

**Contribution of the Tilburg Law and Economics Center (TILEC)  
to the Commission's call for comments**

on the draft Guidelines on the assessment of non-horizontal mergers under the Council Regulation  
on the control of concentrations between undertakings

This paper presents the TILEC\* contribution to the call for input issued by DG COMP on 13 February 2007.

1. TILEC welcomes the draft Guidelines on the assessment of non-horizontal mergers and recognizes the role for such a document in providing clarity on the circumstances in which competition law will apply and on the approach that will be taken in the assessment of facts. We are pleased to find that the document incorporates theoretical findings of the recent economic literature on non-horizontal mergers. Thus, TILEC broadly supports the Commission's position as set out in the draft Guidelines. However, we believe that the draft Guidelines would benefit from being more specific and clear on certain points. In this way, the draft Guidelines could advance legal certainty and promote efficient deterrence of anticompetitive vertical mergers.
2. We agree with the view that a non-horizontal merger is less likely to create competition concerns than a horizontal merger, for the same reasons as outlined in para. 12 and 13 of the draft Guidelines. On the other hand, there are many ways in which a non-horizontal merger might impede competition and the draft Guidelines comprehensively review the factors that facilitate anti-competitive behaviour, incorporating recent theoretical contributions.
3. TILEC welcomes the clarity of the draft Guidelines as to the need for analysis of the **two** necessary conditions for anti-competitive behaviour: ability and incentive, both when it comes to coordinated and non-coordinated effects of non-horizontal mergers. Moreover, the draft Guidelines insist on the need for a merger to have an overall likely impact on effective competition for competition concerns to arise, in line with the new standard review in Regulation 139/2004. Paras 46 and 47 of the section on "*Overall likely impact on effective competition*", however, contain elements that relate to ability and incentive of a merged entity to impede competition, and much less to the likely impact of the merger on effective competition. As such, they should be moved to the relevant sections.
4. However, TILEC would like to draw the attention of the Commission to the fact that the draft Guidelines do not thoroughly take into account the role of Article 82 EC in deterring the merged entity from anti-competitive behaviour. The brief mention of the role of illegality of this type of behaviour in para. 44 is rather vague, asserting that: "... the illegality of a conduct may be likely to provide significant disincentives for the merged entity to engage in such conduct only in certain circumstances."
5. There are several reasons why this statement is unsatisfactory. First it is not supported by an argument or evidence. Second, the statement would imply that Article 82 does not provide effective disincentives for illegal conduct in general. Third, if illegality of a conduct under

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\* TILEC groups researchers from the Faculty of Law and from the Faculty of Economics and Business Administration of Tilburg University. See [www.tilburguniversity.nl/tilec](http://www.tilburguniversity.nl/tilec). This paper is representative of the view of TILEC members, although not every member necessarily agrees with every point made in this note. TILEC members who took part in the discussions leading to this contribution include (in alphabetical order): Jan Boone, Barbara Gabor, Ilse van der Haar, Gregor Langus, Pierre Larouche (co-director), Jens Prüfer and Maartje de Visser. Contact person: Gregor Langus, [g.langus@uvt.nl](mailto:g.langus@uvt.nl).

Article 82 provides a relatively strong disincentive for such a conduct it may be desirable to clarify in the draft Guidelines to what extent these provisions will be taken into account when assessing the effects of a merger.

As is well known, this very issue was belaboured by the CFI and the ECJ in the *Tetra Laval*<sup>1</sup> and *GE*<sup>2</sup> cases. While there seems to be some divergence of views between the two courts, at this point in time the *GE* decision stands as the last word. There the CFI reflected upon the reasoning of the ECJ in *Tetra Laval* and concluded that “although the Commission is entitled to take as its basis a summary analysis, based on the evidence available to it at the time when it adopts its merger-control decision, of the lawfulness of the conduct in question and of the likelihood that it will be punished, it must none the less, in the course of its appraisal, identify the conduct foreseen and, where appropriate, evaluate and take into account the possible deterrent effect represented by the fact that the conduct would be clearly, or highly probably, unlawful under Community law.”<sup>3</sup>

6. The problem with the absence of an explicit analysis of the role of Article 82 EC is that in most cases of horizontal mergers anti-competitive effects are unlikely, and at the same time efficiency gains are likely to be substantial. If the provisions of Article 82 are sufficient to efficiently and effectively deter or sanction illegal conduct then too a rigorous scrutiny of vertical mergers could delay or prevent efficient outcomes more often than prevent inefficient ones in view of the possibility of ex-post enforcement of competition law.
7. TILEC recognizes that foreclosure can take many forms besides refusal to supply (like input price increases and lower quality of inputs supplied – see para. 32 of the draft Guidelines). It is clear that it may be difficult to prove illegal conduct under the standard of Article 82 EC in many of those cases (not least because the price and quality depend on many factors not controlled by the merged entity). On the other hand, within the framework of the examination of a merger under the MCR, using the standard formulated by the ECJ, it may not be all that difficult to prove ability and incentive for foreclosure or other types of illegal conduct (as opposed to proving all the elements required under Article 82 EC). It is exactly in these cases that the application of Art 82 EC may prove not to be an effective deterrence and the draft Guidelines may prove most beneficial.
8. Thus we advise the Commission to (1) analyze the role of provisions of Art 82 more thoroughly in the draft Guidelines and (2) to clarify in the draft Guidelines to what extent the Commission will take Art 82 into account in assessment of future cases.
9. A further field where more clarity would be welcome is the issue of the standard of proof. The draft Guidelines do not discuss the standard of proof in detail, which may be confusing. Although para 9 explicitly acknowledges that the case law of the Community Courts, which address the standard of proof extensively, prevails, revealing the future approach of the Commission in this regard would be an added value of these draft Guidelines.

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<sup>1</sup> CFI, Case T-5/02, Judgment of 25 October 2002, *Tetra Laval v. Commission* [2002] ECR II-4381, upheld by ECJ, Judgment of 15 February 2005, Case C-12/03, *Commission v. Tetra Laval* [2005] ECR I -987.

<sup>2</sup> CFI, Case T-210/01, Judgment of 14 December 2005, *General Electric v. Commission* [2005] ECR II-5527.

<sup>3</sup> *Ibid.*, Rec. 75.

Finally, TILEC would like to comment on a technical issue relating to the assessment of anti-competitive effects. Whenever there is a firm that self-supplies at the retail market the analysis of market power upstream should consider the situation on the downstream market as well. Excluding captive market from the upstream market definition risks overestimating the market power (or concentration) in the upstream market. We are happy to note that para 37 of the draft Guidelines recognizes this fact.

However, TILEC would like to draw attention of the Commission to a case when indirect constraints are actually **more** effective than direct constraints are. This may be true particularly when wholesale competition is less intense than the retail competition.<sup>4</sup> Thus, there are circumstances where vertical integration may actually have a pro-competitive effect in the upstream market, or when anti-competitive effects may be neutralised by these pro-competitive effects.

13. Thus, we believe, it may be worth considering this possibility in para 37 of the document. Foreclosure will be more likely the greater the proportion of profits generated in the downstream market. Thus this will be less likely in the case when there is relatively more concentrated market upstream in comparison to the downstream market.
14. On the other hand, when there are incentives for restriction to input on the side of the integrated supplier they will be decreasing the more the intermediate (upstream) market is concentrated relative to the downstream market. This way both the incentives to foreclose and indirect constraints act in the same directions, exactly when the firms have ability for foreclosure. Thus the effect of indirect constraints should further reduce competition concerns.

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<sup>4</sup> **A Tale of Two Constraints: Assessing Market Power in Wholesale Markets\***  
Roman Inderst and Tommaso M. Valletti