contracts that may be beneficial to suppliers or customers; and (iv) not try to achieve other public policy goals through merger review.

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1 Discussion Points, Business and Industry Advisory Committee to the OECD Competition Committee: Roundtable on Vertical Mergers (Feb. 22, 2007), http://biac.org/wp-content/uploads/2014/05/BIAC_Comments_on_Vertical_Mergers_FINAL_2007-02-09.pdf [hereinafter BIAC 2007].

2 Discussion Points, Business and Industry Advisory Committee to the OECD Global Forum on Competition: Competition Issues in Television and Broadcasting (Mar. 1, 2013), http://biac.org/wp-content/uploads/2014/05/13-BIAC_GFC_Television_2013-02-22_FINAL.pdf [hereinafter BIAC 2013]. As noted in that contribution, *Business at OECD*'s constituency includes members at all levels of competition within the technology, media and telecom sectors. In some cases, these members have very different views on the extent to which antitrust laws should be utilized, or the point at which regulators should intervene, in the technology, media and telecom sectors. In these cases, *Business at OECD* takes no specific view on the merit of the antitrust arguments espoused by any particular company or sector segment.

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II. Vertical Mergers in the Technology, Media and Telecom Sector

4. The technology, media and telecom sector (sometimes referred to as TMT) is undergoing a period of rapid innovation and change.[3] The TMT sector has seen the rapid rise of new entrants. Existing firms are expanding their business activities (often into new territories), developing new business models, and blurring the lines of traditional levels of the supply chain.[4] Indeed, industry players have taken different steps to keep pace and, over the past ten years, many firms have entered into vertical mergers to take advantage of the significant efficiencies that vertical integration offers. As observed by the Secretariat, "[t]he type of vertical relationships observed between different companies and end users may substantially vary along the supply chain, due to the existence of a wide variety of business models within the TMT sector."[5]

5. Significant transactions in this broad sector include, among many others, Disney/Fox, AT&T/Time Warner, Comcast/NBC Universal, Liberty Global mergers, Microsoft/LinkedIn, Facebook/WhatsApp and Apple/Shazam. The Disney/Fox, AT&T/Time Warner and Comcast/NBC transactions are examples of the combination of large telecommunications and distribution firms with content providers, and the parties to these mergers claimed substantial efficiencies from better coordination, lower transaction costs, and the avoidance of double margins. In Europe, Liberty Global's mergers with Ziggo, All3Media, and Cable & Wireless Communications are examples of mergers between a traditional pay-TV and Internet service providers with TV channel providers and content producers. Within the technology segment, significant recent transactions considered by competition authorities include the Broadcom/Brocade, Qualcomm/NXP mergers, and Google/ITA, which are all discussed in the Background Note prepared by the Secretariat.[6] Microsoft/LinkedIn is an example of how vertical integration is occurring between technology and social media companies.

6. There is a general consensus that vertical mergers result in significant efficiencies and should be presumptively viewed as beneficial to competition. This consensus is reflected in antitrust statistics, where the Secretariat notes vertical mergers comprised less than 10% of total competition intervention.[7] Vertical integration is an opportunity for a firm to make decisions about production so that it might "harness productive efficiencies from coordinating production within a single entity and reduce the transaction costs of trying, in the alternative, to achieve these

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3 Television is a prime example; television programming was traditionally distributed to end users through over-the-air broadcast, and then cable, it now also is broadcast via satellite, over the internet, and on mobile devices. Television programming was historically viewed only in real-time, most programming is now "time-shifted", and viewers watch on-demand or through playback of a digital video recording on their own schedules. Television programming was traditionally developed by broadcasting firms and cable TV networks, whereas now, over-the-top providers like Netflix, Amazon Prime, Hulu and Sky are producing large amounts of content. Innovation and rapid change have significantly altered the competitive dynamics of the industry in a very short period of time.

4 For example, in AT&T/Time Warner, the U.S. District Court accepted AT&T, Time Warner and DirecTV's submissions that the merged firm will compete against traditional TV distributors and content providers, as well as Netflix, Hulu, Amazon Prime, and for advertising revenues, against web giants like Facebook and Google. *See* United States v. AT&T Inc., No. 17-2511 (RJL) (D.D.C. June 12, 2018), *available at* www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf.

5 OECD, Vertical Mergers in the Technology, Media and Telecom Sector—*Background Note by the Secretariat*, ¶ 16, DAF/COMP(2019)5 (May 2, 2019), *available at* https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf [hereinafter *Secretariat Note*].

6 *Id.* at Boxes 4.1, 6.1 and 6.2.

7 *Id.* ¶ 2.

efficiencies of vertical coordination through contract."[8] In contrast to horizontal mergers, which combine firms that produce substitutes, vertical mergers combine firms that produce complements and thus generally incentivize the merged firm to reduce prices, expand output and increase investment.[9]

7. Efficiencies may include, but are not limited to, a reduction or elimination of transaction costs (i.e., costs associated with contract writing and monitoring between firms at different levels of the supply chain and costs associated with ex ante investment and ex post performance);[10] greater economies of scope; the elimination of double marginalization; improvements to product or service quality; better innovation from coordination in product, design and innovation efforts; the elimination of free-riding from the harmonization of incentives; and the creation of a maverick.[11] Empirical evidence also confirms that consumers benefit from vertical mergers.[12] In particular, in the TMT sector a merged entity may be better able to better respond to rapidly changing consumer demand.

8. The efficiencies associated with the elimination of double marginalization are intrinsic to vertical mergers. That is, they lower the marginal cost of selling downstream products, thereby inducing the merged firm to lower downstream prices.[13] The elimination of double marginalization may reduce costs for the merged firm and prices for consumers. Without integration, the problem of double marginalization arises because the upstream firm and downstream firm do not take into account the impact of adding a mark-up on the profit of the other firm. The volume of output purchased by the ultimate consumer is inefficiently reduced because the consumer price includes mark-ups imposed by both the downstream and upstream firms. In some cases, the retail prices could even exceed the monopoly price of the manufacturer's product. This inefficiency can be avoided through vertical integration.[14] A vertical merger can internalize this externality by putting the downstream pricing decision in the hands of the upstream manufacturer (or downstream retailer), which does not create an incentive to increase downstream prices above competitive joint profit-maximizing levels. In other words, the merged firm maximizes its profits by eliminating the double mark-up, which leads to lower prices to end users and customers.[15]

9. Vertical integration in the broadcasting and distribution markets provide but one example of how such efficiencies are generated.[16] In particular, vertical mergers may improve efficiency in bilateral

8 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.

9 Janusz A. Ordover et al., *Is Professor Salop Right that Judge Leon Bungled United States v. AT&T?*, 3 CRITERION J. ON INNOVATION 249, 253 (2018).

10 Koren Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ANTITRUST SOURCE, Feb. 2019, at 1, 6, *available at* www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-february2019/feb19_wong_ervin_2_18f.pdf.

11 *Id.* at 3.

12 Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 44 J. ECON. LITERATURE 629, 680 (2007).

13 BIAC 2007, *supra* note 1, ¶ 44.

14 *Id.*

15 *Id.*

16 Tom Evens & Karen Donders, *Mergers and Acquisitions in TV Broadcasting and Distribution: Challenges For Competition, Industrial and Media Policy*, 33 TELEMATICS AND INFORMATICS 674 (2016). The article also provides an overview of the opposing view that vertical integration may lead to anticompetitive effects.

contracting while reducing transaction costs, protecting brand names, and safeguarding intellectual property.[17] Vertical integration enables distributors to create synergies in terms of scale and scope of economies, and easily share information with producers about viewer tastes and preferences.[18] Distributors collect valuable information about their viewers, which they can monetize through innovative business models or new productions. Sharing this information, which is not necessarily unique, may also spur innovation in the form of new content, distribution platforms or advertising formats.[19] In respect of the elimination of double marginalization, vertical integration helps distributors to reduce transaction costs, and can reduce the level of retransmission fees paid to broadcasters.[20] Vertical mergers between broadcasters and distributors have been shown to result in increased program diversity, higher subscriber penetration and a price decrease between the merging firms.[21] As broadcasting and distribution environments continue to expand, these efficiency benefits will become more relevant as their scale and scope increases.

10. While the requirement to consider efficiencies (and to what extent) varies by jurisdiction, *Business at OECD* recommends that competition authorities carefully assess and consider the significant efficiencies that vertical integration is likely to create during the merger review process.

III. Focus on Traditional Theories of Harm in Vertical Mergers

11. Due to the competitive benefits that stem from inherent efficiency gains, vertical mergers will rarely present factual circumstances that suggest competitive harm is likely. This is particularly the case in the TMT sector, which, as recognized by the Secretariat, "is very dynamic and characterised by the constant entry of firms with innovative business models."[22] Therefore, when competition authorities review vertical mergers in the TMT sector, *Business at OECD* recommends competition authorities focus on the two traditional theories of harm, namely, input foreclosure, and customer foreclosure.

12. To begin, it is often not clear that a vertically integrating firm has an anti-competitive incentive at all, as illustrated by the single monopoly profit theory. This theory suggests that because there is only a single monopoly profit to be earned within the supply chain, a firm cannot increase its profits by leveraging market power upstream or downstream.

13. The potential for input foreclosure is one of the principal theories of competitive harm associated with vertical mergers. For input foreclosure to be an applicable theory of harm, the upstream firm must be able to raise the input price to downstream rivals either directly or indirectly. However, for input foreclosure to harm competition and justify enforcement, the increase in the input price charged by the integrated or merged firm to downstream customers must also lead to an increase in the price charged by the downstream firms to their customers.[23]

14. Under the conventional customer foreclosure hypothesis, the vertically integrated downstream firm no longer purchases supply from unintegrated upstream competitors, as all of its demand for inputs would be supplied by its upstream affiliate. In theory, the reduction in demand could limit

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17 *Id.*

18 *Id.*

19 If information is only shared with affiliated broadcasters, it could lead to discriminatory behavior.

20 Evens & Donders, *supra* note 16.

21 *Id.*

22 *Secretariat Note*, *supra* note 5, ¶ 17.

23 BIAC 2007, *supra* note 1.

the addressable market or the sales volume available to the integrated firm's upstream rivals, thereby affecting their ability to achieve economies of scale. As a result, over time, upstream rivals who are unable to implement a counterstrategy may exit the market.[24]

15. To establish input or customer foreclosure, it is necessary for the competition authority to prove that the merged entity has the ability to harm competition. For example, in the Apple/Shazam merger, there were concerns that Apple would foreclose competing music streaming services by discontinuing any referrals from Shazam to its competitors.[25] But the European Commission concluded that Apple could not exclude competitors as Shazam's data was neither unique nor comprised of sensitive information.[26]

16. Competition authorities should carefully evaluate this "ability" criterion, so as to ensure beneficial vertical mergers are not blocked. Pursuant to the European Commission's guidelines, an ability to foreclose may be determined if the input is important to enter the downstream market, but it does not necessarily need to meet the essential facility requirements.[27] This threshold was utilized by the Commission in Microsoft/LinkedIn to determine the value of LinkedIn's data.

17. While the frameworks for analyzing input foreclosure and customer foreclosure are similar, there are important distinctions between the two theories of harm. Putting aside efficiencies, input foreclosure has the direct potential to lead to higher prices in the short run by raising the costs of the integrated firm's downstream rivals.[28] In contrast, customer foreclosure presents a more limited potential for prices to rise in the short run. Prices would not rise until after there was sufficient exit from the industry by the unintegrated rivals, which is less likely to occur in the short run except in cases of monopsony.[29] As exit may not be immediate, the potential harm to competition due to customer foreclosure may not occur until much later, if at all. Because the short run and long run effects are likely to differ, competition policy should treat and distinguish the two theories appropriately.[30]

18. The U.S. District Court's decision in AT&T/Time Warner offers insight into the application of traditional theories of harm to the TMT sector. The U.S. DOJ's main theory of harm in the case was that the merger would likely substantially lessen competition in the sale of video programming and distribution by enabling AT&T to use Time Warner's television content to (i) raise its competitors' video programming costs or, (ii) by withholding certain Time Warner content, so that those same competitors' customers would switch to AT&T's subsidiary, DirecTV.[31] In essence, the

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24 *Id.*

25 Nicolo Zingales, *Apple/Shazam: Data is Power, But Not a Problem Here*, COMPETITION POLICY INT'L (Dec. 2, 2018), *available at* www.competitionpolicyinternational.com/appleshazam-data-is-power-but-not-a-problem-here/.

26 Case M.8788—Apple/Shazam, Comm'n Decision (Sept. 6, 2018), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf. With the exponential increase in data generation in the industry, combined with the non-exclusive and non-sensitive nature of much of this data, input foreclosure of data arising out of a vertical merger is likely to be a rare occurrence.

27 Commission Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2008 O.J. (C 265) 6, ¶¶ 33-57 [hereinafter EC Non-Horizontal Merger Guidelines].

28 BIAC 2007, *supra* note 1.

29 *Id.*

30 *Id.*

31 United States v. AT&T Inc., No. 17-2511 (RJL) (D.D.C. June 12, 2018), *available at* www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf.

DOJ argued that the effect on prices due to the strengthened bargaining power of the merged entity outweighed any efficient benefits.

19. Judge Leon reviewed and assessed the government's evidence at length, ultimately determining that the economic evidence did not support its theory of foreclosure and raising rivals' costs. In contrast, Judge Leon did accept the merging parties' evidence that the merger was likely to lead to substantial integration efficiencies by eliminating "double margins" and bargaining costs between AT&T and Time Warner, to the benefit of their customers. Indeed, the Court found that AT&T would significantly lower the price to subscribers for DirecTV.

20. Integral to Judge Leon's findings were the changes to the American video market; namely, that high-speed internet access has allowed new video content and advertising offerings by Facebook, Google, Hulu, Netflix and Amazon to compete against traditional cable/subscription television media. Indeed, Judge Leon found that the number of cable TV subscribers was declining as consumers increasingly turned to virtual providers and subscription video on demand which included providers like Netflix, Amazon Prime and Hulu. These findings called into question the appropriate market definition in a dynamic industry subject to such rapid technological change.

21. Defining the market is increasingly difficult in the technology industry. When defining the relevant market, it has been suggested that competition authorities should take into account the unique characteristics of the digital sector, including the possible existence of ecosystems of products and the increased personalization of offers.[32] The European Commission has historically identified markets narrowly, e.g. in Microsoft/LinkedIn, where the European Commission assessed the market for professional social networks, so as to assess the narrowest possible product market.[33] Furthermore, the European Commission considers both product functionality and quantitative pricing tests as being central to the market definition analysis.[34] Yet, these techniques prove challenging in the context of digital markets due to the pervasiveness of multi-sided platforms and services offered at zero price.[35] For example, the hypothetical monopolist test fails to consider the pricing interdependencies that exist in multi-sided markets or the importance of other elements of competition, such as quality.[36] While the European Commission has considered multi-sided technology platforms previously (e.g. Google/DoubleClick; [37] Microsoft/Yahoo!; [38]

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32 Marc Bourreau & Alexandre de Streel, *Digital Conglomerates and EU Competition Policy* (Mar. 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512.

33 Case M.8124—Microsoft/LinkedIn, Comm'n Decision, ¶¶ 74-83 (Dec. 6, 2016), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

34 Catriona Hatton, David Gabathuler, & Alexandre Lichy, *Digital Markets and Merger Control in the EU: Evolution, not Revolution?*, CPI ANTITRUST CHRON. (Feb. 2018), at 4, *available at* www.competitionpolicyinternational.com/wp-content/uploads/2018/02/CPI-Hatton-Gabathuler-Lichy.pdf.

35 *Id.* at 4.

36 *Id.* at 5.

37 Case M.4731—Google/DoubleClick, Comm'n Decision, ¶¶ 44-56 (Mar. 11, 2008), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.

38 Case M.5727—Microsoft/Yahoo! Search Business, Comm'n Decision, ¶¶ 62-81 (Feb. 18, 2010), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

Microsoft/Skype;[39] Facebook/WhatsApp;[40] and Verizon/Yahoo[41]), they have most frequently left the exact definition of the relevant market open. In sum, technology sector cases, where there are often multi-sided platforms, pose a number of additional market definition questions for competition authorities.

22. Market definitions are also being blurred due to the proliferation of online ad-supported platforms. These companies compete to offer consumers products/services that they wish to engage with and it is that engaged audience which provides the basis to provide online advertising services. Scholars have argued that competition authorities need to devote greater consideration to attention markets when assessing the market and to increase the dynamism of market definition conceptualization.[42]

23. Alternative or novel models of economic harm for vertical mergers that rely on competitive effects other than input foreclosure or customer foreclosure should be viewed with substantial scepticism. Theories involving coordinated effects, financial leverage, financial predation, data and the like are hypotheses that are relatively new compared to models of vertical foreclosure. This is recognized by the Secretariat in its Background note, "The economic literature identifies some theories of harm describing how a vertical merger could enhance horizontal collusion, but to date these have not been tested empirically and rarely resulted in enforcement action."[43]

24. While it is uncontroversial that the potential for competitive harm exists by employing these theories, applying such novel theories of harm to assess the likelihood of actual harm to competition is subject to much debate.[44] In particular, given the relatively undeveloped state of this literature and lack of empirical evidence in real markets,[45] it may be more appropriate to delay an assessment of these models to the future—after additional theoretical research and empirical study have become available—and to focus on the basic vertical merger models. Accordingly, enforcement actions should be focused on theories such as input foreclosure and customer foreclosure that are well established in economic literature and supported by empirical evidence.[46]

IV. The Role of Remedies in Vertical Mergers

25. Enforcement decisions regarding vertical mergers have an important influence on the decisions made in the marketplace. Remedies must be carefully tailored to the circumstances of the transaction to address either the structure of the market or the post-merger conduct of the merged firm. Since enforcement action in vertical mergers has the potential to prevent efficiencies contemplated by the transaction, stifle innovation, increase consumer costs, and inhibit the merged firm's ability to compete, which can distort competition by precluding the merged entity from engaging in certain activity to the detriment of suppliers or customers who welcome the

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39 Case M.6281—Microsoft/Skype, Comm'n Decision, ¶¶ 10-63 (Nov. 18, 2011), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m6281_924_2.pdf.

40 Case M.7217—Facebook/WhatsApp, Comm'n Decision, ¶ 34 (Nov. 19, 2014), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

41 Case M.8180—Verizon/Yahoo, Comm'n Decision, ¶¶ 11-12 (Feb. 24, 2017), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m8180_240_3.pdf.

42 David S. Evans, *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies* (Aug. 23, 2017), *available at* https://ssrn.com/abstract=3009438.

43 *Secretariat Note*, *supra* note 5, ¶ 45.

44 BIAC 2007, *supra* note 1.

45 Wong-Ervin, *supra* note 10, at 3.

46 BIAC 2007, *supra* note 1.

competition brought by the merged entity, competition authorities should ensure that a high level of evidence exists with respect to key factual and economic evidence that the transaction will result in competitive harm, as well as the impact of any remedy on the market. In considering the need for any remedies, competition authorities should also be cognizant of any licensing/regulatory regime that could also already limit certain behavior by a merged entity.

26. If enforcement action is taken, competition authorities generally seek a structural remedy, behavioral remedy, or a combination of both remedies. The precise remedy should depend on the specific circumstances of the case and an authority should not favor one form of remedy over another as its starting point. Structural remedies directly intervene in the competitive structure of a relevant market to address the anti-competitive effects of a merger, and typically involve a divestiture of assets or shares. Structural remedies aim to restore the level of competition that existed prior to the merger by allowing the entity who obtains the divested assets to exert pressure post-merger.[47] Behavioral remedies modify or constrain the merged firm's behavior and aim to prevent the merged entity from acting anti-competitively. Common behavioral remedies include firewalls, non-discrimination provisions, mandatory licensing, transparency requirements, anti-retaliation provisions and prohibitions on certain contracting practices.[48]

27. Competition authorities around the world have recognized that horizontal and vertical mergers raise different competitive issues, and as a result, raise different remedial considerations. For instance, the U.S. DOJ's *Antitrust Division Policy Guide to Merger Remedies* notes that in the case of vertical mergers, the DOJ will consider "tailored conduct remedies designed to prevent conduct that harm consumers . . . while still allowing the efficiencies that may come from the merger to be realized." [49] The European Commission is more willing to accept structural and behavioral remedies, or behavioral remedies on their own in the case of vertical mergers.[50] The European Commission Guidelines indicate that, in cases of vertical mergers, both structural and behavioral remedies will be considered if the conditions of a foreclosure are proven, namely: the ability to foreclose access to the input; the incentive to foreclose the access to the input; and the overall likely negative impact on effective competition.[51] More specifically, in the Notice on Remedies, the Commission stated that it will consider whether behavioral remedies are appropriate on a case-by-

47 Massimo Motta, Michele Polo, & Helder Vasconcelos, *Merger Remedies in the European Union: An Overview*, 52 ANTITRUST BULL. 603 (2007).

48 *See, e.g.*, the Ticketmaster/LiveNation merger, where the Canadian Commissioner of Competition and U.S. Dep't of Justice sought and obtained firewall behavioral remedies. Press release, Gov't of Canada Competition Bureau Canada, Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition (Jan. 25, 2010), *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html; Press Release, U.S. Dep't of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to its Merger with Live Nation Inc. (Jan. 25, 2010), *available at* www.justice.gov/opa/pr/justice-department-requires-ticketmaster-entertainment-inc-make-significant-changes-its.

49 U.S. DEP'T. OF JUSTICE ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (June 2011), *available at* www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf [hereinafter U.S. POLICY GUIDE TO MERGER REMEDIES]; Kevin J. Arquit & Carrie C. Mahan, *The Guide to Merger Remedies: Non-Structural Remedies*, GLOBAL COMPETITION REV. (Aug. 9, 2018), *available at* https://globalcompetitionreview.com/insight/the-guide-to-merger-remedies/1172912/non-structural-remedies.

50 David Hignee et al., *The Guide to Merger Remedies: Giving Effect to the Remedy*, GLOBAL COMPETITION REV. (Aug. 9, 2018), https://globalcompetitionreview.com/insight/the-guide-to-merger-remedies/1172948/giving-effect-to-the-remedy.

51 EC Non-Horizontal Merger Guidelines, *supra* note 27, ¶¶ 35-57.

case basis.[52] The *Business at OECD* recommends that competition authorities review transactions on a case-by-case basis to determine whether structural remedies, behavioral remedies, or a combination of remedies are appropriate to address competition concerns.

28. Behavioral remedies have been considered an effective method for dealing with competition concerns raised by vertical mergers, mainly because the concern in vertical merger cases is that the merged entity will take advantage of its position (either downstream or upstream) to behave anti-competitively.[53] Yet, in recent years, both U.S. competition authorities have made statements disfavoring their use.[54] Under President Trump's administration, policy speeches and cases have signaled that the DOJ is less inclined to implement behavioral remedies.[55] For example, Assistant Attorney General Makan Delrahim has suggested that behavioral remedies contravene the original aim of the antitrust laws to protect free markets and the competitive process with limited government intervention.[56] This is because behavioral remedies replace competition with regulation by both the government and the courts rather than incentivizing competition among market players.[57] Delrahim noted that the U.S. DOJ Antitrust Division would seek to reduce the number of long-term consent agreements and "return to the preferred focus on structural relief to remedy mergers that violate the law."[58] The Canadian Competition Bureau has historically preferred structural remedies to behavioral remedies, although more recently it has employed behavioral remedies in vertical mergers.[59] In contrast, the European Commission has not signaled that it intends to follow the U.S. competition authorities and shift away from requiring a combination of structural and behavior remedies, or standalone behavioral remedies in contested vertical mergers. The precise remedy should depend on the specific circumstances of the case and an authority should not favor one form of remedy over another as its starting point. Accordingly, *Business at OECD* continues to endorse carefully considered behavioral remedies where there is sufficient factual and economic evidence that a vertical merger requires remedial measures.

29. In vertical mergers in the TMT sector, concerns regarding replacing competition with regulation are very real. For example, if a downstream distribution firm acquires an upstream content provider, and, as a condition of permitting the merger, a competition or other governmental authority limits the merged firm's ability to control or direct the distribution of its content, the merged firm is unlikely to realize the efficiencies and competitive advantages of the transaction. For example, the merged firm would be prevented from competing on the basis of the media

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52 Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004 2008/01, 2008 O.J. (C 267) 1. Note that they refer to behavioral remedies as "conduct remedies."

53 John Kwoka & Diana Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 THE ANTITRUST BULL. 979 (2012).

54 U.S. POLICY GUIDE TO MERGER REMEDIES, *supra* note 49.

55 Arquit & Mahan, *supra* note 49.

56 Makan Delrahim, Statement Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights Committee on the Judiciary United States Senate For a Hearing Entitled "Oversight of the Enforcement of the Antitrust Laws" (Oct. 3, 2018), *available at* www.judiciary.senate.gov/imo/media/doc/10-03-18%20Delrahim%20Testimony.pdf.

57 Arquit & Mahan, *supra* note 49.

58 Makan Delrahim, Antitrust and Deregulation, Address Before the American Bar Association Antitrust Section Fall Forum 2 (Nov. 16, 2017), *available at* www.justice.gov/opa/speech/file/1012086/download.

59 Gov't of Canada Competition Bureau Canada, Draft Discussion Paper—Big Data and Innovation: Implications for Competition Policy in Canada (2007), *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/$file/Big-Data-e.pdf; Gov't of Canada Competition Bureau Canada, Information Bulletin on Merger Remedies in Canada (2006), *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.

content it can offer to the market. In the media market, this will not only negatively affect efficiencies realized by the merged firms, but also may disincentivize the merged firm from developing superior media content to attract and maintain customers for its distribution platforms.[60]

30. Moreover, if not properly time-limited and flexible, behavioral remedies are necessarily implemented in the context of an existing competitive landscape and can create static rules that cannot account for dynamic changes in a market. This is particularly challenging for the TMT sector, which is in the midst of a technological revolution. As a result, behavioral remedies in this sector can have the effect of maintaining the status quo, inhibiting a firm's ability to innovate, and restricting a merged firm's ability to engage in pro-competitive conduct that would allow it to compete effectively in a dynamic market. To counter these effects, these remedies should be made reviewable if conditions change.

31. *Business at OECD* therefore encourages competition authorities to ensure there is sufficient factual and economic evidence that a vertical merger requires remedial measures. If the authority determines that a remedy is necessary, the remedy must be carefully considered to avoid unintended consequences in markets and imposing a chill on the merged firm's ability to innovate and effectively compete in dynamic markets. The remedy must also be clear to facilitate compliance, easy to monitor, comprehensive to cover all potential anti-competitive risks, proportional so as to not chill innovation, and specific to the facts of each merger.

V. Vertical Merger Review Should Focus on Competition Issues

32. Vertical mergers in the TMT sector are being driven by the rapid pace of technological innovation and change. In many countries, this sector is often characterized by relatively complex regulatory restrictions and regimes, which more broadly consider issues related to industrial policy, media and ownership plurality, and privacy.

33. Given the regulated environment in which transactions in the TMT sector take place, *Business at OECD* is of the view that competition authorities should be careful and take account of the regulated environment and the mandated role of national regulators (e.g., OFCOM), when considering mergers in the sector but should not otherwise stray into issues outside their mandate. Where there is overlapping jurisdiction to review a merger, competition agencies should cooperate and coordinate with the sector regulator to avoid costly and inefficient processes and divergent outcomes.

34. Competition authorities should not be more anxious to act in respect to vertical mergers in the TMT sector merely because they are in the public eye and often subject to significant political attention. Vertical transactions in the TMT sector, in fact, represent an important opportunity for competition authorities to demonstrate their independence from these pressures.[61] While merger review is often mandatory (e.g., based on a financial or other jurisdictional threshold), and indeed on occasion may require consideration of specific issues such as media plurality,[62] *Business at OECD* recommends that competition authorities take precautionary measures to avoid any appearance or inference that their enforcement action is motivated by political interference.

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60 *See e.g.*, Gov't of Canada, Canadian Radio-television and Telecommunications Commission, Broadcasting Regulatory Policy C.R.T.C. 2011-601 (2011), *available at* https://crtc.gc.ca/eng/archive/2011/2011-601.htm.

61 BIAC 2013, *supra* note 2.

62 *See, e.g.*, *21st Century Fox / Sky merger inquiry*, GOV.UK, *available at* www.gov.uk/cma-cases/twenty-first-century-fox-sky-merger-european-intervention-notice.

35. In order to avoid such appearance or inference, *Business at OECD* recommends that competition authorities continue to focus on the likely competitive effects of vertical mergers in this sector. A focus on traditional competition theories of harm (e.g., input foreclosure and customer foreclosure), rather than novel theories of competitive harm or non-competition factors which the authority is not mandated to consider, such as public interest concerns, diversity of "voice," plurality of media ownership, desirability of public programming, etc., will help to maintain confidence in the independence of the merger review process from political interference. Moreover, in practice, evaluating novel theories of harm is difficult as the list of theories of harm discussed in academic commentary is expansive.[63]

36. Leaving any regulatory action based on such non-competition concerns to be evaluated, decided and effectuated by a specialist regulatory agency charged with specific jurisdiction over such issues will further reinforce the distinct role of competition review of mergers along normative lines. In conducting its review, a competition authority should not allow non-competition issues to influence the review of competition issues and should not be called upon by governments to enact non-competition policy through merger review.[64]

37. *Business at OECD* encourages competition authorities to resist the temptation to act as an industry regulator and to take action only where competitive effects, as measured by traditional standards, warrant intervention.

VI. Conclusion

38. The TMT sector is undergoing a period of rapid technological innovation and change. *Business at OECD* recommends that when reviewing vertical mergers, competition authorities should recognize the significant efficiencies that drive vertical mergers in this important sector, focus on traditional theories of harm when conducting a competitive effects analysis, take enforcement action only where and to the extent necessary, and avoid implementing non-competition public policy goals through merger review.

[63] Steven Salop & Daniel Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. Antitrust Enforcement 1 (2016).

[64] *Id*.