

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Vertical mergers in the technology, media and telecom sector – Note by Belgium****7 June 2019**

This document reproduces a written contribution from Belgium submitted for Item 10 of the 131st OECD Competition committee meeting on 5-7 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm>

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1. What is the general policy approach towards vertical mergers in your jurisdiction? Do you have specific guidelines and safe harbours for the assessment of vertical mergers, or do you have general guidelines that incorporate vertical effects?

1. We always examine the vertical impact of mergers, when appropriate. We have no specific guidelines or safe harbours and systematically refer to EU guidelines¹ and decision practice.

2. Does your authority review vertical mergers, or considers vertical effects at all in the assessment of a merger? If so, how often do you assess vertical mergers in comparison to horizontal mergers and is there any difference in the intervention rate / outcome between the two categories of mergers? Have you dealt with any cases in the technology, media and telecom sector where you assessed vertical effects?

2. Please see sub (1).

3. In line with EU policy and decision practice, we consider that the vertical impact of mergers is less likely to be anti-competitive than the horizontal impact, and focus primarily on input and customer foreclosure effects and possible disclosure of confidential information.

4. We dealt since September 2013 (establishment of the present BCA), in non-simplified procedures concerning cases concerning technology, media or telecom sectors, e.g. with the vertical impact of:

1. The acquisition by the controlling shareholder of the incumbent cable network operator in Flanders and parts of Brussels (that also owns a number of Pay-TV channels) of the remaining 50% of a broadcaster, that owns three significant Dutch-language free-to-Air TV channels, produces TV content and sells advertising space on several TV channels². The transaction was cleared subject to four remedy packages, regarding the distribution of television channels on FRAND terms, the promotion and ranking of these channels on the electronic program guide (EPG), access to personalized advertising on the set-top-boxes, and access to data on customer behavior.
2. A transaction between two groups that co-operated already in a closed network configuration on the same site (the relevant geographic market), by which one acquired the control over the others' activities on markets concerning electricity, steam and water used in industrial processes, and on which each held a 100% (or close to 100%) market share on each of the relevant markets on which they operated

¹ *Guidelines on the assessment of non-horizontal mergers under de Council Regulation on the control of concentrations between undertakings*, OJ 2008 C 265/6.

² Decision of 13 May 2019, *Telenet*.

- (15 February 2019): the transaction was assessed only in respect of its vertical impact and cleared without remedies;
3. The acquisition by a publisher of magazines of a number of titles (29 June 2018): cleared without remedies;
 4. The acquisition by a major cable operator and telecom company of a company offering integrator services mainly to SMEs (22 May 2018): cleared without remedies;
 5. A complex transaction resulting in the joint control of two publishers of newspapers and magazines over a joint venture publishing the two main financial newspapers (6 March 2018): the transaction was assessed mainly in respect of its vertical impact and cleared without remedies;
 6. The acquisition by a large conglomerate offering electronic products of a company of which the activities are focused on the identification of people (for example electronic identity cards) and the identification of goods (for example by means of bar code readers and small ruggedized mobile computers) (13 April 2017): the transaction was assessed mainly in respect of its vertical impact and cleared without remedies;
 7. The acquisition of two companies distributing printed press by Belgian Post (8 November 2016): impact mainly horizontal, approved with remedies;
 8. The acquisition, following a divestment remedy in decision of the European Commission, by a group owning i.a. a television chain, radio station, newspapers and magazines and offering mobile telephony services, of mobile telephony activities (28 January 2016): cleared without remedies;
 9. The acquisition of magazines by a group owning i.a. a television chain, newspapers and magazines (4 August 2015): cleared with remedies concerning the horizontal impact;
 10. A decision reducing the scope of remedies imposed in an earlier decision concerning the acquisition by the incumbent telecom operator of a chain of telecom retail shops, partly in view of the market developments caused by consumers shifting towards bundled offers (23 June 2015);
 11. The acquisition by a group that is i.a. the dominant cable operator in part of the country, offering also telecom services and triple play, of a publisher of weekly magazines and the publisher of a daily newspaper (26 March 2014): the transaction was cleared with remedies aiming at avoiding foreclosure on advertisement markets;
 12. The establishment of a jointly controlled company bringing together in substance the activities of two publishers of newspapers and magazines (25 October 2013): vertical aspects were considered i.a. concerning the markets for advertising; transaction was cleared with remedies in respect of its horizontal impact;

3. In your jurisdiction, how does the assessment of vertical mergers differ from the assessment of horizontal mergers? Do you apply an “ability/incentives/effects framework”, or any other alternative framework? What kind of economic evidence do you use?

5. We apply the ability/incentives-and (when relevant) effects framework. In practice, the two former represent the bulk of our analyses.

4. Do you find that the assessment of anti-competitive effects in vertical mergers is more challenging in some sectors than others? Do you find vertical mergers in technology, media and telecom to pose particular challenges or to be potentially more threatening to competition?

6. Not really. In a recent telecom/media merger, shaping the reasoning, and showing the non-horizontal effects proved to be a challenge. But, another case that was very difficult to decide concerned trucks and the question whether there (still) was a distinct product market for service and repairs, or an integrated ‘systems’ market for trucks including sales.

5. What theories of harm do you usually consider in the assessment of vertical mergers? Do the theories of harm always involve input and customer foreclosure, or are there any other concerns identified? Can you provide one or two examples of vertical merger cases, if possible from the technology, media and telecom sector, to illustrate the theories of harm?

7. Please refer to the previous response sub 2. We indeed believe that most of our theories of harm can be expressed in one way or another as input and customer foreclosure. However, in practice, partial input or customer foreclosure, access to confidential information or access to specific inputs such as data, can lead to specific theories of harm.

8. For instance, in a recent merger between a cable network operator and a broadcaster, one of the theories of harm concerned the access of the remaining broadcasters to the resources needed to continue to compete effectively, including the capacity of the public broadcaster to achieve its missions of public service. Such theories of harm can be rephrased in a broader sense as partial input, or customer foreclosure.

9. Similarly, another theory of harm concerned access to detailed data on customer behavior (for instance minute-by-minute viewer experience, from their set-top-boxes). Again, this theory of harm is a particular form of input foreclosure.

6. What kind of efficiency effects do you consider in the assessment of vertical mergers? How do you incorporate those effects into the analysis, in light of the particular welfare standard of your jurisdiction? Have you found any particular efficiency effects arising from vertical mergers in technology, media and telecom?

10. We did not yet decide a case with a significant negative vertical impact offset by efficiencies. However, following the non-horizontal merger guidelines of the European commission, we consider that vertical mergers are less likely to be anticompetitive than horizontal mergers, in essence because they are more likely to carry efficiencies.

7. Does your authority use any quantitative methods to assess the impact of the merger on consumers or is the decision solely based on a qualitative analysis? What methods do you use?

11. Within the capacity/incentive/effects framework, we try to use quantitative assessments, when appropriate. In particular, we have used critical loss analyses in a recent merger to estimate the incentives of the parties to engage in total (and to some extent partial) input and customer foreclosure. In particular, for the customer foreclosure, we estimated the costs and benefits that a cable operator would derive from banning competing broadcasters from its platform. We then estimated how many customers the operator would have to lose, for this strategy not to be profitable, and how much of their time the most frequent viewers of these channels spent watching them. As much as we believe that these quantitative estimations are useful to complement more qualitative analyses, it is often not possible to rely solely on these estimations, if they rely on a significant number of underlying assumptions. In particular, an empirical analysis of partial foreclosure (for instance the effect of a cable operator favouring their own channels on the electronic program guide (EPG), or through the set-top-box) might not produce very reliable estimations.

8. What kind of remedies do you impose or could you impose if a vertical merger is likely to impede effective competition? Could you please also describe which challenges, if any, arise as regards the design of remedies? Are the remedies tailored according to the specificities of a sector or industry under analysis (if yes, could you provide examples from the technology, media and telecom sector)?

12. In the case referred to sub 2(x) we imposed behavioural remedies, with a reporting duty and monitored by a trustee, aimed at ensuring the non-discriminatory access of third parties to advertisement space in the acquired publications and restricting the access of the acquiring company in respect of data concerning such advertisements. A delay in reporting was sanctioned in a follow-on decision with a fine of 63 296 € (13 June 2016).

13. In a case concerning the service and repairs of trucks, we imposed a structural remedy requiring in substance the acquirer to upgrade an independent garage into its network and to free a garage in another local relevant geographic market from any non-compete obligations.

14. The transaction between a cable operator and a broadcaster was cleared subject to four remedy packages, regarding the distribution of television channels on FRAND terms, the promotion and ranking of these channels on the electronic program guide (EPG), access to personalized advertising on the set-top-boxes, and access to data on customer behavior. While most of these packages were quite challenging to design, access to data was perhaps the more difficult, because it entailed lengthy discussions on access to personal data and the right to share personal data.

9. What kind of remedies (structural or behavioural) do you consider more efficient if a merger would give rise to a risk of input or customer foreclosure, as well as other risks of harm, such as tacit co-ordination? Have you conducted any ex-post studies to assess the effectiveness of those remedies? Do you have ex-post experience from vertical mergers that were cleared? Were there unforeseen developments in the market and did you draw any lessons for the analysis/remedies to be used in vertical merger cases.

15. Whether structural or behavioural remedies are more efficient depends entirely on the specific characteristics of the relevant market and of the transaction.

16. We have not conducted an ex-post study, but we appoint a Monitoring Trustee when a disrespect of remedies is unlikely to be signaled by a complaint from the beneficiaries of the remedy, and impose sanctions in case the remedy is not complied with (see response sub 8).