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## The non-horizontal merger guidelines in practice

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## Abstract

On the 28<sup>th</sup> of November 2007, the Commission adopted the Non-Horizontal Merger Guidelines. This article illustrates how these guidelines are applied in practice by reviewing the economic analysis undertaken in Google/DoubleClick and TomTom/TeleAtlas, two recent mergers that raised non-horizontal issues. Both cases were subject to an in-depth (Phase 2) investigation and were eventually cleared without conditions. The theories of harm covered both conglomerate issues as well as concerns regarding input foreclosure. These two cases illustrate how the guidelines provide a useful framework for conducting sound economic analysis, both qualitative and quantitative.

Le 28 novembre 2007, la Commission a adopté ses lignes directrices sur les concentrations non-horizontales. Cet article passe en revue deux fusions récentes ayant soulevé des questions non-horizontales et illustre la façon dont ces lignes directrices sont appliquées en pratique. En particulier, l'analyse économique mise en œuvre dans les enquêtes sur les fusions de Google/DoubleClick et de TomTom/Tele Atlas est discutée. Ces deux fusions ont fait l'objet d'une enquête de Phase 2 et ont finalement été approuvées sans condition.

Les théories des possibles effets anticoncurrentiels qui furent examinées pendant ces enquêtes couvraient à la fois des questions conglomerates et des questions de verrouillage du marché des intrants. Ces deux cas illustrent la façon dont les lignes directrices fournissent un cadre de référence utile pour mettre en œuvre une analyse économique solide, tant d'un point de vue fois qualitatif que quantitatif.

# The non-horizontal merger guidelines in practice

1. In November 2007, the Commission published the “Non-Horizontal Merger Guidelines”<sup>1</sup> (hereafter, NHM guidelines) as an addition to the existing guidance on the implementation of the merger regulation, in particular, the “Notice on Market Definition” and the “Notice on Horizontal Mergers”. The objective of the NHM guidelines is to provide guidance regarding the analysis of vertical and conglomerate mergers under EC merger control. The guidelines clarify the inherent differences between the competitive effects arising from mergers between rivals (horizontal mergers) and mergers between firms operating in different, albeit closely related markets (either vertical or conglomerate mergers). While non-horizontal mergers offer greater scope for efficiencies, they can also lead to anticompetitive effects, in particular, foreclosure to the detriment of consumers. The guidelines propose a three-step approach to evaluating non-horizontal mergers that involve an assessment of (a) the ability to foreclose; (b) the incentives to foreclose and (c) the impact on effective competition.

2. When the final NHM guidelines were published, the Commission was in the midst of investigating two mergers raising non-horizontal issues. The TomTom/TeleAtlas merger entered into Phase 2 on the same day the NHM guidelines were adopted and the Google/DoubleClick had been into Phase 2 for a few days. The TomTom/TeleAtlas merger raised vertical issues, in particular, concerns about input foreclosure. In Google/DoubleClick, both conglomerate effects and input foreclosure were considered. Interestingly, both transactions concerned new and rapidly evolving industries.

3. In Section 1, the economic analysis in Google/DoubleClick is discussed – in particular, the focus of the analysis on verifying the assumptions on which the theories of harm put forward by complainants relied. Section 2 discusses the merger between TomTom and Tele Atlas, with a particular focus on the empirical analysis that was performed to determine whether the transaction would lead to input foreclosure. Finally, Section 3 concludes.

## I. Non-horizontal effects in Google/DoubleClick

4. On 11 March 2008, the Commission unconditionally cleared the acquisition of DoubleClick by Google, following an in-depth (Phase 2) investigation.<sup>2</sup> The transaction concerned the relatively new online advertising industry, which is evolving at a fast pace. During the investigation, a large number of similar transactions took place which led to a reinforced integration of activities in the area of online advertising. This case was remarkable in that it covered both conglomerate and vertical aspects, but there were also concerns regarding horizontal effects (both direct and potential).<sup>3</sup> During the investigation, numerous economic submissions were provided and a wide range of theories of harm were put forward by competitors and, to a lesser extent, by customers of the parties.

\*The views expressed in this paper are those of the two authors and do not necessarily reflect those of DG Comp or the European Commission.

1 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on 28 November 2007.

2 Note that the Commission did not issue a Statement of Objections as its Phase 2 investigation quickly alleviated its concerns.

3 This article does not discuss the horizontal aspects of the case.

## 1. A non-horizontal merger

5. Google and DoubleClick are not direct competitors in the traditional sense. Google is a major provider of online space and intermediation services for online advertisements while DoubleClick is a leading provider of ad serving technology used to deliver ads onto websites and to produce performance metrics for these ads. DoubleClick's technology (ad serving) is used by online publishers and advertisers to serve advertisements on web pages. Publishers (e.g. CNN) sell advertising space on their websites in order to generate revenues. Advertisers (e.g. Ford) purchase advertising space to place their ads. Once ad space has been sold by a publisher to an advertiser, either directly or through an intermediary, both parties need to ensure that the correct ad actually appears (i.e. is served) onto the publisher website space at the right place at the right time. This step is undertaken by the ad serving tools, which also measure the performance of the ad placement (by tracking the behaviour of users<sup>4</sup>).

6. Google offers advertising space on its own website (Google.com) as well as intermediation services through its ad network AdSense. Ad networks match the supply of advertiser space offered by publishers and the demand for such space, stemming from advertisers.<sup>5</sup> Through its online activities, Google is mainly active in search (text) and contextual (text) ads while DoubleClick's technology is mainly used for (graphical) display ads.<sup>6</sup>

7. Display ad serving involves sophisticated reporting metrics that are generally not offered in the context of text ad serving. Given Google's focus on text ads (search and contextual), the parties claimed that one of the rationales for acquiring DoubleClick was to enable Google to accelerate the offering of display ads on its AdSense network.<sup>7</sup> The second rationale given was to gain access to DoubleClick's publisher base and improve the attractiveness of the AdSense network for publishers, in particular for the inventory of publishers that currently goes unsold.

4 Performance metrics include impression delivery, clicks, click-through rates, view-through rates, rates of conversion (of web users into actual customers), type of user interactions with ads, and various reach/frequency measurements. These metrics can be viewed in many different ways, including breakdowns by site, site placement, ad and ad type.

5 In addition to ad networks (which pool online space obtained from publishers and allocate it among advertisers having submitted their ads to the network for placement), ad exchanges are a different form of intermediary. They provide a marketplace where advertisers and publishers buy and sell ad space on a real-time basis.

6 Search ads are served on a web page as a result of a web query (such as the one that can be made via the Google search engine). Display ads (also called non-search) are served on a web page either as a result of the context of the page (a contextual ad would for example advertise an online book store on the website whose content relates to literature) or as a result of parameters determined by the advertiser (e.g. geographic location of the user visiting the web page, time of the day and so on). A growing number of online ads are behaviourally targeted, i.e. using information on the web user's surfing activity (generally through so-called cookies). Information provided by the user such as personal details provided on social networks such as Facebook are particularly valuable to target ads.

7 Google currently serves a negligible amount of display ads on its network and is at a very early stage of development of an ad serving technology similar to DoubleClick's.

8. There are various distribution channels through which publishers and advertisers serve online ads. Publishers can either sell their online space directly to advertisers or use intermediation platforms such as AdSense. Valuable (premium) online space (e.g. the homepage of large publishers) is usually sold directly while less valuable (remnant) online space is often sold through intermediaries to maximise the monetization prospect of the space for sale. Large publishers tend to use both direct and intermediated sales while smaller publishers tend to rely on intermediated sales. In the intermediated channel, intermediation services can be bundled with ad serving (this is Google's AdSense model) or sold independently (this unbundled solution is used by ad networks such as AdLink). Hence, while the parties are not direct competitors, DoubleClick provides an input (ad serving) into distribution channels (direct and unbundled) that competes with Google's bundled AdSense offering.

9. From the point of view of publishers and advertisers, the merger could raise conglomerate issues given that Google and DoubleClick offer two products (intermediation and ad serving) that are both used for online advertising. Given that ad networks (such as AdLink) competing with Google's ad network (AdSense) use the ad serving technology to serve the ads on their platform, the merger also had a vertical dimension given that Google was acquiring a leading provider of a major input for rival ad networks.<sup>8</sup>

## 2. The main theory of harm: Leveraging DoubleClick's leading position to acquire market power in intermediation

10. During the investigation, complainants focused on the potential for Google AdSense to become, through the merger, an unavoidable intermediation platform in the future which would marginalise its rivals on the market for intermediation.

11. The main worry expressed by complainants (and some respondents to the market investigation) was that post-merger, Google would be able to leverage DoubleClick's leading position in ad serving to become the dominant intermediation platform for online advertising. Google would be able to engage in a number of strategies aimed at increasing the price of DoubleClick's products *when used with ad networks competing with AdSense*.<sup>9</sup> These strategies involved mixed bundling (offering DoubleClick's products cheaper when used alongside AdSense's intermediation services), pure bundling (selling DoubleClick's products with AdSense only), manipulation/tweaking of the ad serving software to the benefit of AdSense (i.e. the arbitration logarithm would favor AdSense instead of rival networks), price increases (the price

8 In fact, the merger was also characterized as "diagonal" considering that Google purchases an input (display ad serving) used by ad networks that compete with its own network (AdSense) but which AdSense itself does not use (given that AdSense predominantly serves text and contextual ads).

9 The price increase could affect publishers or advertisers purchasing ad serving tools and intermediation services as well as ad networks competing with AdSense that also purchase third-party ad serving tools.

of DoubleClick's products would be raised if used on competing networks) and quality degradation (e.g. the new entity would fail to develop functionalities enabling DoubleClick's products to be used efficiently on rival networks). Through these strategies, Google would attract more publishers and advertisers to AdSense, ultimately leading to a "tipping" effect that would marginalise rival networks. In the long run, Google's AdSense would become the dominant intermediation platform, able to exercise market power and increase intermediation fees.

12. The likelihood of anti-competitive effects based on these theories hinged on a number of assumptions such as (a) the degree of DoubleClick's market power (depending in particular on the extent of switching costs for ad serving<sup>10</sup>), (b) the extent to which intermediation is characterized by direct and indirect network externalities<sup>11</sup> and (c) the impact of price changes for ad serving on the choice of ad network by publishers/advertisers. The investigation focused on gathering evidence to verify whether these assumptions could be validated.

13. With respect to DoubleClick's *market power*, the Commission found convincing evidence putting into question DoubleClick's ability to exercise market power. This evidence covered data on the extent of switching between ad serving suppliers, on the evolution of prices for ad serving and on switching costs. In particular, a large number of ad serving contracts have relatively short durations (under 2 years) and contract terms are frequently renegotiated. Switching is also frequent. Switching data provided by the parties indicated that DoubleClick's customer churn rate was about 12.6% in 2006 and ad serving prices had considerably and consistently been declining over the last few years.

14. With respect to *indirect network effects* (i.e. the larger the number of publishers using an platform, the more attractive it is to advertisers and vice versa), the Commission found evidence that there had been significant entry and strong competition in online ad intermediation, evidence on the prevalence of multi-homing (i.e. customers using more than one intermediation platform) and evidence that ad networks competed even with a relatively small number of partners on the publisher side. The prevalence of multi-homing suggested that the participation by a publisher or an advertiser to an ad network (e.g. AdSense) does not imply that they are unable or unwilling to participate in another ad network; their participation to an ad network is not exclusive. The concern that AdSense would unavoidably become the dominant intermediation platform at the expense of rivals as a result of the merger therefore appeared unconvincing. Also, the market investigation did not provide support for the view that the merged entity would benefit from a *direct network effect*, such that the quality of the matching that it could undertake

between publishers and advertisers would be affected by the scope and quality of its publisher customer base. Direct network effects might arise because of the ability to use information about users across different publishers. However, publishers and advertisers contractually prohibit DoubleClick from using their data to improve targeting to other publishers/advertisers. Moreover, it appeared that the type of behavioural targeting that lies at the core of these direct network effects is an emerging technology which neither DoubleClick nor Google have developed, contrary to a number of competing firms (such as Yahoo!'s ad network BlueLithium or AOL's Tacoda network).

15. With respect to *the cost of ad serving*, the Commission found that ad serving represents a small fraction of the publisher's net profits (and the advertiser's cost of purchasing online space). The price of ad serving on competing ad networks would therefore have to increase significantly to induce the scope of switching towards AdSense that might lead to the tipping effect envisaged by complainants. This was deemed highly unlikely given the competitive constraints to which DoubleClick is subject.

16. In any event, the new entity would continue to compete with a number of vertically integrated rivals such as Microsoft, Yahoo!, AOL as well as WPP (an ad agency) and Axel Springer (a major online and offline publisher). Indeed, these companies were offering both ad serving tools and intermediation services following a number of acquisitions made after the announcement of the Google/DoubleClick transaction.

### 3. Google's market power and non-horizontal effects

17. Google's market power in search advertising was also a cause of concern as Google might have leveraged its position in search to extend its market power in ad serving. Display ad serving tools (the products offered by DoubleClick) are not used for search ads but both products can be purchased by the same customers (publishers or advertisers). A possible strategy to leverage Google's search position would be to bundle search ad services and ad serving tools. In view of the fact that both parties have few common customers (i.e. the pool of customers wanting both search and display ads<sup>12</sup>) and the fact that gross margins in search are significantly higher compared with margins in ad serving, it was concluded that the new entity would not have the ability nor the incentives to engage in pure bundling. Indeed, Google would not risk losing its lucrative margins on search ads to gain a few additional ad serving customers at the expense of its ad serving rivals.

18. Finally, some concerns also related to the amount of data that the new entity would be able to combine, thus gaining an unparalleled competitive advantage that would lead to tipping effects in favour of AdSense. In particular, the combination of customer provided information (CPI data) generated by the use of the internet would allow the merged entity to achieve a

10 See Paragraph 23 of the NHM Guidelines: "Non-horizontal mergers pose no threat to effective competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. The Commission will examine this issue before proceeding to assess the impact of the merger on competition."

11 See Paragraph 101 of the NHM Guidelines.

12 See Paragraph 100 of the NHM Guidelines.



position that could not be replicated by its integrated competitors (mainly Yahoo! and Microsoft) or its non-integrated competitors. The market investigation could not exclude that the merged entity would be able to combine DoubleClick's and Google's data collections. However, no likely anticompetitive effect was identified. Indeed, the combination of data about searches with data about users' web surfing behaviour is already available to a number of Google's competitors today. Data is also available from internet service providers, which can track all of the online behaviour of their users, following them to every website they visit and this data is potentially much broader and richer than data collected by DoubleClick (or even the merged entity) or any of its rivals because contrary to the merged entity's data collection efforts, this data source covers every page on every site a user visits.

## II. Non-horizontal effects in TomTom/Tele Atlas

19. On 14 May 2008, the Commission unconditionally cleared the acquisition of Tele Atlas by TomTom, following an in-depth (Phase 2) investigation. Incidentally, the case entered into phase 2 on the very same day as the NHM guidelines were adopted. During the investigation, numerous economic arguments and evidence were put forward by the parties and complainants, relating in particular to input foreclosure. The Commission carefully evaluated these various submissions and carried out its own economic analysis, which is described below.

### 1. A vertical merger

20. The merger between TomTom and Tele Atlas is a case of backward integration, where a downstream manufacturer (TomTom) acquires one of its input providers (Tele Atlas). Tele Atlas licenses navigable digital map databases, while TomTom supplies Portable Navigation Devices (PNDs) and navigation software. The proposed operation raised vertical concerns as navigable digital databases constitute an essential input for the production of PNDs. Since Tele Atlas and TomTom are not active in the same markets, this case did not raise any horizontal concerns.

21. Navigable maps databases are compiled from a multitude of sources, such as aerial photographs, satellite images and official government sources, which are complemented by field surveys. In particular, driving a fleet of customized vehicles is essential to capture navigation attributes (e.g. turn restrictions or speed limits). In addition to Tele Atlas, there is only one other company, Navteq, that supplies navigable digital map with a similar level of precision, attributes and geographical coverage. Many more sources for non-navigable digital maps are available and there are also some providers of navigable maps with much more limited geographic coverage. On the downstream market for PNDs, there has been significant entry over the last few years, but TomTom remains by far the main player in Europe.

22. Since the beginning of the proceedings, the parties to the transaction put forward that the transaction would bring significant efficiencies. Most importantly, TomTom collects significant feedback data from its users, which according to the parties would be used after the transaction to improve maps, and update them more frequently and at lower cost. In other words, according to the parties, the proposed operation would allow the integrated company to compile "better maps faster".

### 2. The main theory of harm: Input foreclosure

23. The main theory of harm that was considered in this case is input foreclosure, according to which the merged entity would restrict access to navigable digital maps to TomTom's competitors on the PND market, thereby raising its downstream rivals' costs and increasing the price charged to consumers.<sup>13</sup> In particular, it was considered whether the integrated company would stop supplying TomTom's downstream competitors (total foreclosure), who would be faced with only one other digital navigable map supplier, Navteq, and the possibility of increased prices.<sup>14</sup> Alternatively, it was considered whether the integrated company would increase prices or degrade the map quality/delay map updates to TomTom's competitors in a way that may harm end users (partial foreclosure).

24. Some market features may appear to support this theory of harm. Indeed, both Tele Atlas and TomTom have high market shares on their respective markets and, although percentage margins are higher on the upstream than on the downstream market, more profit is made on the sale of a PND than on the sale of a map since maps represent a small share of the PND price. This suggests that it may be profitable for the merged entity to forego sales upstream if it can as a result capture a relatively limited amount of business downstream.

25. Yet, a precise quantification of incentives to engage in foreclosure requires detailed economic analysis. In particular, and as mentioned in paragraph 42 of the NHM guidelines, whether an input foreclosure strategy is profitable depends on how much sales the merged entity would capture in the downstream market. Essentially, the profitability of an input foreclosure strategy consists of a trade-off between profits lost upstream and profits gained on the downstream market, which can be assessed empirically.

13 See paragraph 38 of the NHM guidelines: "When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power. [...]"

14 For such a situation to materialise, the merged entity must be able to commit to stop supplying the input to its downstream competitors. In addition, Navteq must be able to exert market power by committing towards its customers not to sell at lower prices to their rivals (this possible commitment problem vis-à-vis downstream customers is described in footnote 40 of the NHM guidelines).

26. In order to assess the profitability of an input foreclosure strategy by the merged entity, the Commission estimated downstream elasticities to calculate how much sales TomTom would be able to capture downstream with such a strategy.<sup>15</sup> Using these econometric estimates and other industry data, the analysis considered whether such a strategy would be profitable and found that the sales captured by the merged entity downstream by raising its rivals' costs would not be sufficient to compensate for the lost sales upstream if it engaged in input foreclosure. This finding accords with intuition given the small share of the map cost in the PND price, the relatively limited cross-price elasticities downstream, and the fact that TomTom's main competitor, Garmin, is largely protected against foreclosure thanks to its long-term contract with Navteq.

27. In particular, the Commission calculated that the critical price increase by Navteq that would make a foreclosure strategy profitable for the merged entity is extremely high (more than 400%). Such a price increase by Navteq appears unrealistic and might trigger entry.<sup>16</sup> The Commission also calculated that the integrated company would not raise map prices to TomTom's competitors in a way that would have a significant effect downstream (partial foreclosure), even if Navteq is assumed to match any price increase by the merged entity.<sup>17</sup> 28. In order to estimate the overall impact of the proposed transaction, the Commission simulated pre- and post-merger equilibrium prices with a simple linear demand model. The model indicated that the vertical integration of TomTom and Tele Atlas will lead to a small decrease in average PND prices as a result of the elimination of double marginalisation. Indeed, the vertical integration of TomTom and Tele Atlas will allow the merged entity to internalise the double mark-ups resulting from both parties setting their prices independently pre-merger, thereby allowing the merged entity to profitably expand output on the downstream market. This effect is a direct result of profit maximization and an integral part of the evaluation of any theory of harm.<sup>18</sup>

15 Downstream elasticities were estimated using a discrete choice model (nested logit). The model was estimated using retail data covering monthly sales and volumes at the product (i.e. stock keeping unit) level for a period of 3 years. Product characteristics (e.g. screen size and the presence of MP3 or Bluetooth) were used as instruments to control for endogeneity following Steven Berry, "Estimating Discrete-Choice Models of Product Differentiation", *The RAND Journal of Economics*, Vol. 25, No. 2 (Summer, 1994), pp. 242-262. Numerous robustness checks were carried out, in particular concerning the choice of instruments, the size of the outside good and the nest structure. On the basis of the estimated own-price and (inter- and intra-nest) cross-price elasticity parameters for each product, it was calculated that a price increase of 1% by all TomTom's competitors (except Garmin) would lead to an increase in the number of PNDs sold by TomTom in the range of 0.3-0.5%. Similar results were obtained by estimating an Almost Ideal Demand System.

16 In this growing market, it was calculated that the minimum viable scale for a new entrant – even at current prices – is rather low, meaning that a new entrant could recoup its investment by capturing a relatively limited market share.

17 Similarly, the Commission considered that the merged entity would have no incentive to degrade the quality of its map to TomTom's competitors (or delay access to updates). Indeed, PND manufacturers can always turn to Navteq for a quality map. Degrading quality would therefore only be profitable for the merged entity if, as a result of a price increase by Navteq, it is able to capture sufficient sales downstream to compensate for the losses upstream. As detailed above, this is unlikely to be the case.

29. The other source of efficiency in this case (i.e. the use of TomTom's data to improve Tele Atlas' map creation process) was also carefully examined. In order to determine whether such efficiencies are merger specific, the Commission examined whether it can be considered as likely that such efficiencies would materialise both in the absence as in the presence of the merger. Although part of this data could possibly be exchanged between the parties through contractual means, the Commission concluded that the non-integrated companies are unlikely to improve the map production process with the use of TomTom's data to the same extent as the integrated company given the required investments' specificity and contract incompleteness in a rapidly evolving and uncertain environment. In other words, the proposed operation will reduce transaction costs and allow a more efficient production process for digital maps. Although these efficiencies are difficult to quantify precisely, the proposed operation will therefore bring "better maps – faster" than what could be achieved through contractual means absent the merger. This constitutes an important pro-competitive effect of the merger.

30. A related issue that was raised during the investigation concerned the potential access by TomTom to its competitors' confidential information.<sup>19</sup> Confidentiality concerns are similar to product degradation since PND manufacturers would see Tele Atlas' map as less valuable if they feared that Tele Atlas would leak their confidential information to TomTom. The upstream/downstream profit trade-off described above therefore implies that Tele Atlas would have a strong incentive to solve these confidentiality concerns and/or decrease prices to keep supplying maps. Indeed, customers with confidentiality concerns could otherwise switch to Navteq, and the relatively limited downstream gains from the sales that the merged entity could capture if Navteq increased prices as a result would not be sufficient to compensate the merged entity's upstream losses. In addition, the Commission studied the type of information exchanges between PND manufacturers and map makers, in particular with respect to innovation, and concluded that the information that PND manufacturers reveal to their map supplier are relatively infrequent and/or of generally limited strategic importance.

31. Finally, the Commission also considered the possibility of coordination between the merged entity and Navteq.<sup>20</sup> In this respect, recent economic theory suggests that vertical integration may increase the scope for coordination, in particular by limiting the non-integrated company's incentive to deviate.<sup>21</sup> However, in this case, the market investigation

18 The elimination of double margins would not be merger specific if it would be just as likely to be eliminated in the absence of the merger through non-linear pricing (see e.g. footnote 57 of the NHM guidelines). On the other hand, the use of non-linear pricing may limit the impact of a price increase on the downstream market.

19 Confidentiality concerns are described in paragraph 78 of the NHM guidelines.

20 Following paragraphs 79-90 of the NHM guidelines.

21 Volker Nocke and Lucy White, "Do Vertical Mergers Facilitate Upstream Collusion", *American Economic Review*, September 2007. As detailed by Nocke and White, not all effects of vertical integration play in the same direction. In particular, a vertical integration limits the scope for retaliation against the integrated firm, thereby increasing its incentive to deviate from a collusive agreement.

indicated that Navteq and Tele Atlas compete intensely and that market characteristics are not prone to coordination. It was therefore concluded that coordinated effects were unlikely to result from the vertical integration of TomTom and Tele Atlas.

### III. Conclusions

**32.** This paper illustrates how the NHM Guidelines can be applied in different cases, grounded on sound economic principles and supported by quantitative and qualitative information on the market at hand. In the case of Google/DoubleClick, the market investigation focused on establishing whether the assumptions on which the possible theories of harm were based could be validated. The evidence provided by the parties and gathered through the market investigation suggested that these assumptions could not be fully confirmed under the current market circumstances. Hence, the merger was unconditionally cleared. A similar conclusion was reached by the FTC based on similar evidence (though there was a dissenting vote). In the case of TomTom, it was concluded on the basis of detailed empirical analysis that the integrated company would not have an incentive to engage in anticompetitive input foreclosure.

**33.** The experience gained through these two cases strongly suggests that the NHM guidelines should not be used as a mere checklist, which would in any case often be inconclusive. Rather, it should be viewed as providing guidance in adopting a fully integrated approach of the likely effect of the transaction on end-users. In the end, the distinction between incentives, ability and effects is only meant to help structure the analysis; what is essential is to determine whether, on balance, end-consumers would likely be harmed as a result of the transaction.

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