Computer & Communications Industry Association
Tech Advocacy Since 1972

CCIA Comments on the Draft 2020 Vertical Merger Guidelines

I. Introduction

These comments are submitted in response to the U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice's (DOJ) consultation on the draft vertical merger guidelines.[1] The Computer & Communications Industry Association (CCIA)[2] commends the FTC and the DOJ for modernizing the vertical merger guidelines while seeking a better understanding of the legal and policy challenges that arise with the new economy. CCIA welcomes the opportunity to provide its views on the proposed draft vertical merger guidelines.

To ensure that tech-related innovation continues to play a positive role in the global economy, sound competition policy and antitrust enforcement both must play a crucial role in protecting competition across markets. Merger control, as part of the antitrust toolkit, remains a key element in maintaining a dynamic economy. To that end, competition authorities have applied merger control rules vigorously in recent years. This includes transactions where the merger effects on innovation and competition have been analyzed, particularly in the case of R&D intensive industries.

By the same token, the U.S. antitrust agencies for years have been right to recognize that vertical mergers are typically procompetitive in nature, and require a different approach when enforcing antitrust. Vertical mergers usually bring about substantive pro-consumer efficiencies. For example, vertical integration typically helps to lower costs, and increase the stability of supply of an important input. Furthermore, the combination of talent from the different workforces can promote new ideas that eventually become new products and/or services for the benefit of consumers.

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[1] US FTC and DOJ Call for Information - Vertical Merger Guidelines available at https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment.

[2] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

CCIA believes that antitrust authorities should continue to enforce merger control rules, including vertical mergers, and evaluate transactions based on sound economic analysis that focuses on real and potential harms to consumer welfare.

II. Market Shares

The FTC and DOJ typically include as part of their merger review process the market shares and market concentration levels in the relevant market. However, agencies do not exclusively focus on market shares when evaluating the competitive effects of a transaction, but also take others factors into account, including efficiencies.

The proposed Draft Vertical Merger Guidelines introduce a safe harbor threshold of 20% market share. Where the parties to the merger have a share in the relevant market of less than 20%, and the related product is used in less than 20% of the relevant market, the U.S. antitrust agencies would then be unlikely to challenge a vertical merger.[3]

CCIA welcomes the introduction of this safe harbor threshold and acknowledges that this does not impair the FTC or DOJ in reviewing mergers with market shares in the relevant markets of 20% or less. Because the introduction of a safe harbor does not prescribe U.S. antitrust authorities from conducting merger review in any case, CCIA recommends elevating such market share threshold to 35% to align it to the existing exclusive dealing laws.

To date, the existing antitrust case law suggests that input shares below 35% are unlikely to raise competitive concerns.[4] By aligning the vertical mergers safe harbor threshold to the existing exclusionary dealing safe harbors, the U.S. agencies will ensure that the U.S. competition system lacks enforcement asymmetries.

III. Unilateral Effects

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[3] United States Department of Justice & Federal Trade Commission, *Draft Vertical Merger Guidelines* at 3, available at https://www.justice.gov/opa/press-release/file/1233741/download.
[4] ABA Section of Antitrust Law, Antitrust Law Developments 222 n.1275 (5th ed. 2002) (listing cases).

In section 5.a, which examines unilateral effects analysis, the Draft Vertical Merger Guidelines include key considerations that should be analyzed when evaluating if a vertical merger is likely to result in unilateral harm to competition through foreclosure or raising rivals' costs:

> (1) The merged firm's foreclosure of, or raising costs of, one or more rivals would cause those rivals to lose sales (for example, if they are forced out of the market, if they are deterred from innovating, entering or expanding, or cannot finance these activities, or if they have incentives to pass on higher costs through higher prices), or to otherwise compete less aggressively for customers' business;
> (2) The merged firm's business in the relevant market would benefit (for example if some portion of those lost sales would be diverted to the merged firm);
> (3) Capturing this benefit through merger may make foreclosure, or raising rivals' costs, profitable even though it would not have been profitable prior to the merger; and,
> (4) The magnitude of likely foreclosure or raising rivals' costs is not de minimis such that it would substantially lessen competition.

CCIA welcomes the guidance introduced by the U.S. competition authorities and suggests that real-life examples for each element are added to such sections.

The agencies note that a transaction that meets these four factors "potentially raise significant competitive concerns and often warrant scrutiny." By the same token, CCIA strongly recommends that the Draft Vertical Merger Guidelines add text to clarify that if the four conditions detailed in the Guidelines are not met, then a presumption arises that the merger does not raise concerns warranting scrutiny.

CCIA considers this to be a highly important point to make, as well as, clarifying that the presence of these four elements does not shift the burden of proof to the merging parties. As of today, it is for the antitrust agencies to prove with evidence before the courts the reasons why an antitrust agency wishes to block a merger. These processes provide for legal certainty and transparency, and are fundamental aspects of the judicial (rather than administrative) US legal system. By clarifying that the four requirements set in the Draft Vertical Merger Guidelines do not imply shifting the burden of proof to the merging parties, the US antitrust agencies will ensure that the legal certainty and transparency principles that define the US antitrust system are preserved.

IV. International Implications of Vertical Merger Review

The FTC must be cognizant of the international implications of adopting new vertical merger guidelines. In a globalized economy, many transactions are subject to multiple merger control rules. There is significant variation in merger review thresholds in terms of what types of transactions are subject to review, as well as, significant variations in the merger review process in terms of the level of international cooperation, timeline, and information required.

In most cases, there is international convergence when dealing with merger controls. However, there has been a recent trend of foreign antitrust authorities expanding antitrust theories of harm, including that of "portfolio effects." In the context of merger reviews, this trend could negatively impact the ability of international businesses to pursue efficient deals that increase innovation to the benefit of consumers. Divergence occurs not only in the enforcement of novel theories of harm outside the United States, but also with regard to the review of the "conglomerate effects" theory of harm. This divergence is especially damaging to the technology industry where products and services are inherently global in nature.

Recent cases seem to indicate a growing interest in conglomerate and non-horizontal theories of harm, especially with regard to merging parties selling complementary products. This concern includes the consideration of interoperability between one party's products and a rival's competing downstream product, to favor their own downstream product.

For example, the European Commission (EC) conditionally cleared the Broadcom/Brocade merger, with commitments covering non-discrimination measures and firewalls, to resolve concerns about technical degradation of interoperability and/or misuse of confidential information.[5] In the Microsoft/LinkedIn merger, the EC imposed commitments regarding access to Microsoft's application programing interfaces (APIs) and options for customers to disable LinkedIn features in order to resolve concerns about the integration of LinkedIn into Microsoft's programs and denial of access to competitors to its APIs.[6]

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[5] Press Release, European Commission, Mergers: Commission Clears Acquisition of Brocade by Broadcom, Subject to Conditions (May 12, 2017), http://europa.eu/rapid/press-release_IP-17-1309_en.htm.
[6] Press Release, European Commission, Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions (Dec. 6, 2016), http://europa.eu/rapid/press-release_IP-16-4284_en.htm.

CCIA believes that it would be highly important to specifically include a section in the proposed Draft Vertical Merger Guidelines to clarify that under the U.S. merger control rules the 'conglomerate effects' are not applicable.

V. Conclusion

Sound antitrust enforcement will continue to be key to maintaining competition in the different technology markets. Ensuring that vertical merger decisions regarding R&D-intensive markets, such as tech transactions, are grounded in strong evidence is fundamental to maintaining the right incentives for companies to innovate, and for continued economic growth.