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Line of business restrictions as a solution to competition concerns – Note by BIAC

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/line-of-business-restrictions-as-a-solution-to-competition-concerns.htm>

Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.PIKE@oecd.org]

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BIAC

1. Introduction

1. *Business at OECD* acknowledges the current OECD *Recommendation on Structural Separation in Regulated Industries (Recommendation)* and the guidance it provides as to those limited circumstances in which structural separation should be considered as a mechanism to reorganise conventional regulated industries.¹ The OECD Recommendation considers structural separation as a particular remedy when deregulating previously state-controlled or natural monopolies such as telecommunications, electricity, rail and gas network infrastructure.
2. When applying a policy of structural separation or lesser business restrictions,² legislators knowingly sacrifice the economic and practical efficiencies of vertical integration for the benefits of seeking a particular market structure and outcome. The efficiencies of integration in digital services are likely to be relevant both on the supply and demand side. The OECD Recommendation can assist in identifying when the benefits are more likely to outweigh the losses.
3. Experience has shown that structural separation has proved successful in some instances but much less so in others,³ and it is important to recognise that in many cases such an approach may be disproportionate and more effective remedies exist and should be preferred. Separation of assets is not straightforward; it requires careful consideration of its definition and scope, an appreciation of the interaction between platform owners and external participants on the platform, as well as ongoing detailed regulation and oversight.
4. By offering innovative services, increased convenience and improved user experience digital platforms have brought large benefits to society. Many online markets display features associated with competitive markets, such as increased output, lower prices and significant entry and expansion. However, digital markets can also display high levels of concentration and there are ongoing cases and a large and growing body of literature that discuss potential competition issues related to digital markets.⁴

¹ OECD, Recommendation of the OECD Council concerning Structural Separation in Regulated Industries, as amended (rev. 2016), available at <http://www.oecd.org/da/competition/OECD-Recommendation-on-Structural-separation-regulated-industries.pdf> [hereinafter OECD Recommendation].

² Line of business restrictions are antitrust remedies or regulatory restrictions that can be used to limit the range of activities that a firm can undertake. They include separation restrictions ranging from structural separation to weaker forms of behavioural separation (accounting, functional and legal separation). However, there are also behavioural restrictions, such as mandating access or non-discrimination obligations.

³ For example, the Australian water sector and the United Kingdom rail sector. OECD, *Structural Separation in Regulated Industries: Report on Implementing the OECD Recommendation* 39-40, 65-68 (2016), available at <https://www.oecd.org/da/competition/Structural-separation-in-regulated-industries-2016report-en.pdf>.

⁴ See Stigler Committee on Digital Platforms, Final Report 23-138 (Sept. 2019), available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E> (Market Structure and Antitrust Subcommittee Report, July 2019); Digital Competition Expert Panel, *Unlocking Digital Competition* (Mar. 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Jacques Crémer, Yves-

5. Whatever the merits of the substantive debate and the potential benefits of separation in the traditional context of deregulating state-owned and natural monopolies, *Business at OECD* believes that agencies should carefully consider whether there is sufficient economic justification, statutory authority and compelling need, taking full account of potential collateral impacts, before considering such an approach to allegedly dominant platforms, whether through structural separation or through line of business restrictions, or whether such an approach to digital markets would constitute an imposition of restrictions that does not satisfy the conditions that history suggests are required to confidently assure successful outcomes.
6. *Business at OECD* believes that where such a balancing exercise is needed to address market structures it may be done in the context of the legislative process, where the pros and cons of regulation are fully debated, as opposed to through blanket approaches by the competition authorities. However, *Business at OECD* does not take a view on whether regulation leading to structural separation, or line of business restriction, is appropriate for digital platform markets *per se*, given how heterogeneous digital platforms are, how many sectors are digitising and how distinct these are from natural monopolies.
7. We conclude these points for discussion with observations on possible considerations to improve enforcement of the competition rules in cases of alleged abuse by digital platforms.

2. Circumstances Where Structural Separation May Be Appropriate

8. *Business at OECD* generally would agree with the considerations identified by the OECD in the *Recommendation* to balance likely benefits and costs of such structural separation:
 - effects on competition;
 - effects on the quality and costs of regulation;
 - effects on incentives to invest;
 - transitional costs of structural modifications; and
 - economic and public benefits of vertical integration.⁵
9. An additional consideration, not identified by the OECD Recommendation, might be the impact of separation on user welfare, particularly in situations involving two-sided platforms where impact on both sides of the platform could be assessed.⁶
10. In practical terms, *Business at OECD* would identify the following characteristics of traditional infrastructure as typical preconditions of consideration for structural separation:
 - Markets to be deregulated are monopolised by nature or by previous state actors or action, often with publicly funded infrastructure.
 - Monopoly is stable and long-established.

Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era Final Report* (2019), available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

⁵ OECD Recommendation, *supra* note 1, at 3; see also BIAC, Comments to Item 6.iii of the Agenda of the OECD Council Meeting of December 13, 2011 (on file with author).

⁶ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

- The monopoly infrastructure is not only difficult to replicate from an economic perspective, but there are frequently public policy reasons (e.g. societal and environmental) as to why it should not be replicated (e.g. water and gas).
- The monopoly infrastructure is clearly defined and can be separated cleanly from potentially competitive activities without undue delay and uncertainty and without necessarily undermining the business model for the infrastructure.
- The interface between the infrastructure and competitive activities is well-established and capable of definition and effective regulation and monitoring.
- The incentives for investment and innovation in both the monopoly and competitive sectors is maintained.

3. Ex Ante Legislative or Regulatory Intervention

11. In situations involving structural separation, particularly where full divestiture is considered, there are concerns regarding fundamental rights. For instance, full structural separation involves modifying the allocation of property ownership and so an interference with the fundamental right to property. Line of business restrictions would disqualify some business operators from full participation in the free market economy, which in some countries could raise similar issues.
12. Such measures therefore demand especially compelling justification when considered in relation to the fruits of private investment and successful business endeavours.
13. Given these considerations, *Business at OECD* would respectfully suggest that structural separation or business restrictions should be imposed *ex ante*⁷, where felt to be necessary, through a legislative act, where the pros and cons of such a measure can be fully analysed and explored, rather than by competition authorities.
14. *Business at OECD* notes, however, that certain jurisdictions have adopted or are considering legislation that provides greater powers to the investigative agencies to impose or recommend structural divestitures or line of business restrictions.⁸ These often use vague and controversial notions, bypassing the rigour and protections of standard competition assessment (e.g., on the notion of market power), as well as the use of non-consumer welfare centric tests.⁹ Structural separation and business restriction remedies should be

⁷ OECD, THE DIVESTITURE OF ASSETS AS A COMPETITION REMEDY: STOCKTAKING OF INTERNATIONAL EXPERIENCES (2019), available at <https://www.oecd.org/daf/competition/divestiture-of-assets-competition-remedy-ENG-web.pdf>. This report documents numerous examples of remedies being imposed as part of individual antitrust enforcement cases, noting that structural remedies are a “powerful tool” for agencies, stating, “The relevant authorities must carry out a delicate case-by-case assessment and balancing exercise in order to determine which type of remedy, or combination, is most appropriate for each case, taking into consideration a number of different factors. . . . Remedies must be capable of fulfilling their aims while staying proportionate, according to the specific case.” *Id.* at 71.

⁸ See, e.g., Draft Tenth Law Amending the Law Against Competition Restrictions For a Focused, Proactive And Digital Competition Law 4.0 (GWB Digitization Law) (Jan. 24, 2020), available in German at https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&v=10 [hereinafter Draft German Digitization Law].

⁹ For example, in South Africa, these include assessing the undefined “adverse effects” on a particular category of competitors as opposed to the traditional “substantial lessening of competition.” Recent amendments to the South African competition legislation significantly exacerbate these risks. Competition Amendment Act 18 of 2018, available at https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf (S. Afr.). The South African competition authorities and the executive possess wide-ranging powers to impose

used as a last resort based on objective and transparent standards. Otherwise, they are likely to have unintended consequences leading to a dampening of competition and infringement of fundamental rights.

4. Digital Platform Markets Do Not Obviously Meet the Circumstances Identified to Make Structural Separation or Line of Business Restrictions an Appropriate Option

15. *Business at OECD* would respectfully suggest that the nature of any alleged market failure arising from the dual role of digital platform owners as platform operators and traders needs to be thoroughly examined, comprehensively understood and verified before considering potential remedies. Digital platforms and their business models are not all the same and any issues to be addressed may be equally diverse.
16. Digital platform markets are varied, and any intervention should thoroughly and comprehensively address multiple considerations, including:
 - The relevance and effect of any self-preferencing by digital platforms.
 - Whether market power is stable or enduring¹⁰ or whether the digital platform is or may be subject to challenge, whether from start-ups or established players expanding into their markets.¹¹
 - Whether network effects may be replicated.
 - A full understanding of the exact scope of what forms part of a digital platform in a way that is clear and well-defined. This may imply several challenging questions in a dynamic environment. For example, is instant messaging a feature of a social media platform or a separate service? Are cyber security services part of the platform to deliver digital goods? Cloud services to store records of commerce over the platform? Lack of certainty on such issues could obscure the cost-benefit analysis that is essential to evaluation of separation issues and impact the incentives for platform operators to innovate optimally. In this context, the varying degree of technical integration between different features and functionalities is of particular importance.
 - A full understanding of the relationships between digital platforms and various categories of traders using them, as these are not always uniform and adapt with improvements to the platform and so may be difficult to reduce to terms or rules capable of being monitored easily by a regulator.
 - An assessment of whether key assets are intangible and global, such that their regulation would have significant extra-territorial effect¹².

structural remedies based on a standard of competition that is much lower than that utilized in many other jurisdictions. Structural remedies can now be imposed taking into account broad and subjective public interest considerations. The subjective nature of the abovementioned considerations increases the opportunity for arbitrary intervention.

¹⁰ Examples of platforms which seemed pre-eminent in the past but are no longer include Yahoo!, Internet Explorer, and MySpace.

¹¹ See Natalie McNelis, *Digital Mergers Don't Deserve "Knee-Jerk" Suspicion, Regibeau Says*, MLEX (Feb. 20, 2020), available at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1165364&siteid=190&rdir=1>.

¹² See Business at OECD, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 to the Roundtable on Extraterritorial Reach of Competition

- An assessment of the economics of digital platform operations, which may be highly interdependent and difficult to disentangle one side of the platform without impacting the whole.
 - The relevance of the evolution of dynamic digital platform markets and consideration of whether intervention will be necessary and effective by the time the remedy is designed, legislated and implemented.
17. *Business at OECD* would also note that the considerations above need to be framed in the context of other issues related to the operation of digital platforms, in particular:
- Data-ownership issues and the tension between privacy and the desire to open up to promote competitor access to complementary activities;¹³ and
 - Responsibility of platform operators for content, both commercial and potentially harmful.
18. Structural separation or line of business restrictions should be a remedy of last resort and should avoid unintended negative consequences, including:
- The alleged dominance of a digital platform could be enhanced and stabilised if line of business restrictions prevent traders from creating new platforms or expanding to offer platform services.
 - The threat of separation, whether structural or by line of business restriction, could lead logically to the closure of some platforms to third parties entirely, which could impact access to market-leading technology and related security, logistics and delivery services.
 - Potential loss to investment and innovation.
19. Indeed, recent experiences and developments within emerging market jurisdictions suggest that pursuing the mandatory use of structural remedies in relation to digital markets might carry significant risk. This is so as structural remedies are often, in many of the emerging jurisdictions, designed to further industrial policy objectives, creating a business environment vulnerable to intervention risk and uncertainty.¹⁴

5. Suggestions For Alternative Approaches to Line of Business Restrictions

20. *Business at OECD* would suggest that thoughtful consideration be given to ensuring the applicable abuse of dominance/monopolization regimes are flexible enough to cope with

Remedies (Dec. 5, 2017), available at http://biac.org/wp-content/uploads/2017/11/BIAC_2017-11-14-BIAC-Extraterritorial-Remedies-FINAL3.pdf.

¹³ Oberlandesgericht Düsseldorf, Aug. 26, 2019, VI-Kart 1/19 (V), available in German at https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2019/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf.

¹⁴ For example, in a South Africa Competition Tribunal case, Sasol Chemical Industries agreed to comply with a structural remedy comprising of a divestiture of its production facilities and business units to pursue specific industrial policy objectives at the behest of the then-Minister of Economic Development. Competition Tribunal of South Africa, Case No 31/CR/May05, available at <http://www.saflii.org/za/cases/ZACT/2008/45.pdf>.

problems which may arise in rapidly evolving, innovation-based markets, including the development of effective remedies¹⁵.

21. Enforcement of abuse of dominance provisions by competition authorities backed by jurisprudence that has largely already been developed and continues to be adapted to platforms should generally be applied as a first order measure to ensure lack of abuses by digital platforms and address any perceived issues with anticompetitive self-preferencing. Laws and regulations which *a priori* impose a blanket prohibition on self-preferencing on certain pre-identified players in the market¹⁶ in some circumstances could negate efficiencies that have been well-recognized in economic literature in connection with vertical integration. Whether such vertical efficiencies exist should be a subject of significant consideration.
22. Regulatory sandboxes, which are testing grounds for new business models that are not protected by current regulation, or supervised by regulatory institutions, could also be used by regulators at the request of industry.¹⁷

¹⁵ Allison Schrager, *A Nobel-Winning Economist's Guide to Taming Tech Monopolies*, QUARTZ (June 27, 2018), available at <https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/>.

¹⁶ See e.g., Draft German Digitization Law, *supra* note 8; Autorité de la Concurrence, *The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges* (Feb. 10, 2020), available at https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf; Proposition de Loi visant à garantir le libre choix du consommateur dans le cyberspace [Proposal for a law aimed at guaranteeing the consumer's free choice in cyberspace], Feb. 19, 2020, available in French at <http://www.senat.fr/leg/tas19-062.html>.

¹⁷ Schrager, *supra*, note 15.