RE: AFEC’s Comments on the Non-Horizontal Mergers Draft Guidelines

INTRODUCTION

The Draft Guidelines on the assessment of vertical and conglomerate mergers (“the Draft”) constitutes an initiative that presents an important issue for firms.

The Draft opportunely points out that if vertical mergers do not present, in principle, anticompetitive characteristics, they generally lead to substantial improvements in economic efficiency.

In addition, the Draft indicates that these mergers are much less of the kinds that entail competition concerns than horizontal operations.

Indeed, vertical mergers do not eliminate competitors from the market. While it is the elimination of this competitive constraint that justifies the preoccupations concerning horizontal operations, vertical mergers do precisely not entail this source of anticompetitive effects.

On the contrary and as mentioned by the Draft, these mergers most often generate substantial gains of economic efficiency. Indeed, the integration of activities or complementary products naturally leads to substantial efficiencies and reinforces competition.

Thus, in recognizing the pro-competitive aspects of vertical mergers, the Draft aligns itself with the very large consensus that exists on this point among economists.

However, the Draft does not appear to draw all the consequences of the generally positive character of vertical mergers.

First, if these operations are in principle beneficial from an economic point of view, merger control should provide for rules that translate this positive nature. However, the Draft does not contain a presumption that would reflect in the legal field the economic analysis it recalls.

Secondly, having briefly recalled elsewhere the generally positive effects of vertical mergers, the Draft then indulges in long descriptions of the numerous possibilities of anticompetitive situations. This profusion of hypotheses is met with reservation to the extent that the situations evoked appear very abstract.
But above all, the abundance of cases of anticompetitive vertical mergers mentioned by the Draft leads to think about the compatibility of this approach with the recognition of the pro-competitive character of the operations in question.

AFEC’s comments on the Draft will successively relate to the general method of competitive analysis of non-horizontal mergers that is proposed in the Draft (I) and to the specific assessment criteria for these mergers mentioned by the Draft (II).

I – THE METHOD OF COMPETITIVE ANALYSIS OF NON-HORIZONTAL MERGERS SET OUT IN THE DRAFT

The Draft lays out as a rule that “Non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers” (§ 11) but dedicates only two paragraphs to explain the beneficial effects of non-horizontal mergers (§§ 13-14). Immediately afterwards, half a dozen introductory paragraphs explain why these mergers can on the contrary harm competition, thereby reducing the scope of the principle laid down.

It is however suitable to underline that in the field of non-horizontal mergers, it is particularly difficult, if not impossible, to establish predetermined and rigid rules that allow the differentiation of the (rare) potentially anticompetitive mergers from the (numerous) transactions that do not have a harmful effect on competition, or that even have a positive effect. Every competitive analysis resting on such rules would risk leading the Commission to wrongly ban numerous mergers, or to impose unnecessary commitments.

The serious drawbacks of a formal approach, based on the sanction of certain types of behaviour outside of their context, have been identified in both in merger control and for the application of Article 82 EC. It is thus encouraging that the Draft expresses the Commission’s intention to abandon a formal approach and to proceed with the assessment of the effects of the behaviour in question. This evolution is certainly positive, subject to the condition that the analysis of the effects is organised in a consistent framework (A), which respects the principles concerning proofs set by the case-law (B) and which sufficiently takes into account the question of efficiency gains (C).

(A) THE GENERAL RULES OF COMPETITIVE ANALYSIS

According to the Draft, non-horizontal mergers are likely to reduce the intensity of competition by two means: through the exclusion of competitors and through coordinated effects. The Draft is nevertheless devoted above all to the analysis of foreclosure effects¹.

The Draft envisages a framework of analysis in three stages, according to which the Commission has to prove (i) that the post-merger entity will have the possibility to foreclose competitors, (ii) that it will have an interest in doing so, and (iii) that the exclusion will probably have the effect to restrict competition.

This framework, which may appear convincing in principle, calls notwithstanding three fundamental reservations:

¹ The analysis of coordinated effects of vertical or conglomerate mergers proposed by the Draft is not very different from the one generally made in the scope of horizontal mergers.
- the Draft omits or skims the fundamental questions of the burden and standard of proof and the gains in efficiency, which will be examined below (see infra, B and C)

- the questions raised by the notion of foreclosure to which the Draft refers(a), and lastly

- the necessity to clearly distinguish the harm to competitors and the harm to competition (b).

(a) Economic Theories of Foreclosure Inherent to the Draft

Two types of economic theories of foreclosure exist. There are first the theories based on the foreclosure of one or more competitors. According to these theories, the post-merger entity would be able to carry out actions aiming at reducing the profitability of a competitor who, in the long term, would be forced to exit the market, which would allow the merged entity to increase its prices (subject to the condition that no other significant competitive constraints remain). According to the other theories, a vertical or conglomerate merger could harm consumers by pushing the other suppliers to practice less efficient competition while remaining present on the market (the so-called “weakening of competition” theories). According to the latter theories, the anticompetitive effect results from the strengthening of the suppliers’ oligopolistic behaviour.

In practice, the theories founded on the foreclosure of competitors have been frequently used by competition authorities. On the contrary, up to now, the models based on the weakening of competition did not generally find application beyond pure economic theory.

The Draft is innovative, as it envisages an assessment of non-horizontal mergers based not only on the foreclosure theories, but also on the economic theories of weakening of the competition. Even if the Draft does not address this subject explicitly, the intention to develop this type of analysis is clear in several parts of the text and certain parts of the Draft even give reason to think that these preoccupations are at the heart of the Commission’s analysis (see, for example, § 28).

However, the approach considered by the Commission raises two problems.

First, the Draft does not explicitly distinguish the two types of foreclosure theories (neither the different forms that these theories can take). On the contrary, it presents a long list of criteria, aiming to guide the assessment of mergers, which seem to make reference to very different economic theories not always compatible with one another. Indeed, the foreclosure theories based on the foreclosure of a competitor and those based on the weakening of the competition are very different, both from an economic and practical point of view. For example, potential anticompetitive effects of a foreclosure strategy can be observed in the long term, when the competitors exit the market, whereas the effects of the weakening of competition can (theoretically) be almost immediate.

---

2 In this regard, please refer to the report prepared for DG Competition by Professor J. Church, The Impact of Vertical and Conglomerate Mergers on Competition.

3 For example, one could think of a situation where a firm which just merged with another one active on a downstream market decides to stop the sale of its products to competitors in order to supply exclusively its own subsidiary. The fact that the merged entity gets out of the upstream market may thus increase the remaining suppliers’ market power, leading to a price increase on the upstream market.
If, thus, each of the criteria proposed by the Draft, considered on an individual basis, could be useful in the assessment of a merger, the mix of these criteria making reference to very different theories carries a serious risk of compromising the economic consistence of the assessment developed by the Commission.

Secondly, even if the different theories of harming competition were presented in a clear manner, one can wonder if the introduction of theories of weakening the competition in the assessment of non-horizontal mergers is a desirable innovation. Indeed, while every theory of foreclosure is extremely difficult to prove in practice, this is particularly true for the theories of weakening of the competition.

The theories of foreclosure certainly outline, inter alia, the difficulty of considering the evolution of the market in the long term, which can be difficult to forecast. But they nevertheless rest on a structural change of the market, that is to say the foreclosure of one or several competitors: this is an event of which the probability and the consequences can, in principle, be apprehended on the basis of empirical proofs. On the other hand, the theories of weakening of the competition rest solely on the prediction that the merger will change the suppliers’ incentives in a complex way, and that this will lead to a price increase. The evaluation of the incentives of a sole undertaking is a difficult exercise in the best case. It becomes practically impossible when one has to consider the interaction between the interests of several undertakings active on the upstream or on the downstream market, or both. It is therefore legitimate to wonder if it is appropriate to introduce in the future Guidelines the theories of harm to competition that the Commission will most probably not be able to prove with a sufficient standard.

(b) The distinction between harm to competition and harm to competitors

The Draft defines the term “foreclosure” in a broad manner since, in fact, it covers every situation where the merger makes access to the market or to the necessary products for production more difficult for competitors to the point of reducing their capacity or their incentive to exercise competitive pressure on the merged entity.

In the cases of foreclosure targeted by the Draft, the potential harm to competition is thus the result of a weakening of the competition. In this respect, paragraph 28 specifies that the term “foreclosure” does not only apply to cases where competitors are obliged to exit the market, but also to situations where competitors are “disadvantaged” and thus led to “compete less effectively” and to situations that “discourage the expansion” of competitors.

This confusion is in contradiction with the clearly stated Commission’s objective of protecting competition (more precisely the consumers) and not that of protecting competitors (§16) and seems to us completely inappropriate.

A competitor can indeed equally be weakened, or “foreclosed”, when an undertaking competes with it on the merits. For example, the introduction of a new product or a reduction in price can have the effect of reducing the competitors’ market share, or even truly driving them out of the market. Nevertheless, these actions are generally considered pro-competitive, because they bring direct advantages to consumers.

It is thus vital, in the assessment of the risks of foreclosure, to adopt an approach that allows distinguishing on the one hand, the behaviour that reduce the intensity of competition and, on the other hand, those that are unfavourable only for competitors, and which consequently result
from competition on the merits. This question is fundamental in the context of non-horizontal mergers, since transactions of this type generally entail substantial efficiency gains, as stated by the Draft (§11-14).

At least, the notion of “weakening of competitors” must be specified. One must indeed take into account the weakening or “the marginalization” of a competitor only if it is weakened in a sustainable or permanent manner to the point that the competitive constraint that he exercises on the merged entity is reduced. For example, a vertical merger can give the merged entity the incentive to reduce its prices downstream while raising the prices of intermediate products that it sells to competitors, which can reduce the competitors’ market shares on the downstream market. Nevertheless, consumers are not necessarily harmed by this behaviour since, even if certain prices can increase, others fall. Likewise, the competitors are not necessarily weakened in a permanent way. More precisely, it is inaccurate to refer to “foreclosure” if competitors are capable of recovering their market shares following a decision by the merged entity to increase prices for consumers, thus rendering the increase in price unprofitable for the vertically integrated firm.

The Commission specifies, moreover, that one can talk of “anticompetitive foreclosure” when the foreclosure of certain firms allows other competitors, and in particular the merged entity, to increase their price in a profitable manner (§18) 4.

One can wonder if the distinction between foreclosure and anticompetitive foreclosure is relevant. Indeed, should the merger not reduce competition, why should one nevertheless characterise it as “giving rise to foreclosure”? In other words, in what does the behaviour that gives rise to not anticompetitive foreclosure differ from simple competition on the merits?

This semantic distinction is thus, a priori, not useful. On the contrary, it entails concrete risks. Indeed, it could be interpreted in practice as creating unfavourable presumptions for the merged entity. Every behaviour characterised as “foreclosure” risks being suspicious in itself. In this case, it would be easier for the Commission to conclude that a merger restricts competition, and it would be on the parties to prove that this is not the case. This risk is significant since, as we have seen above, the definition of “foreclosure” given by the Draft is vague and applies to anticompetitive behaviour as well as to pro-competitive behaviour.

**Proposal n°1**:

The Draft would gain by clarifying the framework for the competitive assessment of non-horizontal mergers, specifying on the one hand which economic theories ought to be applied and on the other hand that only harm to competition is of an anticompetitive nature.

---

4 See also the Commission’s discussion paper on the implementation of Article 82EC.
B – **Proof of Anticompetitive Effects**

The AFEC would wish to comment here on the burden of proof (a) and on the standard of proof (b).

**(a) The burden of proof**

As indicated above, the Draft does not contain a legal translation of the generally pro-competitive character of vertical mergers. If one acknowledges, as the Draft does, that these mergers are generally pro-competitive and favourable to economic efficiency, they cannot by assessed within the same framework as horizontal mergers.

There is thus, a priori, no reason that these mergers are deprived of a presumption of legality which would translate into legal terms the economically positive presumption that the Draft itself recognizes they have.

The necessity to establish a presumption of legality in favour of these mergers should moreover be accompanied by vital clarifications regarding the approach that the Commission should follow.

Vertical mergers create efficiency gains which are intrinsic to the merger itself. Most often efficiency gains and risks of foreclosure will even have the same origin. Thus, in the case of bundled and tied sales, the risk of restricting competition (foreclosure of competitors which cannot offer bundled sales) has exactly the same origin as the gains directly benefiting the consumer (lower tariffs).

It necessarily ensues that the Commission should proceed with a “unitary” approach that simultaneously takes into account these gains (notable the elimination of a double mark-up) and the potential anticompetitive effects.

The two-stage approach: demonstration of the anticompetitive effects by the Commission and defence by the parties based on efficiency, corresponds to the particular framework of horizontal mergers, where the potential unilateral effects can be counterbalanced by a reduction in the marginal cost. On the other hand, this approach is totally inadequate for vertical mergers owing to the different nature of the efficiency gains produced, as well as the fact that the efficiency gains are intrinsic to these mergers.

It therefore appears particularly desirable that the Guidelines bring accuracy without ambiguity to the “unitary” approach that will guide the Commission in this area. It should be stressed that this approach is advocated by the economists of the American competition authorities as well as by the EAGCP, which affirms notably that “The model used to assess a vertical merger must from the outset take into account the efficiency gains and not only the anticompetitive harm”.

---

5 Non-Horizontal Merger Guidelines: Ten Principles, EAGCP, 17 August 2006.


7 EAGCP, quoted above, p.6
This principle is the one that should be stated and implemented by the Guidelines.

(b) The standard of proof

The Draft does not seem to fully take into consideration Community case law on the standard of proof concerning the effects of a merger. Thus, the favourable approach of the Draft with regard to the mergers concerned appears, as it is, as a welcomed although still theoretical position, bringing little legal certainty for these a priori positive mergers.

As stated by the CFI in the GE and Tetra Laval judgments:

“A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted”.

This analysis thus calls for the identification of the links between cause and effect, in order to retain those of which the probability is strongest. In addition, as noted above, vertical operations, far from being as problematic as horizontal mergers, on the contrary most often generate economic efficiency gains.

In this context, the quality of the elements of proof produced by the Commission to justify a decision declaring a merger incompatible with the common market is fundamental.

In this regard, when the Commission relies on a future behaviour which, according to the Commission, will be adopted by a post-merger entity, it will have to establish, on the basis of solid proof and with a sufficient degree of probability, that this behaviour will really happen. It is not sufficient in this regard to simply state that the merged entity would have the capacity (for example to make an offer of bundled products or to practice cross-subsidisation) or would be able to make such a choice.

Likewise when different strategies are open to a post-merger entity, the Commission must establish that it would necessarily be in the interest of the merged entity to have such or such strategy. Indeed, it is not about attributing to the merged entity immediate anticompetitive behaviour. It is about “predicting” a future or potential behaviour. It should thus be demonstrated that the merger will inevitably limit competition since the merged entity will not only have the capacity to do so but above all it will be necessarily be driven to adopt this behaviour.

But the competition authority which indulges in this “forecast” must hold extremely solid proof. In the GE case, the CFI clarified the notion of “solid proof”: it must be exact, consistent, exhaustive and pertinent. In the Tetra Laval case, the CFI equally specified that “the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects”.

However, the Draft does not clearly allow determining if that is the approach the Commission intends to follow with respect to vertical mergers.

The Draft explains, and this is appreciated, the manner with which the Commission will proceed in order to establish the probability of an anticompetitive scenario: first assessment of the
possibility for the merged entity to produce a foreclosure effect, then assessment of the incentive of the merged entity to resort to this scenario, finally assessment of the harmful effect of this strategy on competition (§ 31 for vertical mergers, §91 for conglomerate mergers).

Notwithstanding, when one looks in detail at the corresponding paragraphs, one can find no method of assessment of the proofs on which the Commission intends to rely in order to establish the existence of these anticompetitive effects, but only a catalogue of possibilities (“will normally be”, “may depend”, “can be expected”, “may take into account”, “may consider”, “can lead to”, etc…), based on pure theoretical economic hypotheses. Generally, there is no concrete example that would allow corroborating the realistic character of the dreaded anticompetitive effects.

This seems to run counter the objective of the Guidelines, which should essentially be to provide firms and practitioners with clear and pragmatic rules to apprehend mergers. It seems on the other hand that a description of all conceivable theoretical cases is not indicated, since that would unnecessarily complicate the assessment of cases or even multiply very cumbersome investigations only to assess the case in light of a purely hypothetical model.

Moreover, the Draft uses notions that seem vague and bearing legal uncertainty: “Future changes to the market that can reasonably be predicted” (§ 20). The Commission therefore envisages to base its appraisal on an idea a priori of the future market and from this “vision” to determine if the merger that is presented to it ought to be prohibited today. This approach is hardly compatible with the developments on numerous markets, characterised by unpredictability, convergences, and widespread volatile developments… Thus, taking into account the speed of reorganization of certain markets (audiovisual, telecoms, new technologies), it appears for example very difficult to determine who could be a potential competitor.

The “predictive” assessment of mergers contains by nature important risks. It must therefore necessarily be based on certain and stringent proofs. After all, when the Commission appraises for example the proposed commitments in view of authorizing a merger, it is rightfully demanding when assessing the proposed remedies. Logically, the same standard should systematically be applied to oppose a merger. In any event, without abiding by a system of proof in line with the case law, it will be illusionary to provide legal certainty to firms.

It is the reason for which it is important that the standards of proof are clearly and precisely defined by the Guidelines.
Proposal n°2:

Non-horizontal mergers ought to benefit from a presumption of legality.

The efficiency gains and the potential anti-competitive effects of non-horizontal mergers should be assessed simultaneously.

In addition, the Guidelines should expressly refer to the strict rules laid down by case law on the standard of proof concerning the anticompetitive character of non-horizontal mergers, thereby departing from pure theoretical hypotheses and requiring extremely solid proof.

C- THE QUESTION OF EFFICIENCY GAINS

The Draft indicates that vertical and conglomerate mergers are “less likely to create competition concerns that horizontal mergers” (§ 11), notably because such mergers “provide substantial scope for efficiencies” (§ 13).

The Draft remains very discreet on this central question about efficiency gains. The Commission restricts itself to enumerate some examples of efficiency gains without however developing their content or suggesting an order of importance (§§ 53-55). On this questions, the Commission refers back to the Guidelines on horizontal mergers while refraining however from giving precise indications on the assessment scheme that it will use in the specific area of vertical and conglomerate mergers (§ 51). Finally, the Commission only makes some brief comments on the situations in which a strong probability exists that these economic efficiencies will not be present (§§ 52-56 for vertical mergers, §§ 113-116 for conglomerate mergers).

It would be vital to complete and flesh out this presentation of the competitive assessment which largely leaves aside the question of efficiency gains and develops on the other hand, to a large extent, and in a very detailed manner, the risks of foreclosure. The Draft should therefore aim at re-establishing a balance by detailing in a more precise manner the assessment of the efficiency gains likely to be generated by vertical and conglomerate mergers.

In particular the facts that give rise to efficiency gains should be specified and hierarchised. For example, the elimination of double mark-up, intrinsic to a great number of mergers, is of critical importance, superior to the classical gains of like cost reductions. In addition it would be valuable that the concrete contexts are exposed in which it would be conceivable, should that be the case, that the gains in efficiency are not significant.
II - ASSESSMENT CRITERIA FOR NON-HORIZONTAL MERGERS LISTED BY THE DRAFT

The assessment methodology for non-horizontal mergers, based on the effects proposed by the Draft contains two aspects. First, it establishes thresholds (or other simple criteria), which allow the Commission to promptly authorise mergers which do not present any significant competitive risk (A). These “filters” are very useful, in particular to reinforce the legal certainty and release sufficient resources for the Commission to conduct a genuine analysis of the effects in potentially difficult cases, but they need to be better defined. Second, it defines an analysis framework to guide the assessment of the effects in cases where this stage is inevitable, framework which also calls for some comments (B).

(A) “Filters” listed by the Draft

The Draft recalls that non-horizontal mergers pose no threat to effective competition unless the merged entity has market power in at least one of the markets concerned (§ 23) and indicates that market shares and concentration levels provide useful first indications of the market power (§ 24).

On these bases, the Draft announces (§ 25) that “The Commission is unlikely to find concern in non-horizontal mergers” subject to the following conditions:

1. the market share post-merger of the new entity in each of the markets concerned is below 30% (“Filter 1”)

and

2. the post-merger HHI is below 2000 (“Filter 2”).

However, although these two criteria have to be fulfilled, they are not sufficient to “filter” a merger operation. Indeed, the Commission specifies that it will not proceed to an extensive investigation of such merger, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) the merger involves a company that is likely to expand significantly in the near future (“criterion (a)”),

(b) there are significant cross-shareholdings or cross-directorships among the market participants (“criterion (b)”),

(c) one of the merging firms is a maverick (“criterion (c)”),

(d) indications of past or ongoing coordination, or facilitating practices, are present (“criterion (d)”).

For a non-horizontal merger not to be examined by the Commission, although already fulfilling the initial and cumulative filters of market shares and HHI index, it should moreover not concern a firm which is likely to expand significantly in the near future and there should be no significant cross-shareholdings or cross-directorships among the market participants and none of the merging firms should be a maverick and there should be no indications of past or ongoing coordination or of any facilitating practice.
Although these proposals of additional “filters” are interesting in principle, their general and vague formulation, and in particular, the addition of the terms “for instance” entail the risk that it may become very rare that a non-horizontal merger, passing through the first “filter”, is not examined in detail by the Commission.

One may wonder once again if the objective of the Guidelines is not, in the end, to result in a systematic exam of all non-horizontal mergers.

These proposals, should they nevertheless be maintained, must therefore imperatively be clarified and. They call for general comments (a) and specific observations (b).

(a) General comments on the criteria set by the Draft

First, it is important to note that it is not in the Commission’s intention to define genuine “security areas” for non-horizontal mergers. Indeed, the Commission intends to provide only a simple guidance where all the conditions of a “probability of absence of competition concerns” are met. The Commission expressly underlines that it does not want to establish a legal presumption (§ 26). However, the establishment of the fulfillment of the criteria which allow to consider that a merger is not likely to cause any harm to competition should lead to a presumption of absence of competition concerns. Of course, the Commission’s assertion that situations where the above criteria are not met do not create a presumption of competition concerns can only be favorably welcomed.

Second, the fact that the Commission states that this exceptions’ list is not exhaustive (the Draft uses the wording “for instance” to present it) and that it doesn’t give any clear indication as to what could lead it to consider that a merger could raise some competition concerns, is not helping the companies. Moreover, it is clear that the Commission will proceed to a detailed investigation of the merger even in cases where only one of these (non exhaustive) criteria is not met. In any case, this is a very important factor for legal uncertainty.

Third, these criteria are formulated so widely that in practice the absence of competition concerns could be noticed only in very limited number of non-horizontal mergers. This contrasts directly with the general considerations expressed by the Commission at the beginning of the Guidelines and according to which non-horizontal mergers do in principle not lead to any competition concern.

Fourth and at last, it should be pointed out that some of the criteria are formulated so generally or imprecisely that they do not concern the market power of the parties concerned but rather the environment of the parties concerned, for instance:

- **Filter 2**: From a technical point of view this point is applicable even in the case where a vertical merger concerns two firms holding a 5% market share on their respective markets to the extent that one of the firms operates on a market on which the presence of other competitors makes the HHI go above 2000.

- **Criterion (b)**: this criterion is drafted in such a general manner that significant cross-shareholdings or cross-directorships among firms that are not parties to the mergers but that are however competitors to one of the parties would be sufficient to withdraw the merger’s “filter” benefit.
- Criterion (d): here again the criterion is too general as it targets the existence of indications of all sorts of past or ongoing coordination on the market, between firms that are not necessarily concerned by the merger but that would be competitors to one of the parties to the merger.

Thus, these criteria do not allow “filtering” the mergers in which none of the parties would enjoy any market power. They could therefore lead to a detailed examination of mergers which, in the Commission’s opinion, should not raise any competition concerns. If in all these cases the non-horizontal merger as such can not have any negative impact in the absence of a position of market power of the parties, it appears that a detailed investigation of the merger would not be justifiable. It is therefore desirable to specify these criteria so that the behaviours in question or the cross-participations do really concern one of the parties to the merger.

Consequently, the envisaged “filters” are not convincing and call for specifications and amendments.

**Proposal n°3:**

The Guidelines should establish a presumption of compatibility of mergers which comply with all the criteria of likely absence of competition concerns.

**Proposal n°4:**

The exceptions to the thresholds of likely absence of competition concerns mentioned in the Draft should only target the parties to the merger, which are the only firms for which it is important to take into account a possible position of market power.

(b) Specific observations on each of the criteria set by the Draft

The following observations can be made with regard to each of the criteria, taken individually:

- **Filter (l) : the 30% threshold as such is welcome**

However, as it is currently proposed, this criterion does not allow filtering all the situations where the parties to the merger do not hold a sufficient market power. Indeed, the filter does not work as soon as the parties to the merger hold more than 30% on only one of the markets concerned. It is nevertheless obvious that an anticompetitive effect involves the holding of a quite significant market position on the two market concerned.

It is thus suggested to keep a first alternative filter, drafted as follows:

*The market share of the post-merger new entity is either below 30% on each of the markets concerned or above 30% on one of the markets concerned and below [10%-15%] on the other market concerned.*

In view of determining the minimal market share threshold the post-merger entity must hold on the second market, reference is made to the two thresholds defined by the Commission in its
Communication relating the de minimis agreements. A consistent approach would be to keep the 15% threshold applying “where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors)” (point 7.b). In a cautious approach, the Commission could nevertheless opt for a 10% threshold applicable to agreements between competitors.

Moreover, all the practical consequences should be drawn from the Commission’s opinion according to which market shares below 30% are unlikely to raise competition concerns. This implies in particular that the threshold for defining markets affected by vertical or conglomerate relations increases from the current 25% to 30%.

While waiting for the amendment of Regulation n°802/2004, the Commission should automatically exempt notifying parties to fill in sections 7, 8 and 9 of the notification form when the 30% threshold will not be reached.

- **Filter (2)**: the application of the HHI index does not seem justifiable for non-horizontal mergers

The HHI index has been rightly retained by the Commission in its Guidelines relating to the assessment of horizontal mergers. It is however difficult to appreciate the relevance of its use in the scope of non-horizontal mergers, which, by their nature, have no impact on the level of concentration on the markets concerned, data which the HHI is precisely meant to measure. Moreover and as indicated above, the criterion as it is defined does not take into account the specific impact of the parties to the mergers only.

- **Criterion (a)**

As far as non-horizontal mergers are concerned, the probability that the market share significantly increases in the future involves a too speculative exercise and should not be considered.

- **Criterion (b)**

As far as non-horizontal mergers are concerned, cross-participations could be considered as relevant with regard to competition law only in circumstances where it is the parties to the merger who are holding such participations.

- **Criterion (c)**

As far as vertical mergers are concerned, the involvement of a maverick to the merger does not seem to be of any interest. Indeed, the maverick theory should be taken into account in the scope of horizontal mergers only. It is even possible to believe that vertical integration of a maverick within a group could consequently reinforce it and thus stimulate competition on its market.

- **Criterion (d)**

---


9 Section 6 III and IV of Form CO and 1.1.3. and 4 III of the simplified.
As it was the case for criterion (c), past or ongoing coordination, as the case may be, can be of interest only if one of the parties to the merger has been part or is part of such practice. Moreover, the experience shows that the change of “ownership” of a firm is also often an opportunity to put an end to a coordinated behaviour. Likewise, coordination is likely to raise concerns only if it is illegal. Thus, should a practice be covered by Article 81 § 3 of the EC Treaty or should it not fall under the prohibition set by Article 81 § 1 of the EC Treaty, if for example, the de minimis rule applies, it should not raise any competition concern.

Proposal n°5:

The first “filter” set out by § 25 of the Draft should be drafted differently (holding of a market share either below 30% on each of the markets concerned or above 30% on one of the markets concerned and below [10%-15%] on the other market concerned) in order to exclude all the circumstances where the post-merger entity does not enjoy a minimal market position on one of the market concerned.

Proposal n°6:

The affectation threshold for the market concerned because of the vertical or conglomerate relations should logically be fixed at 30%.

Proposal n°7:

Criteria (a) and (c) do not seem to be relevant as far as non-horizontal mergers are concerned and should thus be abandoned.

Proposal n°8:

Criteria (b) and (d) seem to be justifiable only to the extent that they target the situation of the parties to the merger only.

In the case where a merger could not be “filtered” (this is frequently the case when considering the large scope of application of the four exceptions mentioned above), the Draft details the specific criteria the Commission intends to apply in order to examine the impact of vertical and conglomerate mergers. For the most part these criteria show overlaps.

(B) Examination criteria for “not filtered” non-horizontal mergers

The Draft specifies, as far as vertical mergers are concerned, that the weakening of competitors can reduce the intensity of competition only if the following cumulative conditions are fulfilled (§§ 73-75) : (i) “excluded” competitors must represent a sufficiently large fraction of the market, (ii) the competitors which are not affected must not be in a position to respond to the price increase of the post-merger entity by increasing their sales volume (for example because of capacity constraints or products differentiation), (iii) new entrants cannot restore effective competition and, finally, (iv) it must be possible to maintain the price increase in the light of the customers’ buying power.

These conditions are particularly important. However, they must be specified or modified for the three following reasons:
First, one can wonder if it is appropriate to address the barriers to entry issue within the analysis of the foreclosure’s impact on competition, i.e., in the last stage of the analysis. In fact, non-horizontal mergers do not raise competition concerns as far as none of the parties holds an important market power. However, it is unlikely that a firm holds market power if barriers to entry are not significant. Consequently, it would be more appropriate to consider this point as an initial “filter”, to be examined at the beginning of the analysis rather than at the end.

Second, it would be necessary to take into account the possible reactions of competitors. Can they engage in similar mergers? Can they enter into agreements with operating firms on the linked markets (upstream, downstream or complementary) in order to compete more efficiently with the post-merger entity? These important questions are addressed in the section of the Draft devoted to conglomerate mergers but not in the one on the transactions of a vertical nature.

Third and lastly, it is important to note that the criteria envisaged by the Draft for the evaluation of the coordinated effects of non-horizontal mergers may entail an excessive extension of the scope of application of the concept of foreclosure. In particular, paragraphs 82 and 118 provide that a competitor’s foreclosure, by decreasing the number of operators on the market, may increase the risk of collusion. However, if such scenario is theoretically conceivable, the circumstances are very unlikely to happen in practice. It is already sufficiently hard to prove the probable foreclosure of a competitor resulting from a merger, and it would not be less difficult in the scope of coordinated effects. To provide sufficient proof of both effects in the same operation will probably be impossible from a practical point of view.

On the other hand, if the theory of coordinated effects is used in an extensive way without relying on strict and thorough proofs, the foreclosure of one single competitor could be considered as anticompetitive even though the foreclosed operator did not exercise a significant competition constraint on the market. There would thus be a serious risk to protect competitors in circumstances where there is no real risk for the well-being of consumers.

(C) Specific criteria for the examination of conglomerate mergers

The section of the Draft pertaining to conglomerate mergers does not seem to offer sufficient and complete indications as to their handling by the Commission.

From a methodological point of view, conglomerate mergers are briefly addressed and often via the referral to other sections of the text, which does not allow to give a clear and complete overview of the analysis of conglomerate merger operations. Equally, the nature of the multiple scenarios envisaged by the Draft leads to recall the warning emitted by Community case-law against subjective speculations concerning non demonstrated foreclosure effects.

In substance, the Draft also does not indicate a clear method. In particular, despite the position of principle according to which conglomerate mergers generally have pro-competitive effects, the numerous hypotheses of anticompetitive operations mentioned by the Draft create an impression of contradiction. The Commission underlines that the conglomerate mergers do not affect competition when the post-merger entity does not hold a market power on any of the markets concerned or when other competitors who have the capacity and the will to extend their market power are present on one or the other market concerned. Here again, this postulate should lead the Commission to establish a presumption according to which there is no anticompetitive effect, unless one of the parties to the merger holds a significant market power.
The Draft restates the three criteria set out for the analysis of vertical mergers. They are applied to conglomerate merger operations in the absence of coordination of behaviour (capacity of the post-merger entity to adopt a behaviour tending to foreclose its competitors, interest in the competitors’ foreclosure, and significant harmful effect on competition). The principles mentioned above raise the following questions.

1) **As to the capacity of the post-merger entity to adopt an anticompetitive behaviour, the Draft examines the capacity to impose bundled and tied sales**

Two points require some attention:

First, the selected approach to characterize the market power of the bundling and tied product seems very vague (§ 98). Does the Draft refer to a real situation of dominance or to a case of lower market power?

Second, the Draft considers that the foreclosure risks are greater when the products are complementary (§ 99). This approach can be worrying since it is the most economically rational category of operations which is thus targeted.

2) **The Draft recalls that the incentive depends on the profitable or non-profitable character of the practice.**

The Draft specifies that this profit may result from gaining market shares and/or from price increases obtained thanks to these practice (§ 104).

However, the Draft does not propose a methodology to appreciate this profitability, although this element is crucial. In the GE case, the Court of First Instance has stated that the theory retained by the Commission in support of the profitability of one of the future practices identified by the Commission was not proved.

If the Guidelines cannot provide a method allowing to assess in every case the incitation of the practices in question, they should however at least underline the importance of proving it with a level of certainty and concordance in line with the standard previously described.

3) **Analysis of the effects on the market**

A specification of the Draft would be an improvement as it often proposes vague notions (“sufficiently large fraction of upstream output”, “minimum viable scale”). Actually, the Draft only describes several circumstances which could potentially entail an anticompetitive behaviour. However, it does not provide any concrete criteria for application, in contradiction with the lessons of the CFI’s judgments asking for a more rigorous standard of proof, in particular in the case of conglomerate mergers.

Furthermore, the Draft does not sufficiently specify the link between the control of conglomerate mergers Article 82 EC. It simply states that, within the scope of the incitation assessment, the illegality of the practice in question and the probability that competition law prohibitions have a deterrent effect will be duly taken into account.

It is not desirable that the rules on merger control on this issue are set independently of the ongoing works and debates concerning Article 82 EC, notably as far as bundled and tied sales are concerned. In particular, it is important to avoid any discrepancy or gap which would harm legal
certainty. In that perspective, the foreclosure notion, key to the Draft, is also a key concept for the implementation of Article 82 EC.

It is therefore vital that the final Guidelines take into account this inevitable interaction, in particular by reducing the excessive number of hypotheses of foreclosure which are only theoretical or too complex and by clarifying in concrete terms the situations of anticompetitive damages mentioned in this document.

**Proposal n°9:**

The scenarios of coordinated effects presented in the Draft seem to be purely theoretical as far as non-horizontal mergers are concerned; it is therefore necessary to require particularly solid proofs.

**Proposal n°10:**

The Guidelines should adopt a cautious approach in order to take into account the results of the ongoing debate on the revision of Article 82 EC.