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**Comments on the draft Commission Guidelines
on the assessment of non-horizontal mergers**

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1. Criteria for evaluating the draft Guidelines

The aim of the draft Commission Notice is to provide guidance as to how the Commission will assess non-horizontal mergers, i.e. mergers involving undertakings active on distinct relevant markets.

Guidelines are useful if they clearly set out the methodology followed by the Commission and, in particular, systematically identify the factors which may be referred to in order to exclude the likelihood that a merger will cause competition concerns.

In order to provide guidance, the Notice should focus on scenarios of competition harm which in practical experience have turned out to be relevant for the enforcement of competition rules and, in particular, as a basis for the prohibition of non-horizontal mergers. A comprehensive review of economic theories, like the one contained in the Church Report, if included in the Guidelines would increase uncertainty and result in over-deterrence of innocent transactions.

We congratulate the DG Comp for the quality of the draft Guidelines and, in particular, for the focus on a small number of "main scenarios of competition harm" (¶ 22).

A few aspects may still be improved. In particular, we suggest the Commission to review all the statements which increase uncertainty on the assessment process and to consider whether it is possible to eliminate them from the final text.

2. Differences between horizontal and non horizontal mergers

The purpose of regulation no. 139/2004 is to prevent mergers that would significantly increase the market power of firms, i.e. the ability of one or more firms to profitably increase prices, reduce output or quality, or otherwise cause customers a competitive harm.

The assessment of non-horizontal mergers under regulation n. 139/2004 differs from the assessment of horizontal mergers in two main respects.

First, non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers. The reason, apart from positive effects in terms of efficiencies and elimination of transaction costs, is that non-horizontal mergers do not entail a loss of direct competition between the merging firms in the same relevant market (¶¶11-14). Non-horizontal mergers may cause harm to consumers only by changing "the ability and incentive to compete on the part of the merging companies". This entails a prospective analysis based on prediction of events which are more or less likely to occur in the future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted. As pointed out by the case-law, the analysis may cover

a period of time stretching well into the future and the specific conduct of the merged entity may determine to a great extent what effects the concentration has. For this reason, the Community Courts laid down a high standard of proof for the prohibition of non-horizontal mergers. In particular, for conglomerate mergers the Courts require the Commission to show that, by reason of their effects, a dominant position would “in all likelihood” be created or strengthened “in the relatively near future” and would lead to effective competition on the market being significantly impeded as a result of the concentration¹. In these cases, the quality of evidence produced by the Commission in order to form a sound basis for a prohibition decision is particularly important, since it must support the Commission’s conclusion that if such a decision were not adopted the economic changes envisaged by it would be plausible².

Second, for non-horizontal mergers the alternative of ex post control is more viable than for horizontal mergers. From a public policy perspective, the option to prohibit a merger under regulation no. 139/2004 should always be assessed against a scenario of ex post intervention, based on article 82 of the Treaty for non coordinated effects and, in case of coordinated effects, also on article 81. In the case of non-coordinated effects, for horizontal mergers the main alternative to the prohibition of the transaction is the ex post prohibition of exploitative abuses, which is hardly feasible; for non-horizontal mergers the alternative is much more meaningful: it is the prohibition of exclusionary abuses, which is by far the core activity in the enforcement of article 82 of the Treaty.

3. Ex ante prohibition of non-horizontal mergers versus ex post application of article 82

The higher the uncertainty on the negative impact of a merger, the more seriously the Commission should consider the alternative of ex post control. In the case of non coordinated effects, in our view the ex ante prohibition of the merger should be used only when ex post intervention based on article 82 would be clearly inefficient or ineffective.

Paragraph 44 of the draft Guidelines recalls that the Community Courts formally required the Commission to consider, at least *prima facie*, whether, under the existing legal prohibitions to anticompetitive conduct, the merging undertakings would have less or no incentive to behave after the merger in a way that would damage consumers. In particular, the case-law requires the Commission to assess, “on the basis of a summary analysis” whether a given conduct would be “clearly or highly probably unlawful” under Community law.

¹ Case T-210/01, *General Electric v. Commission* (2005), ECR II-5575, paragraph 65; Case T-5/02, *Tetra Laval v. Commission* (2002), ECR II-4381, paragraph 153.

² Case T-210/01, *General Electric v. Commission* (2005), ECR II-5575, paragraph 66.

We argue that the Commission should not limit itself to satisfy this legal requirement. In the exercise of its discretionary power, before resorting to the prohibition of mergers the Commission should always compare the effects of the use of ex ante and ex post control instruments as part of its task to ensure effective enforcement of Community competition rules, taking into account the need not to unduly chill market developments.

The Guidelines might more clearly anticipate self-restraint when ex post control would be effective, especially in the section on conglomerate mergers.

4. Notion of consumer harm and anticompetitive foreclosure

Only mergers that “cause harm to consumers” should be prohibited (¶¶10 and 15). The Notice properly addresses the concept of consumers, clarifying that when intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling; indeed, “the mere impact on competitors at some level of the supply chain” should not matter (¶ 16 and footnote 12).

For non coordinated effects, it is important to stress that a significant impediment to effective competition may only arise from “anticompetitive foreclosure”, and not from foreclosure as such. To this aim, we suggest to modify paragraph 18 as follows:

“As for coordinated effects, a significant impediment to effective competition may arise when non-horizontal mergers give rise to ‘anticompetitive foreclosure’. In this document the term “foreclosure” is used to describe any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete. The instances where, as a result of such foreclosure, the merging companies – and, possibly, some of its competitors as well- may be able to profitably increase the price charged to consumers, are referred to as ‘anticompetitive foreclosure’”.

5. Terms of comparison for evaluating the effects of the merger

The Notice states that in some circumstances the Commission will not take the conditions existing at the time of the merger as the relevant comparison for evaluating the effects of the merger, but will consider future changes to the market that can be reasonably predicted (¶20). It is of the utmost importance that a symmetric prospective analysis is carried out to ascertain the circumstances which increase and those which eliminate competition concerns.

6. Safe harbours

Guidelines should usefully identify safe harbours, i.e. circumstances under which the undertakings may expect that the Commission will not extensively investigate the merger since the risk of significant competition concerns may be reasonably excluded.

The draft Guidelines on non-horizontal mergers indicate a market share threshold below thirty per cent in each of the markets concerned and a post merger HHI below 2000; however they add a wide list of exceptions under which these thresholds will not be considered (basically when the merger involves an aggressive competitor or in situations where coordination is likely).

We suggest to eliminate the claim that the thresholds “do not give rise to a legal presumption”. The legal consequences of a Commission Notice are known; the specification in a chapter of the Guidelines of the value of statements contained therein may give rise to misunderstandings.

Indeed, the indication of thresholds is useless if undertakings cannot expect the Commission to consider them as safe harbours.

The draft Guidelines recognize that in the context of non-horizontal mergers it is less appropriate presenting market shares and concentration levels above which there are competition concerns (¶ 26). It would seem desirable to dedicate a separate paragraph to this statement, in order to underline its importance.

7. The three analytical steps for the assessment of anticompetitive foreclosure

The draft Guidelines indicate that in assessing the likelihood of an anticompetitive foreclosure scenario the Commission examines, first, whether the merged entity would have post merger the ability to substantially foreclose, second whether it would have the incentive to do so and third whether the foreclosure strategy would have a significant detrimental effect on competition (¶¶ 31, 58 and 93). The incentive to foreclose depends on the degree to which foreclosure would be profitable.

The three different analytical steps indicated in the draft Guidelines provide a very useful guidance to the Commission assessment of the likelihood of an anticompetitive foreclosure scenario. It seems important that all three factors are always taken into account.

8. Vertical mergers

We suggest to change paragraph 28 as follows:

“ A vertical merger may significantly impede effective competition through non coordinated effects ~~mainly~~—when it gives rise to anticompetitive foreclosure. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found event if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. ~~As a result of such foreclosure~~ Such foreclosure may have anticompetitive effects when it enables the merging companies –and, possibly, some of its competitors as well- ~~may be able to~~ profitably increase the price charged to consumers”.

We wonder whether the scenario described in paragraph 37, i.e. the price increase in an oligopolistic input market as a result of input foreclosure, has enough empirical relevance from a policy viewpoint to deserve a mention in the Guidelines.

The draft Guidelines include the content of internal strategic documents such as business plans among the factors that the Commission may take into account in its assessment of the likely incentives of the merged firm to foreclose rivals (¶ 43). In our view, statements contained in internal documents, showing the intent to compete aggressively and reduce the competitiveness of rivals, should not be considered *per se* sufficient to prove the existence of economic incentives to anticompetitive foreclosure.

The Commission states that when assessing efficiencies in the context of non-horizontal mergers, it will apply the principles already set out in Section VII of the Notice on Horizontal Mergers. The burden to prove efficiencies is on the merging parties. In particular, the draft Guidelines state that the Commission will not take account of efficiency claims unless efficiencies benefit consumers, are merger-specific and verifiable (¶ 55); moreover, they add that efficiencies may not always be merger specific in that vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anticompetitive effects.

In general, we believe that for non-horizontal mergers the positive impact of the transaction should be considered, together with its possible negative impact, within an overall assessment of the prospective impact of the merger itself, and not as a separate step, under the strict conditions provided for efficiency defences. Efficiency defences should be considered only when the overall assessment of the merger has clearly shown that the concentration may significantly impede effective competition to the detriment of consumers.

Moreover, the implicit presumption that vertical cooperation or vertical agreements may in most cases be an effective substitute for a merger entails the danger of a regulatory approach. The counterfactual for justifying the prohibition of a merger should be the absence of the merger, not a different form of integration preferred by the competition authority.

9. Coordinated effects

The list of ways in which a vertical merger may make it easier to reach a common understanding on the terms of coordination should include only factors which may be empirically relevant in a merger control perspective. The elimination of a maverick in a market, for instance, may certainly be one of these factors (¶ 84). We would not include in such list the reduction in the number of effective competitors in the market which may result from a vertical merger (¶ 82), since the statement might be interpreted as a truncated rule implying a per se prohibition of vertical mergers leading to foreclosure, and not just of those leading to anticompetitive foreclosure. The same can be said with reference to the inclusion of the reduction in the number of competitors among the factors which facilitate monitoring each other's actions on the market (¶ 86).

In our view, the current text puts an excessive emphasis on coordinated effects. The Guidelines might usefully recognise that, so far, the risk of coordinated effects as a basis for the prohibition of non-horizontal mergers has not had much empirical relevance.

Footnote 74 is not clear. In particular, it does not explain how the parties, if the merger had taken place, would have been able to avoid that downstream competitors turned to cement imports from other countries.

10. Conglomerate effects

As for the assessment of conglomerate mergers, the draft Guidelines contain a series of important statements: in the majority of cases such mergers do not lead to any competition problems (¶ 90); tying and bundling are common practices that often have no anticompetitive consequences (¶ 92); the portfolio effect, i.e. the fact that the merged entity will have a broad range of products, does not, as such, raise competition concerns (¶ 103). Moreover, the draft Guidelines usefully focus on the ability and incentive to leverage a strong market position from one market to another, leading to foreclosure, and on the need for the Commission to verify whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers (¶ 92-93). Finally, the draft guidelines stress that in its assessment the Commission will consider, on the basis of the information available, whether there are effective and timely counterstrategies that the rival firms may deploy (¶ 102).

For conglomerate mergers it seems particularly important that the Commission resorts to the prohibition of mergers only when ex post intervention based on article 82 would be clearly ineffective (see section 3 of our comments).

As anticipated for vertical mergers, a likely reduction of the number of competitors as a result of a non horizontal merger should not be considered, as such, sufficient to prove that foreclosure will have a significant anticompetitive effect through coordinated effects.

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