VERIZON COMMENTS

to the U.S. Department of Justice and the Federal Trade Commission

DRAFT VERTICAL MERGER GUIDELINES

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Verizon is pleased to provide these comments on the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together "the agencies") Draft Vertical Merger Guidelines issued on January 10, 2020.[1] We commend the agencies in their effort to provide more clarity and transparency regarding their practice in evaluating proposed vertical transactions. We also welcome the agencies' openness to feedback on the Draft Guidelines by considering input by those affected.

The Vertical Merger Guidelines impact Verizon's businesses at all levels. As our corporate purpose holds, we create the networks that move the world forward, and that enables us to serve customers across our business, consumer, and media groups. As we enter the Fourth Industrial Revolution, technologies are emerging, converging, and affecting consumers and citizens in new and unanticipated ways – and our technology and businesses are at the center of this change. Verizon's 5G technology involves deployment of an ultra wideband network that will transform the way data is transmitted and used throughout the economy. At the same time, we continue to heavily invest in 4G to meet customers' demand for advanced wireless technology and continue to expand our fiber and broadband services to provide more and better access to high speed data services. Our media and technology business continues to innovate and serve customers in new ways with original content, video, web pages, applications, mobile ads, live event coverage, and more. We also support and bring the internet of things to

[1] See U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Vertical Merger Guidelines, Jan. 10, 2020, https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-mergerguidelines-public-comment.

customers, businesses and communities, from our connected cars and fleet businesses to smart community offerings. All of these will be amplified by the convergence of our technology with other technologies, such as augmented and virtual technology, artificial intelligence, robotics, autonomous vehicles and other devices, quantum computing, to name a few. In short, we focus on innovating and building the infrastructure, products, and services integrally linked with the Fourth Industrial Revolution.[2]

Mergers and acquisitions can be an important way to drive innovation and spur the development of new products and services. Through transactions, companies can work to streamline costs and leverage efficiencies and scale, complementary expertise, and research and development resources for greater impact. The use of mergers and acquisitions in the technology, media and telecom (TMT) space to usher in the next phase of technology and even the next industrial revolution is not unique to Verizon. As the Organization for Economic Cooperation and Development (OECD) noted in 2019,

> "[t]he TMT sector has a high incidence of mergers and acquisitions, exceeding the volume of transactions in any other sector and currently accounting for around one quarter of the total M&A activity around the world. Within the TMT sector, the vast majority of mergers takes place within the technological segment (16%), which is relatively new as compared to other industries and, therefore, might still be undergoing a process of market consolidation. The substantial number of mergers within the TMT sector is also explained by the fact that the sector is very dynamic and characterised by the constant entry of firms with innovative business models, many of which are acquired by the established incumbents."[3]

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[2] As the World Economic Forum explained a few years ago, "The Fourth Industrial Revolution can be described as the advent of 'cyber-physical systems' involving entirely new capabilities for people and machines. While these capabilities are reliant on the technologies and infrastructure of the Third Industrial Revolution [which hinged on information technology], the Fourth Industrial Revolution represents entirely new ways in which technology becomes embedded within societies and even our human bodies. Examples include genome editing, new forms of machine intelligence, breakthrough materials and approaches to governance that rely on cryptographic methods such as the blockchain." https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/. The convergence of information and other advanced technologies – quantum computing, 3D printing, virtual reality, 5G, multi-access edge computing, among others – underlies the shift from the Third Industrial Revolution to the Fourth.

[3] OECD Secretariat Background Note on Vertical Mergers 2019, para. 17, https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf.

As the OECD notes, much of this merger activity is non-horizontal, and yet, merger intervention by enforcers is particularly high in this sector despite the largely held belief by enforcers that non-horizontal mergers are usually procompetitive.[4]

Guidance that provides clear direction on agency enforcement priorities and mode of analysis is thus of particular importance in our sector, and especially to Verizon. Guidelines that provide direction and clarity help us gauge how best to achieve innovation and procompetitive goals and assess whether acquisitions intended to further those goals have a strong likelihood of success or whether the risk of agency intervention will be more costly than the likely benefits. Our new business incubation group, which provides a greenhouse to incubate new software businesses leveraging the power of 5G, is one example of the type of area where non-horizontal mergers and acquisitions may be critical, and where clear direction would be particularly useful.

Transactions resulting in complementary assets, scale, experience, and talent may sometimes be the most efficient ways to develop and scale nascent businesses. As we examine opportunities to advance innovations and drive the progress that will allow consumers and society to benefit from the Fourth Industrial Revolution through merger activity, the acquisitions and mergers assessed often involve complex technologies, different types and uses of data and the technical talent of businesses that are not our horizontal competitors.

Withdrawing the 1984 Non-Horizontal Merger Guidelines,[5] which do not reflect the legal, economic, technological, or business developments of the last 35 years,[6] is a positive development towards acknowledging the reality of modern-day competition and enforcement dynamics. Making clear how the agencies view mergers and previewing enforcement priorities in light of dynamic technological and market realities through fresh Guidelines is a valuable

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[4] Id. at paras. 18-19.

[5] 1984 U.S. Department of Justice Non-Horizontal Merger Guidelines, https://www.justice.gov/atr/page/file/1175141/download?mkwid=c.

[6] Since 1984, not only have wireless and wireline technologies undergone several revolutionary changes (when mobile telephones were virtually nonexistent and fiber technology had just been commercially deployed in the US), but the collection, use and importance of data has changed fundamentally. The role of data as a strategic asset, an essential facility, a way to foreclose competition or raise rivals costs has become a serious matter of debate only recently, long after the 1984 Guidelines were drafted.

contribution. While we applaud this effort, we were surprised to see the focus primarily on brick-and-mortar scenarios, and a lack of explanation around the issues that have developed since the 1984 Guidelines – especially how the agency views non-horizontal mergers regarding fast moving, dynamic markets like those in the TMT sector. In particular, the Guidelines would be strengthened in terms of their value to the digital economy by providing more clarity around issues such as:

- what constitutes a vertical merger in the technology space in particular;
- how to define vertical markets – where do vertically integrated markets end, especially when data is at play (see more on data below);
- whether the agencies view intangible assets the same way as tangible assets in assessing vertical mergers;
- in industries where data plays a large role including as an input or potential input, when might data be viewed as a "related product" such that a merger that would otherwise be viewed as non-horizontal and non-vertical now crosses the line to vertical;
- in industries with zero-price products, how is competitive impact measured or assessed for likely harm to competition and consumers; and
- in industries at the center of the Fourth Industrial Revolution, how do the agencies use technological expertise to assess the facts within a broader context that illuminates where the ability and incentives to harm competition exist.

The examples provided in the Draft Vertical Merger Guidelines are useful to provide clarity in linear, more traditional brick-and-mortar type sectors, but that is not the digital world many of us live in today. As the questions listed above and left open by the Draft Vertical Merger Guidelines indicate, additional clarity and direction for mergers involving digital industries would be useful. In particular, it would be helpful to expand the discussion and examples in the next iteration of the Guidelines to clarify[7] how these guidelines apply to the digital economy – particularly given the very large percentage of the economic activity that digital comprises. Moreover, the Draft Vertical Merger Guidelines go to pains to limit their applicability to vertical mergers only,[8] and leave open the assessment of non-vertical, non-horizontal mergers – though the role of intangibles, especially data, raises questions around the practicality of "vertical" and "horizontal" taxonomies in today's world – much less tomorrow's.

Again, we applaud the agencies efforts to grapple with these challenging issues to advance merger review and provide clarity in the interest of preserving and advancing innovation and progress. Given the complexities inherent in non-horizontal issues generally, but especially coupled with the role of data, other intangibles, converging technologies, and the changing expectations and dynamics of the Fourth Industrial Revolution, it is no easy feat. Nonetheless, additional direction and guidance on the agencies' views on "vertical mergers" in digital is essential.

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[7] We strongly appreciate that dynamic industries present complicated - sometimes novel – questions and that market realities and technological evolution require agency flexibility that may not lend itself to black-and-white rules about whether the agency will challenge a merger. Such rules are more feasible for brick-and-mortar industries where the agencies have decades of experience. We do not seek definitive rules but rather request additional clarity to help companies like Verizon understand how the agencies would approach these topics and issues in digital markets.

[8] See Draft Vertical Merger Guidelines, n. 1 ("These Guidelines do not cover horizontal or other types of non-vertical acquisitions.").