

Group Legal Department

**DRAFT COMMISSION NOTICE**  
**Guidelines on the assessment of non-horizontal mergers under the Merger Regulation**

**France Télécom Group comments on the EC consultation**  
**13/05/2007**

France Télécom welcomes the initiative of the European Commission ("EC") of guidelines on its analysis of non-horizontal concentrations. In its draft document subject to consultation, France Télécom's view is that the EC introduces more elasticity and economics in its assessment of the potential effects of vertical and conglomerate concentrations.

This approach is considered positive, although it remains necessary for the EC to preserve at the same time a sufficient level of legal certainty for parties to concentrations. Indeed, these kind of operations are of significant importance in the business life of companies, and it must therefore be ensured that a certain level of predictability and security is maintained for companies which will have to decide whether or not to engage in such operations.

Therefore, France Telecom would like to make a number of comments on the proposition of the European Commission. On a general level, France Telecom considers that the Commission leaves open a relatively high number of situations and scenarios, which gives limited legal certainty to companies. Moreover, the draft guidelines raise the issue of the borderline between what should fall under ex-ante merger control, and what should be reasonably left to ex-post control through article 81 and 82 EC.

**I. General comments : definitions**

France Télécom regrets that the EC decided to define conglomerate mergers negatively as "mergers between firms that are in a relationship which is neither purely horizontal, nor vertical" (§ 5). This choice of definition is neither clear nor precise in the context of the guidelines whose aim is to give more clarity to companies. Conglomerate merger should not be the third category encompassing all concentrations that are not horizontal nor vertical, but should be positively defined as mergers between firms providing complementary products on distinct relevant markets. Only those truly conglomerate mergers should be analysed by the EC in the light of the draft guidelines.

As for the definition of coordinated effects with the context of non-horizontal mergers, France Telecom notices that there is no reference made in that definition to the concept of collective dominance (which covers in principle the same effects and risk for competition<sup>1</sup>), reference which would have enabled the EC to rely on its former case-law on the subject. The existence of coordinated effects through the creation of a collective dominant position is not incompatible with the test of article 2.2 of the Merger Regulation<sup>2</sup>. France Télécom wonders at the absence of such reference.

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<sup>1</sup> Except that collective dominance is limited to oligopolistic markets, which, as outlined below, is not the case for coordinated effects.

<sup>2</sup> Regulation n°139/2004 of 20.01.2004

## II. Market Share and concentration levels

It is appreciable that the EC has set a necessary condition to the existence of a possible threat to competition of non-horizontal mergers<sup>3</sup>. This condition is stated several times at various steps of the analysis as well, and it would be useful for the EC to confirm that this prerequisite should be verified once and for all before the analysis itself.

France Télécom agrees that market shares and concentration levels are among the most appropriate tools to be used to determine the market power of a company. However, two comments have to be made in that regard:

- Firstly, the market share threshold is considered rather low (30%) for the determination of market power. There is in this proposition a certain inconsistency with prior practice from the EC with regard to determination of market power/importance, and France Télécom would have favoured a level closer to that of dominance.
- Secondly, the EC sets a number of exceptions to the market share and HHI levels, which makes it even more difficult to have any degree of certainty as to the way a merger will be treated. Indeed, the first three exceptions, about which no detailed explanation is given (cf. §25), seem to us to leave the EC too much discretion in their assessment, and thus weaken the proposed “level system”.

Therefore, the market share and concentration levels stated in the proposed guidelines, although useful, lack in legal certainty for parties to a merger.

## III. Assessment of Vertical and Conglomerate Mergers

On the general assessment proposed by the EC for both types of Mergers, France Télécom globally agrees with the three-step analysis described, as well as with the setting up of a necessary condition providing that competition issues can only be raised in cases where a party has market power on a market.

France Télécom also agrees with the way the EC deals with efficiencies, although it would have been welcome to have a lighter burden of proof for the companies.

However, France Télécom would like to make several comments on specific elements of the proposed analysis :

- In §28, the EC indicates that for foreclosure to be found, “it is sufficient the rivals are disadvantaged and consequently let to compete less effectively. This proposition widens inappropriately the cases where the EC could consider competition to be impaired, since it seems that any disadvantage to rivals would create foreclosure, instead of having a set of conditions as to when a “disadvantage for rivals” actually becomes a competition issue. Usually, the idea behind a merger is for the parties to try to create an advantage for the merged entity, through synergies, share of know-how, efficiencies, etc. When does the related disadvantage created for the rival amount to a competition issue? France Télécom would welcome a clarification on this point, in particular the EC should clarify if any disadvantage, as long as it creates a disincentive to compete, amounts to anti-competitive foreclosure.

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<sup>3</sup> this condition being the existence of a market power from one of the parties at least on a relevant market

- In §30 and following, the EC explains how the ability to foreclose can be found if the merged entity is able to adopt a defined “foreclosure” strategy , such as a restriction of supply, price raise, choice of another technology, degradation of the quality of input supplied, etc. Globally the EC presents as cases of foreclosure express actions of the company, which would impede competition, and that the company itself may consider as an unlawful strategy. France Télécom wonders as to the extent to which these strategies directly stem from the merger itself and should be treated ex-ante rather than ex-post through article 82. Moreover, in this context, what would be the remedy against adopting such a strategy? Would it be requiring the parties not to engage in an unlawful strategy?

Finally, on this issue, the EC seem to presume the anti-competitive intent of the merged entity. For example, the EC doesn't give any scenario where conduct on the upstream market even, if has negative effects, can be justified by other reasons than the willingness to impede competition. Such a presumption is also dangerous for the parties to a concentration, and the EC should leave room for the companies to provide alternative reasons for a potential strategy .

France Telecom's remaining comments on specific elements of the analysis are made below following the structure of the draft guidelines.

### *1. Input foreclosure in vertical mergers (pt 30)*

The EC considers that foreclosure can arise when the input is important on the downstream market, it being enough that “the cost of switching to alternative inputs is relatively high” (§33). This criteria seems both too broad and too vague, leaving too much discretion to the EC.

France telecom would prefer the EC to refer to the existing notion of essential facility in the context of this assessment, and to apply the conditions for defining such an essential facility in the context of the definition of an “important input”.

In § 44, the EC explains that it will put in the balance the disincentive represented by the risk of the strategy to be considered illegal (by competition law or regulation more particularly) and the disincentive of the related sanction if the company is found and fined. This raises again the question of whether the strategy should be prevented ex-ante by merger control, or should be only sanctioned ex-post if and when it actually happens. A merger can not be prohibited in order to prevent the parties to act unlawfully.

### *2. Customer foreclosure (pt 57)*

Among the various scenario described, the EC sets the necessary conditions for significant impediment of competition<sup>4</sup> in the case of customer foreclosure. France Télécom welcomes the initiative but would have favoured a set of conditions clearly defined and more easily identifiable for companies.

### *3. Other non-coordinated effects of vertical mergers*

France Télécom does not believe that vertical mergers are likely to create non-coordinated effects other than foreclosure, in particular as relates to access to sensitive information from

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<sup>4</sup> e.g. § 61 : « customer foreclosure can lead to higher input prices only if there are significant economies of scale or scope in the input market » ; §73 : « it is only when a sufficiently large fraction of upstram output is affected that the merger may significantly impede effective competition ».

competitors. Such scenario should not be dealt with under merger control, but should be left to procedures under article 81EC

#### *4. Coordinated effect in vertical mergers.*

In addition to the comments already made regarding this section, France Télécom notes that the EC does not limit the existence of coordinated effects to oligopolistic markets.

Moreover, it gives only broad and vague examples as to how a vertical merger could favour coordination. An example of this is that the EC retains as relevant criteria the fact that a vertical merger reduces the number of players (§ 82), which is the case for all mergers.

In France Télécom's opinion, the analysis of coordinated effect, as presented by the EC, leaves a large discretionary power to the EC, to the detriment of the parties to a merger.

The EC should define limits to its analysis of coordinated effects through the addition of an "oligopolistic market prerequisite", and the clarification of the scenarios in which a vertical merger could create a high likelihood of coordination on the market.

#### **IV. Assessment of conglomerate mergers (pt 90)**

Generally, the comments made on the assessment of vertical mergers can be made for conglomerate mergers as well, in particular regarding the identification of positive strategies which could be dealt with ex-post (strategies of bundling and tying), and a lack of clarity as to the definition of the conditions in which competition issues may arise (use of undefined terms such as "large pool of customers"<sup>5</sup>, "large fraction of output"<sup>6</sup>).

The same comments above relating to the analysis of coordinated effects are also relevant within the context of conglomerate mergers.

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<sup>5</sup> §99

<sup>6</sup> §111