



Aan  
European Commission  
Directorate-General for Competition  
Consultation Non-horizontal merger  
guidelines  
Merger Registry  
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Onderwerp  
Written reaction of the Dutch Ministry of Economic Affairs and the Netherlands  
Competition Authority on the Draft guidelines on the assessment of non-horizontal  
mergers

The Dutch Ministry of Economic affairs (hereinafter Ministry) and the Netherlands  
Competition Authority (hereinafter NMa) would like to thank the Commission for  
preparing the draft guidelines on the assessment of non-horizontal mergers under the  
Council Regulation on the control of concentrations between undertakings. Below you  
will find the joint reaction of the Ministry and the NMa. Before drafting this reaction we  
consulted Undertakings, Lawyers, Practitioners, Economists and Academics in a round  
table discussion on this subject. We would like to draw your attention to the following  
points.

1. First we would like to mention that guidelines on this subject are very much  
welcomed. Hopefully the document will have an educational function for all  
national competition authorities, which will increase predictability for  
undertakings through a clear framework of assessment and subsequent consistent  
application by competition authorities in all member states. The document could  
thereby lead to a harmonised approach towards non horizontal mergers  
throughout the European Community. In our view the document could give even  
more guidance to competition authorities and undertakings when the Commission  
would incorporate some clear examples of cases that have been dealt with, or of  
hypothetical cases. Furthermore, more extensive reference should be made to  
other relevant guidelines of the Commission (apart from the guidelines on  
horizontal mergers), for example to the application of Articles 81 and 82 of the  
Treaty.

Bezoekadres	Doorkiesnummer	Telefax
Bezuidenhoutseweg 30, Den Haag	(070) 379 67 10	(070) 379 60 94
Hoofdkantoor	Telefoon (070) 379 89 11	Behandeld door
Bezuidenhoutseweg 30	Telefax (070) 347 40 81	T.D. Stroband
Postbus 20101	Email ezpost@minez.nl	
2500 EC 's-Gravenhage	Website www.minez.nl	<i>Verzoeken bij beantwoording van deze brief ons kenmerk te vermelden</i>



2. The Commission clearly adopts a three-step approach in its framework of analysis as laid down in the current draft guidelines. First the Commission looks at the ability of the merging parties to foreclose rivals, second the Commission assesses the incentive of parties to foreclose and lastly the detrimental effect on competition has to be determined. We regard this approach as useful and thorough and believe this will contribute to a consistent application of merger enforcement within Europe.
3. Post-Chicago literature has provided for several possible theories of anticompetitive harm resulting from non-horizontal mergers. However, there is only limited empirical evidence explicitly establishing the negative effects of non-horizontal mergers on competition, whereas the potential for such mergers to result in efficiencies is more widely supported, both in theory as well as in practice. Although it is understandable that in the guidelines the Commission mainly focuses on those instances in which possible negative effects on competition are most likely to occur, the abovementioned facts could be acknowledged more explicitly in the document.
4. The Commission's choice for the general term market power as being the essential element for foreclosure to become a concern does in our opinion not reflect an adequate level of clarity. Most firms in most markets have some degree of market power. The relatively limited number of situations in which foreclosure through vertical or conglomerate integration can become a profitable strategy for merging parties, does not warrant such a general criterion. We therefore believe that the use of the term 'an appreciable degree of market power' would be a better criterion.
5. We welcome the Commission's decision to provide for a safe harbour in its guidelines. However, when considering the likelihood of non-coordinated effects resulting from non-horizontal mergers - and given that such concerns are more likely to be of relevance than coordinated effects - the current safe harbour appears somewhat too much 'on the safe side'. In most economic theories regarding foreclosure, strategic behaviour only becomes relevant in instances well above these thresholds. Perhaps the Commission can take this into consideration when deciding upon the thresholds in the current document.
6. There is a general consensus, also on the part of the Commission, on the ability of most non-horizontal mergers to provide substantial scope for (significant) efficiencies - often leading to pro-competitive results - as compared to those achievable in horizontal cases. Additionally, given that non-horizontal mergers do not lead to a direct elimination of competitors, an entirely analogous assessment of efficiencies under both regimes does not necessarily seem appropriate. In this regard, within its three-step approach the Commission could



give greater and more explicit consideration to the efficiencies that arise as a result of non-horizontal mergers. Especially when assessing the possible detrimental effects on competition, the Commission could in our opinion give clearer guidance on the different types of relevant efficiencies it will consider as well as the way in which it will weigh these efficiencies against possible anticompetitive effects, such as foreclosure of rivals.

7. The Commission could also give more explicit consideration to the impact of dynamic effects as a result of non-horizontal mergers, both in its general treatment of efficiencies as well as in the possible efficiency defence for merging parties. Herein lie multiple opportunities for dynamic efficiencies to occur, such as the effects of possible counter strategies by rivals in the markets concerned as well as effects on incentives for investments in innovations, possibly leading to a general increase in overall welfare post-merger.
8. Furthermore, cases can arise wherein a direct relationship between efficiencies and the incentive to foreclose exists. This could for instance be the case where, as a result of vertical integration, the downstream firm will prefer to predominantly or solely use internally supplied inputs, effectively leading to customer foreclosure. Such situations should be distinguished from instances wherein through strategic conduct - possibly even leading to short-run losses - a vertically integrated firm specifically aims to foreclose competitors either upstream or downstream. In the current guidelines such a distinction does not become very apparent and a further elaboration by the Commissions could be clarifying.
9. Although many of the efficiencies that can be achieved through a non-horizontal merger could also be achieved by way of for example extensive contracting, this does not necessarily imply that it is to be preferred over a merger. First of all, similarly exclusionary effects as anticipated with a merger can also be achieved by way of contracting. Secondly, given that contracts are not necessarily perfect substitutes for a merger - for instance due to double sided moral hazard problems - contracting may even result in similar foreclosure effects but without allowing the full potential of efficiencies to be realised. Furthermore, contracts will be subject to continuous renegotiations as well as antitrust assessments within dynamic settings, significantly increasing the costs of such alternatives. These considerations should therefore also be more explicitly taken into account within the Commission's assessment of the overall likely impact on effective competition (para 52-56), and not merely be left for the merging parties to substantiate.
10. Although the sections concerning coordinated effects provide a number of scenarios wherein such mergers could give rise to an anticompetitive outcome,- be it 'directly' or 'indirectly' as a result of foreclosure - it does so without



providing a sufficiently clear framework within which the likelihood of such effects can be evaluated. Given the difficulties in assessing this likelihood as well as giving credence to such effects ex ante, the Commission could more explicitly attach weights to the different conditions within the markets concerned. More legal certainty for merging parties can mitigate potential chilling effects resulting from a prominently figured yet insufficiently clarified section on coordinated effects.

Yours sincerely,

A.J.I. van den Ende  
deputy Director Competition Department  
Ministry of Economic Affairs

A.J.M. Kleijweg  
acting Director Merger Control Department  
Netherlands Competition Authority