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Subject Matter: DRAFT COMMISSION NOTICE
Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings

Submissions by: Bird & Bird

Introduction

Bird & Bird broadly welcomes the Guidelines on the assessment of non-horizontal mergers. However, we wish, as an attempt to introduce clarity in a complex area of law characterised by many variables, to make some suggested additions or changes to the Guidelines.

The following three areas could be clarified:

- I. Relevant market power in vertical mergers and the HHI Index
- II. Relevance of the Article 82 prohibition and sector specific regulatory measures
- III. The concept of multi market competition

I. Relevant market power in vertical mergers and the HHI Index

Bird & Bird agrees with the Commission's approach to relevant market power (paragraph 25 of the draft Guidelines), though we consider the Guidelines should state that no presumption, not merely no legal presumption, arises where the parties come below the stated thresholds. Generally, in vertical mergers, in contrast to horizontal mergers, concentration issues do not arise insofar as there is rarely any concentration in the same market. The draft Guidelines state that there will normally be no concern in non-horizontal mergers when the post-merger market share of the merged entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000, save in the following exceptional circumstances:

- The merger involves a company that is likely to expand significantly in the near future.
- There are significant cross-shareholdings or cross-directorships in the market.
- There is a high likelihood that one of the merging firms would disrupt coordinated conduct.

- There are indications of past or ongoing coordination.

We propose that another exception should be added providing for situations where, for example, a downstream competitor of the merged entity becomes a customer for upstream supplies by the new merged entity. The merged entity could then have access to confidential information as the supplier, which would give it an advantage as a competitor. This type of situation was examined in the *EDP/ENI/DDP* case.¹

Clearly the transfer of sensitive confidential information clearly raises competition concerns. Although this point is at present addressed in the Guidelines in paragraph 77 and also in footnotes 6 and 39, we believe it is appropriate to give it more prominence. For these reasons we believe that this type of situation (involving a merged entity as supplier obtaining sensitive information from a customer which competes with it downstream) should be a further stated exception in relation to the market share and concentration thresholds described in paragraph 25.

II. Relevance of the Article 82 prohibition and sector specific regulatory measures

In paragraph 44 of the Guidelines the situation is briefly addressed of whether a merger should be prohibited in so far as any likely anti-competitive consequences of the merger could be the subject of enforcement action as an abuse of dominance or under sector-specific regulatory measures.

Regarding the question of the lawfulness of likely conduct of the merged entity in relation to Article 82, paragraph 44 correctly reflects the *Tetra Laval*² judgment of the European Court of Justice, in particular paragraphs 74-78. However, the Guidelines could go further and state that, in particular, it is not necessary for the anticipated conduct in question to be discouraged by the possibility of it being unlawful by reference to Article 82 EC (or national laws) or specific regulatory measures, in order for the Commission to be able to invoke its powers under the merger control Regulation.

The implication is that the Commission, in assessing whether conduct can be expected to substantially reduce competition for purposes of the merger control tests, is not required to distinguish whether such conduct would be prohibited under Article 82 EC. If the Commission were required to make an evaluation of whether conduct came into one category or the other (and could only oppose the merger if the conduct would only be caught by the merger control rules), then this could detract from the effectiveness and focus of a merger control investigation.

Specific regulatory measures provide for the prohibition of abuse of various forms of anti-competitive conduct, but reliance on them is often not sufficient as

¹ Case No COMP/M.3440; *ENI/EDP/GDP* (see paragraphs 368-379)

² Judgment of the Court 15.02.2005 in Case C-12/03

anti-competitive conduct can occur even where the regulatory measures are not prima facie infringed. In this context two situations should be addressed in the Guidelines:

- First, conduct of the merged entity could have an adverse effect on price competition and yet not technically be caught by the sector specific competition regulatory purposes, which may give rise to a need for separate assessment. This can occur, for example, because there is no transparency on why a new entity raises prices.
- The second point is connected to this issue, that the secrecy and complexity of certain contractual provisions of the new merged entity can make it impossible for competitors or the regulatory authorities accurately to detect actual pricing strategies or whether they are caught by sector specific regulatory measures.

Each of these issues arose in the *EDP/ENI/DDP* case, in paragraphs 424 and 414 of the decision. This shows that it is often not sufficient to rely on sector specific regulation to avoid the adverse effect of the merger.

III. The concept of multi market competition

Regarding the concept of ‘multi market competition’, referred to in paragraph 119 of the draft Guidelines, we question whether there is any clear issue that can properly be addressed in these Guidelines.

At least, the concept should be explained in more depth highlighting the specific concerns which the Commission will seek to assess.

All merger control investigations require an assessment on a market by market basis. Therefore we question the appropriateness of the reference to ‘multi-market competition’ and in particular the appropriateness of the second sentence in paragraph 119 of the draft Guidelines.

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