

**DRAFT EUROPEAN COMMISSION
MERGER GUIDELINES FOR COMPANIES IN
A VERTICAL OR CONGLOMERATE RELATIONSHIP**

Observations by the AFEP

In February 2007, the European Commission unveiled draft guidelines on vertical or conglomerate mergers. The observations of the French Association of Private Companies (AFEP) regarding the guidelines which the Commission is submitting for discussion are outlined below.

AFEP represents at present more than 85 of the top private sector companies operating in France. The stock market value of the French listed companies which belong to AFEP amounted in 2006 to 1300 billion euros, with more than 4,9 million employees, and a combined turnover of over 1150 billion euros.

Companies welcome the clarification process initiated by the Commission. However, they have reservations about the general methodology and wish to highlight various specific comments about the consultation draft, linked in particular to the notion of efficiency of these vertical or conglomerate merger operations.

GENERAL COMMENTS

While the Commission wishes to provide companies with clarity and predictability, companies nevertheless question the approach that was chosen for achieving this objective. This concerns both the arguments put forward by the Commission for the purposes of its demonstrations, and certain envisaged amendments for which there does not appear to be any clear justification.

In fact, in addition to the precision of the demonstrations, based on numerous examples which convincingly clarify the Commission's approach, intentions have, without justification, been attributed to companies in the context of these operations. The confusion between objective and subjective assertions may call into question the consistency of the approach initiated by the Commission.

Moreover, the Commission considers that vertical mergers generally create fewer problems than horizontal mergers (§11 to 14). This assessment appears to invalidate the judgment that companies systematically infringe competition in this type of operation.

Since vertical operations rarely lead to a reduction in the number of competitors and, on the contrary, enable significant efficiency gains, companies are surprised that the Commission is changing the market shares and concentration levels (IHH). Below these levels it is presumed to be no case for analysing these operations from the standpoint of competition. Companies observe that these levels were recently reiterated in the 2004 guidelines on horizontal mergers¹ and, as a result, that it is not necessary to change them again.

Companies are therefore asking the Commission to maintain these references. Having been part of their practices for a number of months, they give to them the clarity and visibility sought in this consultation.

SPECIFIC COMMENTS

With regard to vertical operations, and taking into account the comments provided by the Commission, companies wish to stress the importance they attach to autonomous intellectual property rights. They would also like to draw the attention of the Commission to certain definitions which appear in the part of the text concerning vertical operations but for which the changes remain valid for conglomerate operations. Finally, they are concerned about the highly speculative nature of the elements taken into account for assessing a conglomerate merger.

Concerning vertical operations

The autonomy of the intellectual property right is essential

Protecting industrial property is of general interest, and its aim is as legitimate as Competition law or the Internal Market. As such, intellectual property rights must be dealt with extremely carefully by Competition Law². As intellectual property is of general interest, the autonomy of its legal framework is fundamental for the development and economic dynamic of R&D and innovation. Any conflicts concerning legal approaches must be settled on the basis of analysing the socio-economic effects specific to each situation.

However, companies are concerned about the growing gap between what the Community authorities say about increased protection of intellectual property rights and the growing number of obstacles facing them when they seek to actually protect these rights. The risk is that the motivation of innovation could increasingly be hindered, at the risk of pulling the plug on the driving force behind the growth of European companies, and therefore their competitiveness.

¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJEU C 31/5 of 05.02.2004).

² This refers to the footnote on page (22) of §32, which mentions a generic term for the notion of contribution (“inputs”) which, among other things, covers “access to intellectual property rights”.

Certain definitions must be clarified

This is the case for the notions of relevant market (§23), efficiency gains and period during which these efficiencies can be assessed.

- Relevant market

In §23, the Commission sets out the principle whereby non-horizontal operations do not hinder effective competition provided that the merged entity has no market power in at least one of the markets concerned.

Although the companies agree with this principle, they nevertheless propose that the relevant markets concerned should be specified. Indeed, the effect of such an operation can *de facto* often increase the market power of the new entity without it being worthwhile taking it into account in the analysis in that these markets concerned have little significance for the new entity.

- Efficiency gains

According to §85³ of the Commission's 2004 guidelines on horizontal mergers, the "efficiency gains generated by the concentration" must satisfy two conditions:

- the gains must be a direct consequence of the operation,
- they cannot be obtained to a similar extent by means of less anti-competitive alternatives.

The companies would like the Commission to clarify this definition by indicating that efficiency gains should be taken into account even when they are not caused exclusively by the merger.

- Assessment of efficiency gains over time

The Commission considers in §83⁴ that the more remote the planned efficiency gains are in time, the less relevant they are. To offset any infringements of competition, they "must happen in a timely manner".

Although it is flexible, this time notion appears so imprecise that it is bound to create uncertainty for companies. They cannot anticipate which criteria the Commission will use to assess the positive effects of the operation for consumers. They would therefore like the Commission to take into greater account the time for both the company and its investments, which are often medium or long-term.

Concerning conglomerate operations

The approach described by the Commission when it comes to analysing conglomerate mergers with non-coordinated effects (§92 et seq.) appears highly speculative for companies, to an even greater extent than the other guidelines. In fact, they question the relevance and the robustness of the hypotheses liable to be constructed by the Commission on the basis of such anticipations. The examples described by the Commission probably fall more within the domain of *a posteriori* control of abuse of a dominant position.

³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03); OJEU of 5.2.2004.

⁴ Ibid.